

THE ARREST OF SHIPS – SOME LEGAL ISSUES

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Introduction

Whilst Admiralty jurisdiction is not confined to the pursuit of proceedings *in rem*, it is the action *in rem* and the ability thereby to arrest a ship or other property that is most associated with the exercise of Admiralty jurisdiction and which distinguishes the exercise of that jurisdiction from the way in which claims are more conventionally pursued before Australian courts, namely by way of *in personam* proceedings against an individual defendant.

As the Full Court of the Federal Court of Australia said in *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')*:¹

The arrest of ships is a recognised feature of international maritime commerce and international maritime jurisdiction. Very often legitimate claims will go unsatisfied unless there is recourse to an effective and efficient system of maritime arrest. Ships, their owners and insurers are expected, in the ordinary course of their businesses, to be ready to deal with *in rem* claims arising in connection with the use or deployment of the ship or the business of the owner or charterer.

There are three issues concerning the action *in rem* and the associated ability to arrest the ship or other property the subject of *in rem* proceedings that I address in this paper, relevant to the theme of this seminar, namely the interaction between Admiralty and insolvency. These are:

- the advantages associated with the ability to arrest a ship or other property, in comparison to the interim relief to similar effect that might be obtained in an action *in personam*;
- recent issues concerning the scope of those claims that may be pursued *in rem* and for which a ship or other property may be arrested; and
- some issues that may arise where there is a jurisdictional challenge to *in rem* proceedings or the arrest of a ship in such proceedings and which are also relevant to the obligations of the plaintiff when commencing such proceedings.

The exercise of *in rem* jurisdiction

In general terms, an action *in rem* involves the pursuit of a maritime claim (or a claim in the nature of a maritime lien or other charge) in a proceeding that is brought directly against a ship or other property which is either the subject of that claim (or lien or charge) or belongs to the person who is alleged to be liable for that claim. Admiralty lawyers commonly refer to the ship or other property that is the subject of *in rem* proceedings as the *res*.

Although in Australia the action *in rem* is not confined to ships and may extend to 'other property', it is only certain limited types of property – generally cargo and freight – that might properly be the subject of

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¹ (2004) 210 ALR 601 at 607.

in rem proceedings. The ability to commence *in rem* proceedings against the bunkers or fuel on board a ship independently of any proceeding against the ship itself has been significantly constrained (if not ruled out completely) by the recent decision and dicta of the Full Court of the Federal Court in *Scandinavian Bunkering AS v the bunkers on board the fishing vessel "Taruman"*.² Moreover, the types of claims that might be pursued as an action *in rem* against 'other property' and the circumstances in which such claims might be pursued against such 'other property' are also somewhat limited, much more so than proceedings *in rem* against a ship. For these reasons I intend to confine my comments in this paper to the arrest of ships (as its title implies).

An action *in rem* is only available in the exercise of Admiralty jurisdiction. Since 1 January 1989 the exercise of Admiralty jurisdiction in Australia has been pursuant to the *Admiralty Act 1988* (Cth) (*the Act*) and the *Admiralty Rules 1988* (Cth) (*the Rules*) which are made pursuant to section 41 of the Act. Both the Act and the Rules govern and apply to all Admiralty proceedings in Australia, irrespective of the Court in which the proceedings are commenced and whether it is a State or federal court.

The Act distinguishes between actions *in personam* and actions *in rem*. In relation to the latter, section 14 of the Act provides:

14 Admiralty actions *in rem* to be commenced under this Act

In a matter of Admiralty or maritime jurisdiction, a proceeding shall not be commenced as an action *in rem* against a ship or other property except as provided by this Act.

Accordingly, the Act is an exhaustive code as to the pursuit of *in rem* proceedings and the claims that may be pursued in an action *in rem*.

Section 10 of the Act confers jurisdiction to entertain *in rem* proceedings upon only the Federal Court of Australia and the Supreme Courts of each of the States and Territories. Whilst the Federal Magistrates Court and State courts other than the Supreme Court have been invested with jurisdiction in respect of proceedings commenced under the Act as actions *in personam* (pursuant to section 9 of the Act), those courts have not been invested with *in rem* jurisdiction. They may only exercise *in rem* jurisdiction upon the remission of *in rem* proceedings from the Federal Court or a Supreme Court pursuant to section 28 of the Act.

It is not necessary for a ship the subject of an *in rem* proceeding to be arrested in that proceeding and a claim may be pursued as an action *in rem* against that ship without it being arrested. But it is the ability to arrest a ship and the consequences of that arrest that give rise to one of the main advantages of the action *in rem* where it is available, namely the ability of a plaintiff either to obtain security for its claim or in the absence of such security to have recourse to the ship to meet that claim and any judgment that the plaintiff may subsequently obtain in respect of that claim.

Security for the Plaintiff's claim

If the owner of the ship under arrest (or threatened with arrest) wishes to obtain the release of that ship from arrest (or to avoid the threatened arrest) so as to thereby regain the possession and use of that ship and to avoid a judicial sale of that ship, then it can only do so by providing the plaintiff with some alternate security for its claim. This security may be in the form of a bail bond pursuant to Part VII of the Rules, a letter of undertaking, letter of guarantee, bank guarantee or cash deposited with the Court. In this way, a plaintiff in a proceeding *in rem* may obtain security for its claim by the arrest or threat of arrest of the ship the subject of that proceeding and present in the geographical jurisdiction of the Court.

This ability to obtain security for a claim in advance of judgment is not generally available where the claim is pursued in an *in personam* proceeding (even where the *in personam* proceeding is in the exercise of Admiralty jurisdiction). Clearly there are benefits to a plaintiff where such security is provided. It avoids

² (2006) 151 FCR 126.

(or at least minimises) the risks that the plaintiff would otherwise face in having to enforce the judgment that it hopes to subsequently obtain against the assets of the defendant, especially where the defendant and / or its assets are overseas and the recovery of the plaintiff's claim may require the enforcement of the locally obtained judgment in another jurisdiction. Where the security is provided by a third party (such as a bank, insurer or P&I club), this also protects the plaintiff from the risks and consequences of the defendant becoming insolvent or having its assets depleted by the claims of other creditors in the time it takes for the plaintiff's claim to be heard and judgment obtained.

As to the amount of the security that a plaintiff may obtain in this way, where a ship or other property has been arrested in an action *in rem*, a plaintiff is entitled to security for its claim in an amount equal to its 'reasonably arguable best case' including interest up to the likely date of judgment and its costs of the proceedings³ or the value of the ship arrested, whichever is the lesser.

The Courts recognise that the power to insist that a ship remain under arrest unless and until security is provided is a drastic power and one which should not be exercised oppressively. But at the same time, the authorities also indicate that the Court should ensure that the plaintiff is not left without sufficient security to cover what it would be entitled to in the event that its claim is ultimately successful and should be comfortably satisfied that the amount of security to be provided in return for the plaintiff's agreement to the release of the ship from arrest is likely to be sufficient to meet that claim including interest and costs.

In balancing these considerations, the Court does not generally undertake a detailed assessment of the quantum of the plaintiff's claim or the damages or other amount that the plaintiff is likely to recover in the event that its claim succeeds. This is especially bearing in mind that this task of determining the amount of security to be provided is usually undertaken:

- first, at a very early stage of the proceedings where generally all there is before the Court is a brief statement of the plaintiff's claim and particulars of that claim (in the Writ in Rem and possibly the affidavit in support of the application for the arrest of the ship) and no evidence of the damages or other amounts claimed or of the quantum of those damages claimed;
- secondly, as a matter of urgency because it is important that the ship be released as soon as reasonably practicable, especially where the ship under arrest is a commercial vessel; and
- thirdly, where the plaintiff has no right to re-arrest the ship (in Australia) in respect of its claim once it has been released from arrest, even if it subsequently appears that the amount of the security provided at the time of its release is or is likely to be insufficient to meet the plaintiff's claim. Once it is released from arrest, a ship may only be rearrested in Australia by the plaintiff in respect of that same claim by order of the Court and in the circumstances contemplated by section 21(1) of the Act.

Provided that the amount sought is reasonable and supportable on the face of the limited material then available, generally speaking a plaintiff will be entitled to security in the amount that it seeks and (subject to the determination by the Court of the appropriate amount of security to be provided) entitled to refuse to agree to the release of the ship from arrest until the amount of security sought has been provided.⁴

As Sheppard J observed in *Freshpac Machinery Pty Ltd v the ship "Joana Bonita"* if the Court errs on the side of caution and is found to have provided for security in a greater sum than was actually necessary to protect the plaintiff's claim, that is one of the incidents of the balancing exercise that is involved and a consequence of the invocation of this jurisdiction.

³ *Freshpac Machinery Pty Ltd v the ship 'Joana Bonita'* (1994) 125 ALR 683.

⁴ It should be noted that an unreasonable demand for excessive security or an unreasonable refusal to agree to the release of the ship from arrest where reasonable security has been offered may provide a basis for an action for damages under section 34 of the Act, which section is discussed later in this paper.

Even if no security is provided for the release of a ship under arrest, the plaintiff still has a measure of security in respect of its claim. This is because in those circumstances the ship will remain under arrest for the duration of the proceeding and be thereby available to the plaintiff to enforce any judgment that it may subsequently obtain on its claim in the proceeding. This would be by way of the judicial sale of the ship pursuant to rules 69 and 70 of the Admiralty Rules. In this way, the proceeds of sale of the ship arrested in the proceeding may eventually provide a fund from which the plaintiff's claim in that proceeding may be met.

In appropriate circumstances – such as a where the ship under arrest is '*deteriorating in value*' so that any delay in its sale will eat into and thereby reduce the security that it otherwise represents – the plaintiff may be able to obtain an order for the judicial sale of the ship or other property under arrest even before it has obtained any judgment on its substantive claim.⁵

Comparison with interim relief in *in personam* proceedings

Admittedly a plaintiff in an *in personam* proceeding may possibly be able to achieve some measure of security for its claim for the recovery of a debt or damages through an application in that proceeding for an interim preservation order or a freezing order⁶ (or *mareva* injunction as they were once known). But there are material differences between that relief and the arrest of a ship in an action *in rem* and the circumstances in which each may be obtained, which tend to favour the latter, especially where both remedies are available.

There are three differences that I particularly wish to refer to in this paper

Provision of security for the plaintiff's claim

The first is the ability of a plaintiff to an action *in rem* to obtain security for its specific claim and the benefits to the plaintiff where such security is provided. As I have already indicated, the ability to arrest a ship in an *in rem* proceeding and the risk that that ship may be sold in that proceeding in order to meet the plaintiff's claim usually provides a powerful inducement to the owner of that ship to provide alternative security for the plaintiff's claim. I have already described the benefits of such security where it is provided.

In contrast an application for a freezing order, even if successful, only results in freezing the assets of the defendant. It does not usually prompt or result in the provision of security for the plaintiff's claim, in particular security from a third party. Even where a freezing order has been obtained, the plaintiff still faces risks associated with the possible insolvency of the defendant, the competing claims of other creditors of the defendant and the defendant's assets being insufficient to meet all its liabilities.

Even where no security is provided and the ship the subject of the *in rem* proceeding remains under arrest, it still provides a potential source of funds against which any judgment obtained by the plaintiff might be enforced. This is in the manner I have already described. The commencement of the *in rem* proceeding against the ship and its arrest in that proceeding in effect confers on the plaintiff to that proceeding a limited security over that ship from that time onwards. Admittedly, in those circumstances, the plaintiff still faces the risk that other maritime claimants, including possibly those with claims attracting a higher priority (such as crew, mortgagees or maritime lien holders) may also make a claim on the fund representing the proceeds of sale of the ship under arrest and in doing so exhaust or deplete the fund before the plaintiff's claim is able to be satisfied from it. This is an issue that is to be touched on in the final session of this seminar. But even in those circumstances, the plaintiff will still generally have priority in its access to the funds produced by the sale of the arrested ship over the claims of other unsecured non-maritime claimants, as well as any liquidator of the defendant or any other person standing in the shoes of the defendant (this is subject to the issues addressed by Dr Derrington in her paper on the interaction of the Admiralty and insolvency regimes).

⁵ See rule 69(1) and *Marinis Ship Supplies (Pty) Ltd v the ship 'Ionian Mariner'* (1995) 59 FCR 245.

⁶ For instance pursuant to Order 25A of the Federal Court Rules or UCPR Pt. 25 r.11 in NSW.

In contrast, a freezing order generally does not inhibit execution against the assets frozen by any other creditor of the defendant, before the plaintiff has obtained its judgment. It confers no priority on the plaintiff in respect of its enforcement of its claim against the frozen assets and over the claims of other unsecured creditors. Nor does such an order give priority to the plaintiff in the event of the liquidation of the defendant. It may not prevent a defendant from carrying on business in the ordinary way through the use of the otherwise frozen assets, even if there is a perceived danger that those assets will be lost to the plaintiff. The terms of a freezing order usually do not prevent the defendant from borrowing further money during the period in which the proceedings are underway, thereby increasing the defendant's total indebtedness and the potential of unsecured claims, particularly in the event of liquidation.⁷

Matters required to be proved to get the order

The second material difference between an arrest and interim relief in an *in personam* proceeding is the matters that are required to be proven in order to obtain the arrest of a ship, as opposed to a freezing order.

The grant of interlocutory injunctions, interim preservation orders and freezing orders are in the discretion of the Court and generally only available in certain limited circumstances, such as upon proof of a likelihood of the dissipation of assets out of the jurisdiction or other than in the ordinary course of business or upon proof of some such other conduct that gives rise to a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied. Whilst said to be '*quite common place*', a freezing order is a drastic remedy and should not be granted lightly.⁸ In order to obtain such an order, a plaintiff must generally establish:

- first that it has a '*reasonably arguable case*' or '*good arguable case*' or that there is a '*serious question to be tried*' so far as its substantive claim is concerned,⁹ and
- secondly that the balance of convenience is in favour of the granting of the interim preservation order or the making of the freezing order sought.

The onus of proving each of these matters rests squarely upon the plaintiff moving the Court for such relief.

In contrast, subject to compliance with the Admiralty Act and the requirements of the Rules, a plaintiff in an action *in rem* may arrest the ship the subject of that proceeding as of right in that proceeding.¹⁰ The ability to arrest does not depend upon or require the exercise of the discretion of the Court in which the proceeding has been commenced. Nor does it depend upon or require a consideration of the balance of convenience and whether that balance lies in favour of the arrest of the ship the subject of the proceeding. It also does not depend upon any assessment of the strength of the plaintiff's case before the arrest can take place, let alone require the Court to be persuaded by the plaintiff that it has a reasonably arguable case or there is a serious question to be tried so far as its claim is concerned. The arrest of the ship the subject of the *in rem* proceeding also does not depend upon or require proof of the risk of a dissipation of assets or that the ship will be removed from the jurisdiction and thereby the possibility of enforcement once a judgment has been obtained. Whilst commonly arrest proceedings are instigated against foreign ships which would otherwise leave Australian waters but for their arrest, the intention to depart Australia is not itself an element that must be proved before the ship can be arrested. Conversely, an application for the arrest of a ship will not be defeated merely by the fact that the ship is to remain in the jurisdiction of the Court or within Australia or Australian waters for the foreseeable future, including up until when any judgment is likely to be given on the plaintiff's claim.

⁷ Peter M Biscoe, *Mareva and Anton Pillar Orders*, (1st ed 2005), [1.11].

⁸ *Ibid*, [1.12].

⁹ *Ibid*, [1.8].

¹⁰ Although the Rules provide that a Registrar '*may*' issue an arrest warrant, it is submitted that if the requirements of the Rules are otherwise satisfied then the Registrar should issue a warrant when sought. Moreover, once the warrant has been issued, then a request for its execution must be acted upon by the Marshal.

Damages for wrongful arrest

A third difference has to do with the shipowner's remedy if the arrest of its ship proves to be unjustified.

An interlocutory injunction or interim preservation order or freezing order is generally only made upon the plaintiff giving an undertaking as to damages, in particular the '*usual undertaking as to damages*' or '*usual undertaking*'.¹¹

In the event that an interlocutory injunction is granted or an interim preservation or freezing order made and the plaintiff's claim is ultimately unsuccessful, any loss or damage suffered by the defendant (or any other person affected by the injunction or order) as a consequence of the granting of that injunction or making of the order may be recoverable from the plaintiff pursuant to the undertaking given.¹²

However, no such undertaking is required of a plaintiff wishing to arrest a ship the subject of an *in rem* proceeding. Rather, the only remedy for a person adversely effected by the arrest of a ship or other property¹³ is an action for damages pursuant to section 34 of the Act which provides:

34 Damages for unjustified arrest etc.

- (1) Where, in relation to a proceeding commenced under this Act:
 - (a) a party unreasonably and without good cause:
 - (i) demands excessive security in relation to the proceeding; or
 - (ii) obtains the arrest of a ship or other property under this Act; or
 - (b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;
the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

I do not propose to discuss in detail in this paper the scope and operation of section 34. It is a topic in itself. However in the present context (of comparing the right to arrest with interim relief in actions *in personam*) it is sufficient to observe the following.

First, as is apparent from the terms of the section quoted above, damages may only be recovered under section 34 where in arresting the ship or other property¹⁴ the plaintiff has acted '*unreasonably and without good cause*'. These are matters that the person claiming damages must prove.

This is a more stringent test for the recovery of damages than that found in the usual undertaking. In particular, a plaintiff will not necessarily be liable under section 34 of the Act for any damages that the owner of the ship arrested (or any other person interested in that ship) may have suffered as a consequence of its arrest, merely because the plaintiff's substantive claim was unsuccessful or merely because the arrest of the ship has been set aside.

There have been no decided cases in Australia as yet on the application of the test found in section 34 or what must be proved in order to satisfy it. It is therefore still a matter of some conjecture as to precisely what conduct would be sufficient to give rise to an entitlement to damages under this test, whether the phrase '*unreasonably and without good cause*' is to be construed as a whole or whether the phrase is to be

¹¹ Namely an undertaking to pay to any party adversely affected by the interlocutory injunction or interim preservation or freezing order such compensation if any as the court thinks just in such manner as the Court directs (see Federal Court Practice Note 3).

¹² *Air Express Limited v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249.

¹³ Or as a consequence of a plaintiff claiming an excessive amount of security in return for its agreement to the release of the ship or property under arrest or for unreasonably refusing to agree to the release of a ship or other property under arrest.

¹⁴ Or in demanding what subsequently proves to be excessive security or in failing to give consent to the release of a ship or other property under arrest.

construed as containing in effect two separate requirements and if so what if anything the addition of the words ‘*without good cause*’ add to the requirement that the plaintiff have acted ‘*unreasonably*’ in arresting the vessel. Nor has there been any indication by any court in Australia as yet of the extent to which the test in section 34 represents a departure from that under the common law (which still applies in England, Canada and New Zealand) under which damages for wrongful arrest are only available where the plaintiff had acted in bad faith, malice or with gross negligence.¹⁵ But even if the test in section 34 represents a less stringent approach to that under the common law (as seems likely), it does nevertheless still appear to be a more onerous test for the recovery of damages than that inherent in the usual undertaking.

Arrest as interim preservation

The above comments are made where the ship is arrested in the context of a claim for damages or the recovery of a debt and in effect represents security for that claim. But they equally also apply if the claim that is the subject of the *in rem* proceeding is more in the nature of a proprietary maritime claim, such as a claim for possession or title to a ship.

In those circumstances, the arrest of the ship and its detention by the Court pending the determination of the plaintiff’s substantive claim is more in the nature of an interim preservation order. In those circumstances, it will generally not be appropriate for the ship to be released from arrest prior to the determination of the plaintiff’s substantive claim, even upon the provision of security.

But even in these circumstances, the plaintiff still has the benefit of an entitlement as of right to the arrest of the ship in that proceeding (subject to compliance with the Act and Rules and assuming that the ship is within the jurisdiction of the Court) without having to give the usual undertaking as to damages or having to persuade the Court of the matters that would warrant the exercise of its discretion in favour of granting the interim relief sought, which it would have to do were it to seek that relief by way of an interlocutory injunction or interim preservation order in an *in personam* action.

Further procedural aspects

There are two further procedural aspects associated with the arrest of a ship which I wish to refer to briefly in this paper.

The first is as to the relative ease with which a ship may be arrested. It is not usually necessary for a plaintiff to apply to a judge of the Court for the arrest of a ship, in the same way as it is to obtain an interlocutory injunction or interim preservation or asset freezing order. Rather the application for arrest is usually done through the Registry, with the filing of three short documents each in accordance with a prescribed form.

In particular, once an *in rem* proceeding has been commenced, the plaintiff may obtain the arrest of the ship the subject of that proceeding by lodging with the Registry an application for an arrest warrant (Form 12) together with the required affidavit in support (Form 13) and a draft arrest warrant (r. 39). The plaintiff is also required to disclose at the time of the application any knowledge of any matter that could affect the safety of the Marshal, ship or those on board (r.39A). Assuming the documents filed with the Court are in order and the Registrar is not aware of any of the matters listed in r.40(3)(a) to (c), the Registrar will issue the plaintiff with an arrest warrant. A request is then made of the Marshal to execute the warrant and it upon the execution of the arrest warrant (under r.43) that the ship is arrested.¹⁶

The application for the arrest of a ship is therefore generally simpler and quicker than an *ex parte* application for interim relief in an *in personam* proceeding and has the appearance of being more administrative in nature.

¹⁵ Or crass negligentia.

¹⁶ The steps that the Marshal takes both at the time of arrest and in preparation beforehand are conveniently set out in the Marshal’s manual available on the Federal Court web site:
<http://www.fedcourt.gov.au/pdfsrfts_a/admiralty_marshall_manual_PUBLIC2008.pdf> at 13 June 2009.

Moreover, once the ship has been arrested, it will remain under arrest until such time as it is either released from arrest upon the application of the parties (for instance pursuant to an application made under either r. 51 or r. 52) or by order of the Court (for instance if there is a successful challenge either to the arrest itself or the proceedings generally, such as a jurisdictional challenge). The arrest does not take effect for a short time only or require further orders extending its duration once the defendant has appeared or has an opportunity to be heard, in the same way as an interlocutory injunction or interim preservation or freezing order does when first made. In the absence of an application by the parties or the Marshal, the arrest does not automatically come back before the Court in the same way as an interlocutory injunction or interim preservation or freezing order.

The second aspect has to do with the duty of disclosure of the plaintiff upon an application for the arrest of a ship. The application for an arrest warrant is made *ex parte* (that is, in the absence of the defendant or any one interested in the ship who may or may not yet have appeared in the proceeding) and as such, arguably, a plaintiff applying for the issue of an arrest warrant with the intention of arresting the ship is under the same duty of full and frank disclosure as a plaintiff seeking an interlocutory injunction on an *ex parte* basis in an *in personam* proceeding, namely a duty to place before the Court at the time of their application all matters relevant to the relief sought including such matters as might be raised by the defendant if it had been present at the time of the application.

Formerly, the position in England was that a plaintiff applying for the arrest of a ship was under such a duty.¹⁷ That approach was followed in Australia by Lockhart J in the Federal Court of Australia in *Sea Containers Ltd v the owners of the vessel "Seacat 031"*.¹⁸

However, more recently, the English court has held that there is no duty of full and frank disclosure on a plaintiff seeking the arrest of a ship, following a change to the English Rules.¹⁹ In particular, in England the Court found first that amendments to its Rules had transformed the issue of the warrant of arrest from a discretionary remedy into one to which the plaintiff had a right if the requirements of the relevant rules were satisfied and secondly that the requirement of full and frank disclosure had no real substance except in the context of an application for a discretionary remedy. Although there have been further changes to the Rules in England since the above decisions, it is generally considered that the obligations associated with *ex parte* disclosure are probably still not required in England.²⁰

As I have already noted, in *Sea Containers Ltd v the owners of the vessel "Seacat 031"*²¹ Lockhart J found that there was a duty of disclosure on an applicant for the arrest of a ship and was prepared to discharge the arrest warrant that had been issued in that proceeding (unusually following an application to a judge of the Court rather than through the Registry in the manner contemplated by the Rules and described above) on the basis of the non-disclosure by the plaintiff of information which, had it been disclosed to the judge who had granted the issue of the arrest warrant, would have undermined the impression given by the evidence which had been put forward on the *ex parte* application for that warrant. In doing so, his Honour accepted that the applicable principles to be applied were those expressed by Sheen J in *the "Stephan J"*²² (specifically in the context of an application for arrest) and Isaacs J. in *Thomas A Edison Ltd v Bullock*.²³

But this judgment was delivered shortly after the decision in *the "Varna"* and his Honour does not appear to have been referred to either that judgment or the argument which prevailed in that case. There is therefore possibly a question as to whether the approach in England in *the "Varna"* would (or having

¹⁷ *The Vasso* [1984] 1 QB 477 at 491-92; *the "Stephan J"* [1985] 2 Lloyd's Rep. 344 at 346; *the Kherson* [1992] 2 Lloyd's Rep. 261 at 268-69.

¹⁸ 1080/93 1993 FCA (Unreported, Lockhart J, 7 June 1993).

¹⁹ *The "Varna"* [1993] 2 Lloyd's Rep. 253; approved by the Court of Appeal in *Hali-Ioannou v Frangos* [1999] 2 Lloyd's Rep. 337 at 353.

²⁰ Nigel Meeson, *Admiralty Jurisdiction and Practice*, (2003, 3rd ed), [4.42]; The Hon. Justice James L Allsop, 'Possible Issues in Admiralty Reform (a) beneficial ownership and jurisdictional facts; and (b) the nature of arrest and disclosure' (Paper presented at Maritime Law Australia & New Zealand Conference, Brisbane, 2003).

²¹ 1080/93 1993 FCA (Unreported, Lockhart J, 7 June 1993).

²² [1985] 2 Lloyd's Rep. 344.

²³ (1913) 15 CLR 679 (in another context).

regard to the terms of the Admiralty Rules could) be applied in Australia and an applicant for the arrest of a ship thereby not be under a duty of full and frank disclosure.

That question arose, although was not decided, in *The Zoya K*²⁴ at first instance. One of the grounds on which the arrest in that case was sought to be set aside was that the plaintiff's solicitor had failed to disclose relevant material at the time of applying for an arrest warrant. However, Tamberlin J found that there had been no failure to disclose on any basis and that the Court therefore did not need to decide whether the position in *the "Varna"* also applied under the Admiralty Rules and whether or not an applicant for an arrest warrant was under a duty of full and frank disclosure.²⁵ Although his Honour did state that if it had been shown that there was credible relevant evidence known to the deponent of the affidavit in support of the arrest warrant but withheld from the Court on that application, there may have been a ground for release in that case.

Whilst *the "Varna"* was also referred to in the judgment of the Full Court of the Federal Court in *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')*²⁶, this was only in passing, the Court stating that it was unnecessary to discuss '*the curial incidents of the procedure of the arrest such as the obligations of disclosure*' in that case.

Otherwise, this question does not appear to have been the subject of further judicial consideration in Australia.

However, until the Courts say otherwise, a plaintiff in an *in rem* proceeding wishing to arrest a ship (and those legal practitioners representing such a plaintiff) should treat themselves as being under a duty of full and frank disclosure and therefore a duty to disclose all matters that may be relevant to the arrest of the ship, even if adverse to the plaintiff's interests.

At the very least, the plaintiff should consider itself as being under an obligation:

- to give full and frank disclosure of those matters that are required to be addressed in the affidavit in support of the application for the issue of the arrest warrant;
- to give full disclosure of any matters affecting the safety of the ship, the Marshal and those on board the ship, as required by r.39A; and
- to give full disclosure of any of the matters listed within r.40(3)(a) to (c) if known to the plaintiff, and which if known to the Registrar would prevent the Registrar from issuing the warrant for arrest.

Indeed, if there are matters within that last category known to the plaintiff or its legal representatives – or even other matters which might be thought to be potentially adverse to the application for arrest or which should otherwise be disclosed to the Court – then it may be more appropriate for the application for the arrest warrant to be made to a judge of the Court (rather than in the Registry as the Rules otherwise contemplate) where those matters can not only be disclosed to the Court but also reasons or submissions may be given as to why the arrest should nevertheless still proceed.²⁷

Finally in this regard, whatever the position may be so far as initial disclosure is concerned, should it subsequently become apparent that evidence that had been placed before the Court on an arrest or in

²⁴ [1997] FCA 379.

²⁵ The issue was not taken on appeal and therefore not dealt with by the Full Court.

²⁶ (2004) 210 ALR 601.

²⁷ As was initially done in *Sea Containers Ltd v the owners of the vessel 'Seacat 031'* 1080/93 1993 FCA (Unreported, Lockhart J, 7 June 1993).

support of an application for an arrest warrant was incorrect, then it is incumbent on the solicitor for the plaintiff to correct that forthwith.²⁸

Obtaining jurisdiction over a foreign defendant

A second possible advantage of the use of *in rem* proceedings is as a device to obtain personal jurisdiction over the owner of the ship the subject of the *in rem* proceedings for the purposes of pursuing a claim against that person.

Subject only to exceptions in the Act regarding inland waters²⁹ and the innocent passage of foreign ships passing through the territorial sea,³⁰ a writ *in rem* issued out of the Federal Court may be served on the ship the subject of that writ anywhere within Australia including within the external territories and the Australian territorial sea. In this way, the mere presence of the ship within Australia or Australian waters is sufficient to ground the Court's jurisdiction to entertain the claim that is the subject of that proceeding.

This is so:

- in respect of all ships, including all foreign ships irrespective of the place of residence or domicile of the owners (s. 5(1)(c) of the Act);³¹
- irrespective of where the cause of action the subject of the proceeding arose and even where the claim or cause of action arose overseas and has no connection with Australia (s. 5(1)(b) of the Act);³² and
- where all the parties to the proceeding are domiciled or resident overseas and have no connection with Australia, apart from the proceeding.

The jurisdiction conferred on the Australian courts by the *Admiralty Act*, including the jurisdiction to entertain proceedings *in rem*, is a truly international one.

Moreover, the arrest of the ship in the proceeding, its threatened detention pending the determination of the plaintiff's claim and the possible sale of the ship in the event that the claim is successful, may prompt the owner of the ship or the person who is alleged to be liable for the plaintiff's claim to come to this jurisdiction in order to defend the claim and reclaim the ship.

Where that occurs and where the person who appears in the *in rem* proceeding to defend the claim is the person who is liable for that claim, then the proceeding takes on a hybrid status, both retaining its original status as an action *in rem* but also continuing as if it were an *in personam* action against the person who has appeared.³³ In those circumstances, the person who has appeared will be personally liable for any judgment that the plaintiff may obtain in the proceeding for the full amount of that judgment and even if the amount of the judgment exceeds the value of the ship.³⁴

In this way, through the commencement of an *in rem* proceeding against a ship in Australia and the service of the ship here, the person who would be liable for the plaintiff's claim may in effect be brought to this jurisdiction to defend that claim. Even if the claim has no connection with Australia, a plaintiff may find the prosecution of its claim here preferable to having to pursue that claim and the person liable for it in some other foreign jurisdiction in which that person is otherwise resident or to which it is otherwise

²⁸ *The Zoya K* [1997] FCA 379 at 36.

²⁹ Section 5(3) of the Act.

³⁰ Section 22(4) of the Act.

³¹ Subject again to the exception for inland water way vessels and causes of action arising on inland waters – s. 5(3).

³² Again subject to the exception for causes of action arising in respect of inland water way vessels or in respect of the use or intended use of a ship on inland waters: s.5(3).

³³ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [109]; *Caltex Oil (Australia) Pty Ltd v the dredge 'Willemstad'* (1976) 136 CLR 529.

³⁴ Section 31 of the Act.

amenable. This is quite apart from the benefits to the plaintiff if security is provided for the release of the ship from arrest in that proceeding.

This is of course subject to the possibility of an application by the defendant or person liable for the claim for a stay of the Australian proceeding on the grounds of *forum non conveniens*³⁵ or in reliance upon an arbitration clause or foreign jurisdiction clause.³⁶

But even if such an application were to be made and the Australian court were to conclude that it is appropriate for the proceedings before it to be stayed on either basis, it is nevertheless also open to the Court to do so on terms that the ship or other property the subject of the *in rem* proceeding that is being stayed be retained by the Court as security for the satisfaction of any award or judgment that may be made in the arbitration or proceedings in the court of a foreign country or that equivalent security be provided for the satisfaction of any award or judgment that might be made in the arbitration or court of the foreign country. This is pursuant to section 29 of the Act.

In this way, even if the underlying substantive claim is not eventually heard and determined in Australia, the initiation of the *in rem* proceeding here may nevertheless allow the plaintiff to obtain security for the litigation of its claim elsewhere, including by way of arbitration or an *in personam* action in another jurisdiction, which security the plaintiff would not otherwise be entitled to in respect of the pursuit of its claim there.

Associated with this aspect of Admiralty jurisdiction is the possible scope for a plaintiff to commence an action *in rem* in Australia against a ship and to arrest that ship in that proceeding solely for the purposes of obtaining security for a claim that is either currently being pursued or intended to be pursued as an arbitration (whether locally or overseas) or in foreign *in personam* proceedings elsewhere.³⁷

The elements of an action *in rem*

Having identified the possible advantages to a plaintiff of the action *in rem* and the associated right to arrest the ship the subject of that action, it is however also necessary to recognise that there are certain limitations on the ability both to pursue a claim as an action *in rem* and to arrest a ship in the pursuit of that claim.

The *Admiralty Act* does not itself provide for the arrest of a ship or other property. That entitlement is to be found in Part VI of the *Admiralty Rules*, in particular rules 39, 40 and 43. Relevantly, under the Rules, the entitlement to arrest a ship or other property in an action *in rem* rests upon the entitlement of the plaintiff to commence an *in rem* proceeding against that ship or other property under the Act.³⁸

In other words, a plaintiff may only arrest a ship in relation to a claim if it is able to commence an *in rem* proceeding against that ship in respect of that claim under the Act. If the intended claim is of a type that under the provisions of the Act is not able to be pursued as an action *in rem* then it will not be possible to arrest any ship in relation to that claim. This might occur, for example, because the claim that it is wished to pursue is not a maritime lien and does not fall within the list of maritime claims found in section 4 of the Act. Equally, if the claim can be pursued *in rem* but not against the particular ship in question, then it is also not possible to arrest that ship in the pursuit of that claim. This might occur, for instance where the person liable for the claim is no longer the owner of that ship at the time the *in rem* proceedings are commenced, as required by section 17(b) of the Act (as occurred in *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')*).³⁹

In order to pursue a claim as an action *in rem* and to thereby arrest a ship or other property in support of that claim it is necessary to identify:

³⁵ *Seereederei Baco Lines GmbH v 'Al Aliyu'* [2000] FCA 656.

³⁶ *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc.* (1998) 90 FCR 1.

³⁷ *Allonah Pty Ltd v the ship 'Amanda N'* (1989) 21 FCR 60.

³⁸ R. 39 and *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')* (2004) 210 ALR 601.

³⁹ (2004) 210 ALR 601.

- first, the particular ship or property which is to be the subject of the proposed *in rem* proceeding;
- secondly, the nature of the claim that is sought to be pursued against that ship or other property. This is for the purposes of determining that the proposed claim is one that is capable of being pursued as an action *in rem* under the Act;
- thirdly, the relationship between that claim and the ship or other property the subject of the proceeding or in the case of surrogate ship arrest the relationship between the claim and the ship in respect of which the claim is said to arise;
- fourthly, in the context of *in rem* proceedings pursuant to sections 17, 18 or 19 of the Act, the identity of the ‘*relevant person*’, that is the person who it is alleged would be liable for the plaintiff’s claim had it been commenced as an action *in personam*;⁴⁰
- fifthly, the relationship of the relevant person to the ship or other property in respect of which the claim is made at the time the cause of action arose (and in particular whether that person was the owner or charterer or person in possession or control of the ship at that time); and
- finally, the relationship of the relevant person to the ship or other property at the time the proceedings are commenced, and in particular whether at that time the relevant person was the owner of that ship (in the context of *in rem* proceedings brought pursuant to sections 17 or 19 of the Act) or the demise charterer of that ship (in the context of proceedings brought pursuant to section 18).

I do not propose to address each of these requirements in this paper. Rather, I intend to confine my comments to the second of the above requirements, namely the nature of the claims that are capable of being pursued as an action *in rem* under the Act and in respect of which a ship may be arrested.

The nature of the claims that may be pursued in an action *in rem*

Part III of the Act is entitled ‘*Rights to proceed in Admiralty*’. As I have already mentioned, section 14 of the Act provides that a proceeding shall not be commenced as an action *in rem* except as provided for by the Act. Sections 15 to 19 of the Act deal with the circumstances in which proceedings may be commenced as an action *in rem* against a ship or other property.

More particularly, sections 15 to 19 deal with different types of claims, namely maritime liens (s. 15), proprietary maritime claims (ss. 16 and 18) and general maritime claims (ss. 17, 18 and 19). It is only in respect of these three types of claims that proceedings *in rem* may be commenced under the Act and for which a ship or other property may be arrested under the Rules. Unless the claim to be pursued is a maritime lien or a proprietary or general maritime claim as defined by the Act, then it is not possible to bring an *in rem* proceeding in respect of that claim or to arrest a ship in the pursuit of that claim. Moreover, the nature of the claim to be pursued may also determine under which section the proceeding *in rem* is to be commenced, which in turn may determine the ship (or other property) that might be the subject of that proceeding and the requirements that must be met in order for that *in rem* proceeding to be commenced against that ship and in respect of that claim.

Maritime claims

Maritime claims are defined in section 4 of the Act. They are divided into ‘*proprietary maritime claims*’ and ‘*general maritime claims*’. The particular types of claims that fall within the former description are listed in section 4(2) of the Act. The specific types of claims that are general maritime claims are listed in section 4(3).

⁴⁰ See definition of ‘*relevant person*’ in section 3(1) of the Act.

The lists of claims in sections 4(2) and 4(3) do not exhaust the scope of those claims that might be included as maritime claims in the Act in the exercise of the powers conferred on the Commonwealth Parliament by section 76(iii) of the Constitution. These lists of claims may be added to from time to time (such as for example, the recent addition to the list of general maritime claims in s. 4(3) of the Act of paragraph (ba) and claims under the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) which gives effect to the *Bunker Oil Convention*).

But the lists of claims found in sections 4(2) and 4(3) are both closed lists and at any one point of time represent the totality of those claims that are proprietary maritime claims and general maritime claims respectively and which might be pursued in an *in rem* proceeding in Australia at that time.

Accordingly, if it is wished to pursue a claim as an action *in rem* or to arrest a ship in respect of such a claim, the claim must fall within one or more of the categories of claims listed in section 4(2) or 4(3) of the Act (unless it is a maritime lien, as to which see below). If it does not, then it cannot be the subject of an action *in rem* and a ship or other property cannot be arrested in the enforcement of that claim

It is beyond the scope of this paper to consider all the potential claims listed in section 4(2) and section 4(3) of the Act let alone to comment upon them in any detail. For present purposes I propose to make only two general observations.

First, the distinction between a proprietary maritime claim and general maritime claim can be important in a number of respects. For instance, the right to proceed *in rem* on a proprietary maritime claim is found in section 16 of the Act. It is a right that may only be exercised under that section against the ship or other property that is the subject of that claim (although it is also possible to pursue a proprietary maritime claim against a demise chartered ship under section 18 of the Act if the requirements of paragraphs (a) and (b) of that section are otherwise satisfied). It is not possible to pursue a proprietary maritime claim against a surrogate ship under section 19 of the Act.⁴¹ The right to pursue a surrogate ship under section 19 – that is the right to pursue not the ship in respect of which the claim arises but another ship belonging to the person who is alleged to be liable for that claim – is confined to general maritime claims.

The second observation is as to the scope of the claims that fall within those listed in section 4. The categories of claims listed in each of sections 4(2) and 4(3) are not mutually exclusive. The categories or types of claims that may amount to a general maritime claim within section 4(3) are extensive. In many instances, these claims are also described as ones ‘*relating to*’ or ‘*in respect of*’ the subject matter specified, which words have been construed broadly and as being of wide import.⁴² This is quite apart from the broad and liberal approach that is taken to the interpretation of the Act generally, in particular to those provisions of the Act conferring jurisdiction.⁴³

Nevertheless, the claims listed in sections 4(2) and 4(3) are all claims that are expressed to (or impliedly) concern or relate to ‘*a ship*’. They therefore contemplate some connection between the claim and a particular ship or ships. That being so, it is not sufficient for the pursuit of an action *in rem* that the intended claim be one against a shipowner either generally or in respect of its ships or operations generally.⁴⁴ Nor is it sufficient that the person who is alleged to be liable for that claim happens to own a ship. It is therefore not possible to pursue as an action *in rem* against a ship a claim that is not related to (or concerns) that ship, or in the case of surrogate ship arrest, a general maritime claim that is not related to (or concerns) some other ship that was at the time the cause of action arose owned or chartered by or in the possession or control of the owner of the surrogate ship. This distinction between a claim against a ship and a claim against a shipowner generally was addressed by both Foster J in the *Port of Geelong Authority v the*

⁴¹ *Vilona v the ship ‘Anilham’* [2001] FCA 411.

⁴² *Port of Geelong Authority v the ship ‘Bass Reefer’* (1992) 37 FCR 374; *Caravelle Investments Pty Ltd v Martaban Ltd* (1999) 95 FCR 85; *Heilbrunn v Lightwood plc* (2007) 64 FCR 1.

⁴³ *Elbe Shipping SA v the ship ‘Global Peace’* (2006) 154 FCR 439 at [74]; *Tisand Pty Ltd v the owners of the ship ‘Cape Moreton’ (ex ‘Freya’)* (2005) 143 FCR 43 at [59]-[65].

⁴⁴ *Port of Geelong Authority v the ship ‘Bass Reefer’* (1992) 37 FCR 374.

ship “*Bass Reefer*”⁴⁵ and the Full Court of the Federal Court in *Opal Maritime Agencies Pty Ltd v the proceeds of sale of the “Skulptor Konenkov”*.⁴⁶

Accordingly, in order to pursue a claim as an action *in rem* against a ship or other property, there must be some connection between that claim and either the ship that is intended to be the subject of the *in rem* proceeding (in the case of proceedings commenced pursuant to sections 15, 16, 17 and 18) or of which the ship the subject of the *in rem* proceeding is intended to be a surrogate (in the case of proceedings commenced under section 19 of the Act).

The action *in rem* may therefore be of limited (if any) utility to the creditor of a person who also happens to own a ship or who has advanced monies or credit even to a shipowner but in respect of the business and affairs of that shipowner generally rather than in relation to any specific ship or ships.

Maritime liens

Section 15 of the Act provides that a proceeding on a maritime lien or other charge in respect of a ship or other property may be commenced as an action *in rem* against that ship or other property.

A maritime lien is a species of charge that attaches to property – most commonly a ship – to secure certain types of claims. It was described by Allsop J in *Comandate Marine Corp. v Pan Australia Shipping Pty Ltd* as

... a creature of maritime law and is generally described by reference to cases such as “the ‘*Bold Buccleugh* (1851) 7 Moo PC 267 at 284-85, 13 ER 884 at 890-91 as a non-possessory claim or privilege upon a ship carried into effect by legal process by *in rem* action. It is inchoate from the time of the events giving rise to it, attaching to the ship, travelling with the ship into anyone’s possession (even a bona fide purchaser for value without notice, except a purchaser at an Admiralty Court sale) and perfected by legal process relating back to first attachment.”⁴⁷

In Australia, the claims that are maritime liens include those listed in s. 15(2) of the Act, namely claims for salvage, for damage done by a ship (*the damage lien*), for the wages of the master or a member of the crew of a ship and for master’s disbursements.

But in contrast to sections 4(2) and 4(3), the list of maritime liens in section 15(2) is not a closed list. It is possible that the categories of maritime liens which could be used to found an action *in rem* against a ship or other property (and thereby allow the arrest of that ship or other property in Australia) may be extended beyond those listed in section 15(2) of the Act. As Allsop J noted in *Elbe Shipping SA v the ship ‘Global Peace’*:

... the word “includes” in s 15(2) reflects the fact that the Act leaves open the possibility of other maritime liens being recognised beyond those listed. This might occur by reference to the development of Australian maritime law in this respect, or by the recognition of foreign maritime liens by reference to principles of private international law different to those expressed by the majority of the Privy Council in *The ‘Halcyon Isle’*.⁴⁸

In *Global Peace*, the plaintiff sought to advance a claim *in rem* in part on the basis of a maritime lien which was said both to arise from the alleged commission of a tort on the high seas and to be recognised under Australian law and which was different from the damages lien referred to in section 15(2)(b) of the Act. In disputing the existence of this lien, the defendant argued against the recognition of new maritime liens, including the lien propounded by the plaintiff. This was especially in light of section 6 of the Act, which provides:

⁴⁵ (1992) 37 FCR 374.

⁴⁶ (2000) 98 FCR 519.

⁴⁷ (2006) 157 FCR 45 at [112].

⁴⁸ (2006) 154 FCR 439 at [131].

6 Certain rights not created or affected

The provisions of this Act (other than section 34) do not have effect to create:

- (a) a new maritime lien or other charge; or
- (b) a cause of action that would not have existed if this Act had not been passed.

As Allsop J observed, section 6 was consistent with the approach to the formulation of the whole Act on the basis of the perceived limitation of the legislative power of the Commonwealth under section 76(iii) found in the decision of the High Court in the *owners of the SS Kalibia v Wilson*⁴⁹ to the effect that the Commonwealth Parliament does not have implied power under section 76(iii) of the Constitution to legislate for Admiralty and maritime substantive law. In that regard his Honour went on to comment on both the scope of section 76(iii) and the duty of the Court when confronted with a claim asserting a maritime lien in the following terms:

It is unnecessary and inappropriate to discuss whether The ‘Kalibia’ reflects the current Constitutional position given the emergence of Australia as a fully independent nation state ... It is sufficient to say that s 76(iii) provides for Parliament to confer or invest Admiralty and maritime jurisdiction. The absence (according to The ‘Kalibia’) of a coterminous legislative power to deal with substantive law matching the reach of judicial authority over Admiralty and maritime controversies does not limit the full import and implication of the grant of judicial power. The conferral of jurisdiction is not a matter of mere procedure. It is the conferral of a species of government power to quell controversies. Subject to limited circumstances that may exist by way of an exception, courts have a duty to exercise the power if jurisdiction is invoked. Thus, judges have a responsibility to ascertain and declare the general maritime law of Australia, as part of the common law of Australia. If that includes ascertaining and declaring the law of maritime liens, that is part of the task.

When one has recourse to the ALRC Report, it appears clear that the intention was to leave the determination of the extent or scope of the maritime lien to the courts. The non-exhaustive list in s 15(2) was placed in the Act for educative or information purposes: see [122] of the ALRC Report. There was no intention, for instance, to eliminate bottomry or respondentia as bases for liens on the ship or cargo. The Report recognised that the Act was to be jurisdictional in scope, but made no attempt to define the nature and extent of the maritime lien.

In the end, his Honour found that in the circumstances before him it was not necessary to decide whether Australian law recognised a maritime lien arising from a tort on the high seas, independently of the damage lien. This was especially where the plaintiff’s claim in that proceeding fell within the existing lien described in section 15(2)(b) in any event.

Nevertheless his Honour’s comments reflect a broader and potentially more liberal view of the scope and operation of section 15 and what may amount to a maritime lien for the purposes of the commencement of *in rem* proceedings pursuant to that section, leaving open the possibility of the Court finding at some future time a potentially broader jurisdiction than might otherwise have been thought to be found within the words of the section. Arguably, these comments also leave open the potential for the categories of claims that would amount to maritime liens (including for the purposes of the commencement of *in rem* proceedings) to be possibly expanded by the Commonwealth Parliament by legislation.

A similar lien to that asserted in the *Global Peace* was also subsequently advanced in the Supreme Court of New South Wales in *Rail Equipment Leasing Pty Ltd v CV Scheep. Emmagracht*,⁵⁰ although in that case it was in support of an entitlement claimed by the ship owner to arrest cargo⁵¹ in respect of a claim for damage which the cargo was alleged to have done to the ship in the course of the ship’s passage to Australia. In particular, it was argued by the shipowner in that case that the damage to its ship gave rise to a maritime lien over the cargo which caused that damage and for which the ship owner could arrest the cargo pursuant to section 15 of the Act. Such a lien clearly did not fall within any of the maritime liens listed in

⁴⁹ (1910) 11 CLR 689.

⁵⁰ [2008] NSWSC 850.

⁵¹ That is, ‘other property’ within the meaning of section 15 of the Act.

section 15(2) of the Act and would only permit an action *in rem* against the cargo if it otherwise amounted to a maritime lien on some other basis (such as arising from a tort on the high seas) as the shipowner claimed.

However, Rein J doubted that any maritime lien over cargo for a tort on the high seas was known or recognised by Australian law and was not satisfied that the Court had jurisdiction to deal with a claim upon the cargo based on s 15 of the Act. In doing so, his Honour only dealt with the particular lien that had been asserted by the shipowner in that case and whether or not it had been made out. He did not address (nor needed to address, in view of his findings as to there being no such lien as that asserted) the broader question as to the possible availability of maritime liens other than those listed in section 15(2) of the Act and if so whether *in rem* proceedings might be brought in respect of such additional liens, which Allsop J had adverted to in the passage from *Global Peace*⁵². In particular, Rein J did not reject the maritime lien asserted in that case by the shipowner on the basis that it was not possible to have a maritime lien other than those listed in section 15(2) of the Act; it was simply that Australian law did not recognise the particular lien asserted by the shipowner in that case.

Apart from the possibility of new maritime liens or the rediscovery of old liens, the other way in which Allsop J contemplated (in the passage quoted above) the maritime liens within section 15 being possibly extended was via the recognition of foreign maritime liens as maritime liens for the purposes of that section and thereby the Act by reference to principles of international law different from those expressed by the majority of the Privy Council in the *Halcyon Isle*.

In the *Halcyon Isle*⁵³ the Privy Council ruled by a ‘bare majority’⁵⁴ of 3:2 that the recognition of a ship repairers’ right to enforce its claim by way of a maritime lien and also the priority to be afforded to that claim were to be adjudged according to the law of the forum in which the claim was being pursued, rather than the law governing the claim or underlying cause of action. In particular, the majority held that the characterisation of a claim was to be regarded as relating to the remedy rather than the underlying rights inherent in that claim. It was therefore procedural in nature and as such to be dealt with by the law of the forum (in that case, Singapore law, which was indistinguishable from English law). Unless the claim or facts giving rise to that claim created a maritime lien under the law of the forum, the majority held that the claim was not to be treated as a maritime lien. Moreover this was so notwithstanding that the claim was recognised as a maritime lien under the law governing it (namely US law in that case).

However, in what has been described as a powerful dissent,⁵⁵ the minority of the Privy Council concluded that the balance of authority, comity of nations, private international law and natural justice all required that English law ought recognise the maritime lien created by the law of the United States as a maritime lien. The minority held that the nature of the maritime lien was a substantive right and therefore in determining the nature of the claim in the local jurisdiction, the Court ought to apply the *lex causae* or law governing the claim (namely US law) rather than the law of the forum.

The decision of the majority of the Privy Council has been followed elsewhere in the Commonwealth, although not universally. In particular, it has not been followed in Canada or South Africa.

The Australian Law Reform Commission considered this issue in its report no. 33 entitled ‘*Civil Admiralty Jurisdiction*’ and concluded⁵⁶ that although the dominant view expressed to the Commission favoured the Canadian and South African approach rather than that of the majority of the Privy Council, the matter was best left to be resolved through further attempts at international unification. In the absence of any formal international agreement, the Commission concluded that ‘the question is best left to the courts to resolve, taking into account developments in other jurisdictions.’

⁵² *Elbe Shipping SA v the ship ‘Global Peace’* (2006) 154 FCR 439 at [131].

⁵³ [1981] AC 221.

⁵⁴ Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report no. 33 (1986), [123].

⁵⁵ M Davies and K Lewins, ‘Foreign Maritime Liens : should they be recognised in Australian Court’ (2002) 76 *Australian Law Journal* 775.

⁵⁶ At paragraph [123].

In Australia, the majority view in the *Halcyon Isle* was followed by Sheppard J in *Morelines Maritime Agency Ltd v the proceeds of sale of the 'Skulptor Vuchetich'*.⁵⁷ In that case his Honour declined to treat a claim by Transamerica Leasing Inc (TLI) for monies owing under a container hire agreement as a maritime lien notwithstanding that it was said to give rise to a maritime lien under US law. This was because, applying the majority view, the question of whether the claim should be treated as a maritime lien was to be decided by determining how the facts giving rise to the claim were treated under Australian law and his Honour found that under Australian law a claim for monies payable under a container hire agreement did not give rise to a maritime lien (nor indeed did they even give rise to a general maritime claim). In those circumstances, his Honour concluded that TLI was not a maritime claimant and therefore not entitled to pursue its claim for the recovery of the monies owing by the shipowner under the container hire agreement as a maritime claim against the fund representing the proceeds of the sale of the ship the subject of those proceedings.

In an article published in December 2002,⁵⁸ Professor Martin Davies and Kate Lewins suggested that the approach in the *Halcyon Isle* and its adoption in Australia should be reconsidered in light of the decisions in *John Pfeiffer Pty Ltd v Rogerson*⁵⁹ and *Regie National des Usines Renault SA v Zhang*⁶⁰ in which the High Court recognised that torts committed out of the jurisdiction – including overseas – were to be governed by the *lex loci delicti* or law of the place of the wrong.⁶¹ The adoption of such an approach to the law of tort, it was argued, is more consistent with the approach taken by the minority of the Privy Council in the *Halcyon Isle*, at least so far as the characterisation of the claim (and whether it is a maritime lien) is concerned. If the approach taken by the High Court in relation to the law of torts were also to be applied to the characterisation of maritime liens in Australia then conceivably the scope of the liens which might be the subject of *in rem* proceedings under section 15 of the Act may be increased, at least where the claim arises overseas and is treated as a maritime lien by the *lex causae*.

It is beyond the scope of this paper to canvass in detail whether the view of the majority of the Privy Council in the *Halcyon Isle* should or is likely to continue to be applied in Australia or whether Australian courts may (or should) now prefer the approach of the minority of the Privy Council, especially given the High Court's treatment of foreign torts in *Zhang*.

But if the approach of the minority were to be accepted and followed in Australia so far as the characterisation of a claim is concerned, then it would potentially expand the scope of claims that might be pursued as maritime liens in Australia and in respect of which a ship may be arrested in Australia pursuant to section 15 of the Act. This may be particularly relevant in the case of the insolvency of a ship owner (as it was in the *Morelines* proceedings before Sheppard J), where there are many competing claims for a limited fund created from the proceeds of sale of a ship and the question of the characterisation of a claimant's claim may be important in determining whether that claimant is entitled to pursue its claim against the fund as a claim under the Act and is thereby entitled to a share of that fund.

Moreover, if the approach of the minority were to be followed in Australia, it may also have an impact on the priority of competing claims, in particular competing claims on a fund representing the proceeds of sale of a ship sold in an *in rem* proceeding in Australia. If for instance the foreign claim is (in accordance with the view of the minority) afforded the status of a maritime lien for the purposes of proceedings against that fund in Australia (consistent with its status under the *lex causae*) then that claim may have a higher priority in the distribution of the fund (in particular over those claimants who only have general or proprietary maritime claims) than it would if the claim was to be characterised as if the circumstances giving rise to it had occurred in Australia (consistent with the approach of the majority view) and under Australian law it did not have the character of a maritime lien – for instance because under Australian law the facts giving rise

⁵⁷ [1997] FCA 432 at [78] – [83].

⁵⁸ M Davies and K Lewins, 'Foreign Maritime Liens : should they be recognised in Australian Court' (2002) 76 *Australian Law Journal* 775.

⁵⁹ (2000) 203 CLR 503.

⁶⁰ (2002) 210 CLR 491.

⁶¹ This was in lieu of the 2 step test in *Phillips v Eyre* which once satisfied resulted in the court applying the tort law of the forum to the foreign tort (*Thompson v Hill* (1995) 38 NSWLR 714).

to the claim would only give rise to a general maritime claim or (as with the claim of TLI in *Morelines*) did not entitle the claimant to pursue a claim *in rem* at all.

Associated jurisdiction

The jurisdiction of the courts under the Admiralty Act extends beyond maritime liens and maritime claims in at least one respect. This is the extent to which jurisdiction is conferred on ‘*associated matters*’ pursuant to section 12 of the Act, which provides:

12 Jurisdiction in associated matters

The jurisdiction that a court has under this Act extends to jurisdiction in respect of a matter of Admiralty and maritime jurisdiction not otherwise within its jurisdiction that is associated with a matter in which the jurisdiction of the court under this Act is invoked.

The scope of this additional jurisdiction in respect of ‘*associated matters*’ was also considered by Allsop J in *Elbe Shipping SA v the ship “Global Peace”*⁶², in particular in the context of proceedings *in rem*.

As his Honour there observed,⁶³ provisions such as section 12 of the *Admiralty Act* and section 32 of the *Federal Court of Australia Act* dealing with associated jurisdiction confer or invest jurisdiction in a matter which, by reference to sections 75 and 76 of the Constitution, could be (but has not been) conferred (or invested) on the Court, if that matter is associated with a matter in respect of jurisdiction that has been conferred or invested on the Court, and that jurisdiction has been invoked by a plaintiff through the commencement of proceedings. If jurisdiction of the Court is extended to an associated matter by operation of section 12, then the authority of the Court is widened to hear that associated matter which is otherwise not within the Court’s jurisdiction.⁶⁴ In this way, the jurisdiction of a Court seized with a matter under the Act is expanded by section 12 of the Act to entertain matters beyond those which have been expressly conferred by the provisions of the *Admiralty Act*. That is, provided that this additional (or associated) matter is associated with a matter within jurisdiction and can itself be characterised as a matter of ‘*Admiralty and maritime jurisdiction*’ within the meaning of section 76(iii) of the Constitution.⁶⁵

Accordingly, the effect of section 12 of the Act is to confer jurisdiction on a court, otherwise seized with a matter under the Act in respect of a claim that is of a maritime nature notwithstanding that it may not be a maritime lien or does not otherwise fall within any of the closed categories of proprietary or general maritime claims listed in section 4 of the Act.

But perhaps more significantly, Allsop J also held that section 12 deals only with the authority of the Court to adjudicate a claim or dispute and not the statutory permission to commence a proceeding in respect of that claim or dispute as a certain type of action.⁶⁶ In particular, his Honour found that section 12 of the Act does not deal in terms or in subject matter with the permission to bring a proceeding as an action *in rem*. Accordingly, his Honour concluded that whilst section 12 might be relied upon to expand the scope of claims that might be brought within the jurisdiction of the Court, through associated matters, there is no statutory permission within either section 12 or otherwise within the Act to commence a proceeding in vindication of that associated matter as an action *in rem*. Nor is there any basis on which that associated matter could be included in an action *in rem* along with other claims properly the subject of *in rem* proceedings under the Act and simply on the basis that the associated matter is a matter associated with those other claims.

⁶² (2006) 154 FCR 439 at paras. [59] – [67].

⁶³ *Elbe Shipping SA v the ship ‘Global Peace’* (2006) 154 FCR 439 at [60].

⁶⁴ *Elbe Shipping SA v the ship ‘Global Peace’* (2006) 154 FCR 439 at [64].

⁶⁵ In this regard, section 12 of the Act does not deal with other kinds of matters contemplated by sections 75 and 76 of the Constitution, although the Federal Court may nevertheless have such jurisdiction in respect of a matter within its Admiralty jurisdiction pursuant to section 32 of the Federal Court of Australia Act.

⁶⁶ *Elbe Shipping SA v the ship ‘Global Peace’* (2006) 154 FCR 439 at [64].

If such an associated matter were to be pursued by the plaintiff to an action *in rem*, then it would have to be commenced as an action *in personam*.⁶⁷

The same position obtains in relation to claims that might be said to be accrued to a claim which is a maritime lien or other charge or a proprietary or general maritime claim and thereby within the Court's 'accrued jurisdiction'. Whilst the Court may have jurisdiction to determine an accrued claim in conjunction with its determination of the claim based on the maritime lien or maritime claim for which there is jurisdiction expressly under the *Admiralty Act*, the Act does not allow that accrued claim to be pursued either as an action *in rem* or as part of an action *in rem* properly commenced in respect of a claim within jurisdiction.⁶⁸

Undoubtedly section 12 provides a means by which a Court exercising jurisdiction under the Act may be able to entertain claims of an Admiralty and maritime nature which are not expressly found in the Act. As Dr Cremean states:⁶⁹

... there is clear potential in s12 for a growth in jurisdiction of the courts under the Act. This could come from insurance claims, marine and non-marine alike. It could also come from parties who are otherwise interested in the outcome of proceedings, intervening in those proceedings. There is no need to read s12 restrictively. Certainly the evident endeavour of the section is to increase the jurisdiction beyond those matters specified in other provisions.

This would also be further expanded in the case of the Federal Court by section 32 of the *Federal Court of Australia Act* (Cth).

Where the principal action brought in the exercise of the Admiralty jurisdiction of the Court is by way of an action *in personam*, then no difficulties arise in including in that proceeding the associated or accrued claim.

But where the principal action is a proceeding *in rem*, then there are a number of consequences including procedural consequences that flow from the above conclusions of Justice Allsop in *Global Peace*.

First, it is not possible to pursue the associated (or accrued) matter as an action *in rem*. This represents a limitation on the utility of the associated jurisdiction conferred by section 12 of the Act (as it also does on both the Federal Court's associated jurisdiction under section 32 and its accrued jurisdiction). If the associated (or accrued) claim cannot be pursued as or within an action *in rem*, the Plaintiff would not be entitled to security in respect of that claim (even if it is otherwise entitled to security in respect of the claim that is within the jurisdiction conferred by the Act). This may be of no practical importance and may not adversely affect a plaintiff if the associated or accrued claim is no more than a different way of arguing for the same damages that are sought by the claim that is within the jurisdiction conferred by the Act and for which the plaintiff would be entitled to security in any event. But it may be relevant (and may adversely impact on a plaintiff and its intended claims) if the damages claimed under the associated or accrued claim go beyond the damages sought by the claim that is within jurisdiction and which is properly the subject of the *in rem* proceeding. As I have already stated, in those circumstances, the Plaintiff would not be entitled to security in respect of that claim. It would also not be entitled to obtain a judgment against the ship (if no security was otherwise provided and the ship remained under arrest) in respect of that claim and may therefore not be able to enforce that claim against the proceeds of any sale of that ship (or at least be able to enforce the claim against the proceeds with the priority of a maritime claimant).

Secondly, although the associated matter may be pursued as an action *in personam*, it would have to be commenced as a separate proceeding, in particular separate to any action *in rem*. This is especially having regard to rule 18 of the Rules.⁷⁰

⁶⁷ *Elbe Shipping SA v the ship 'Global Peace'* (2006) 154 FCR 439 at [65].

⁶⁸ *Elbe Shipping SA v the ship 'Global Peace'* (2006) 154 FCR 439 at [67].

⁶⁹ Dr Daniel Cremean, *Admiralty Jurisdiction* (3rd ed 2008), 122.

⁷⁰ *Elbe Shipping SA v the ship 'Global Peace'* (2006) 154 FCR 439 at [67].

If the person who is alleged to be liable for the associated or accrued claim is not present in Australia, then the initiating process in the associated *in personam* proceeding will either:

- have to be served on the defendant (or relevant person) within Australia if they are subsequently present in Australia; or otherwise
- have to be served on the defendant (or relevant person) outside of Australia and pursuant to the rules for service *ex juris* applicable in the Court in which the proceeding is commenced.

The mere presence in Australia or Australian waters of the ship or other property the subject of the *in rem* proceedings would be of no assistance in relation to the service of the initiating process for the associated *in personam* proceeding, notwithstanding that it would be sufficient for service of the writ *in rem* that commenced the principal *in rem* proceeding.

The second of the two courses referred to above may in turn require the plaintiff to obtain the leave of the Court before service could be effected overseas.⁷¹ In doing so, it may also be necessary for the plaintiff to establish some connection between the associated or accrued claim and Australia which would permit service of the initiating process in the *in personam* proceeding out of the jurisdiction.⁷² Precisely what this would entail may depend on the particular Court in which the *in rem* proceeding was commenced and the terms of that Court's *ex juris* rules. These requirements may differ between the Courts.

In *Global Peace* as the cause of action that was within the associated jurisdiction was alleged to have occurred within the Australian territorial sea, there was no difficulty in establishing a connection with Australia and his Honour found that '*plainly service ex juris would be available*'.⁷³ In that case, his Honour was also prepared to consider an application for substituted service. However the position may be different where the cause of action sought to be relied upon occurred outside of Australia and the parties to the proceedings are both resident or domiciled outside of Australia. Whilst that is no bar to the prosecution of the claim within the jurisdiction conferred by the Act as an action *in rem*, it may prevent the pursuit of the associated matter as part of that claim unless the defendant submits to the jurisdiction of the Court or is otherwise present or able to be served within the jurisdiction.

In those circumstances, a question may arise as to whether the plaintiff is able to rely upon an appearance filed by the defendant (or relevant person) to the *in rem* proceeding either as a submission to the jurisdiction of the Court generally or a presence within the jurisdiction for the purposes of the associated *in personam* proceeding. This is especially bearing in mind my earlier comments as to the hybrid status of the *in rem* proceeding once an appearance has been filed. If it can, then the plaintiff may be able to serve the initiating process in the *in personam* proceeding on the address for service in the notice of appearance and thereby avoid the difficulties described above. But if the plaintiff cannot or if there is no appearance by the relevant person on behalf of the ship (for example because the appearance is by some other person who is not the relevant person but who has an interest in the ship, as occurred in *the 'Iron Shortland'*⁷⁴ and *the 'Zoya K'*⁷⁵) then the plaintiff may not be able to pursue its associated claim notwithstanding section 12 of the Act.

To the extent that other sources of what is arguably Admiralty and maritime jurisdiction might also be found in the Federal Court through s. 39B(1A)(c) of the *Judiciary Act* 1903 (Cth), as well as through the general jurisdiction of the State Supreme Court where proceedings are commenced in a State court, they would also be constrained along the lines described above (in particular insofar as it might be wished to pursue those claims as or within an action *in rem*). Whilst such ancillary matters might also be capable of being dealt with by the Court in conjunction with a matter brought within the jurisdiction conferred on the Court by the *Admiralty Act* and invoked by a plaintiff including by way of an action *in rem*, this would only

⁷¹ As it would in the Federal Court pursuant to FCR O.8 r.3(1)(a).

⁷² FCR O.8 r.2

⁷³ *Elbe Shipping SA v the ship 'Global Peace'* (2006) 154 FCR 439 at [143].

⁷⁴ (1995) 59 FCR 535.

⁷⁵ [1997] FCA 379.

be so insofar as that ancillary matter was and could be pursued as an action *in personam*. It would also be subject to any jurisdictional or other restrictions on that Court in that regard. It would not be possible to pursue such ancillary matters or ancillary claims as an action *in rem* or to include such ancillary claims within the scope of an action *in rem* brought in the exercise of the Admiralty jurisdiction expressly conferred by the Act or to arrest a ship or other property in respect of such an ancillary claim.

Challenges to the exercise of *in rem* jurisdiction and the arrest of ships

As a statutory jurisdiction of a defined and limited ambit, it is possible that a plaintiff may seek to pursue claims including by way of *in rem* proceedings which are not in fact within that the (Admiralty) jurisdiction conferred by the Act.

The consequences of this are perhaps more particularly significant in the context of *in rem* proceedings where a vessel may be arrested in that proceeding and would not otherwise be released from arrest until security has been provided for the plaintiff's claim or the arrest has been set aside for some other reason. In those circumstances, a successful challenge to the Court's jurisdiction to entertain that claim as an *in rem* action will not only result in the early termination of the proceedings without any determination of the Plaintiff's substantive claim, but also the release of the ship from arrest without the need for the shipowner to put up any security in respect of that claim.

Where there is a challenge to jurisdiction, that challenge should be determined immediately and before any substantive steps are taken in the proceeding.⁷⁶ Where there is such a challenge, the onus is on the plaintiff asserting jurisdiction to establish the existence of that jurisdiction and that the proceedings are properly within the *in rem* jurisdiction of the Court. Although the defendant raising the jurisdictional challenge and seeking to set aside the proceedings for want of jurisdiction may be the moving party, it does not thereby assume the burden of disproving jurisdiction.

The manner in which a challenge to jurisdiction is determined and the evidence and submissions needed to successfully dispose of such a challenge will depend on the nature of the challenge and the particular aspect of the jurisdiction being challenged.

Principally there are two situations to consider. The first is where jurisdiction depends on particular facts or a particular state of affairs. In those circumstances, a challenge to jurisdiction may only be resisted by establishing the facts on which that jurisdiction depends. These facts or the state of affairs must be established on the balance of probabilities in light of all the evidence adduced in the proceedings at the hearing to determine whether or not there is jurisdiction.⁷⁷ The facts or state of affairs necessary to give jurisdiction must be proved by evidence, admissible on a final hearing. Evidence of these jurisdictional facts on information and belief is generally inappropriate and unacceptable.⁷⁸

A common example of this type of jurisdictional challenge is where there is an issue as to whether the relevant person was the owner of the ship at the time the proceedings were commenced for the purposes of either section 17(b)⁷⁹ or section 19(b) of the Act.⁸⁰ Where there is such a challenge then it is incumbent on the plaintiff to adduce evidence and establish on the balance of probabilities that the relationship that the relevant person has to the ship the subject of the *in rem* proceeding is one that is sufficient to make it the owner of that ship.

The above comments would also equally apply if the issue raised by the jurisdictional is whether the relevant person had at the relevant time the relationship specified in sections 17(a), 18(a), 18(b) and 19(a) of the Act.

⁷⁶ *Owners of the ship 'Shin Kobe Maru' v Empire Shipping Inc* (1994) 181 CLR 404; *Heilbrunn v Lightwood plc* (2007) 64 FCR 1.

⁷⁷ *Owners of the ship 'Shin Kobe Maru' v Empire Shipping Inc* (1994) 181 CLR 404 at 426.

⁷⁸ *Lloyd Werft Bremerhaven GmbH v the owners of the ship 'Zoya Kosmodemyanskaya'* (1997) 79 FCR 71.

⁷⁹ *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Frey')* (2004) 210 ALR 601.

⁸⁰ *Kent v ss 'Maria Luisa' (no. 2)* (2003) 130 FCR 12.

Where the challenge to jurisdiction is on factual grounds, requiring proof of jurisdictional facts in the manner just described, there may be an issue as to whether the plaintiff is entitled to make use of the Court's powers, including its coercive powers – such as subpoenas, notices to produce and discovery – in order to obtain the evidence (including evidence from the person challenging jurisdiction or third parties who may be otherwise amenable to the Court's jurisdiction) necessary to prove ownership or such other jurisdictional fact in issue.

The second situation is where the challenge to jurisdiction is as to whether the claim being pursued is a maritime claim (or maritime lien) and therefore a claim of the type that is able to be pursued as an action *in rem*. In those circumstances, the proper approach to the determination of that challenge is to look at the claim (including any particulars of the claim) as formulated in the Writ in Rem (and possibly other material filed by the plaintiff such as the affidavit in support of arrest) to see if that claim answers the description of a maritime claim or maritime lien as defined by the Act.

In this second situation, the question raised by the jurisdictional challenge is whether the claim made bears the legal character of a maritime claim (or maritime lien). This generally does not depend on findings of fact and thus does not involve any consideration on the balance of probabilities.⁸¹

Nor is it necessary or appropriate in those circumstances for the Court to embark upon an investigation of the merits or strength of the claim or whether there is evidence to make out the claim. As Allsop J stated in *Elbe Shipping SA v the ship 'Global Peace'*:

This analysis must be undertaken by reference to the nature of the plaintiff's case as put forward, without reference to ... whether it is likely to succeed or not. Statements in some of the cases of the necessity to show some strength in the case before the jurisdiction of the court is attracted (that is before the court is legitimately seized of authority to adjudicate) appear impermissibly to combine the attraction of jurisdiction with its exercise.⁸²

It is also not necessary or appropriate for the Court in disposing of the jurisdictional challenge to proceedings commenced under sections 17, 18 or 19 of the Act (in either of the above situations) to investigate whether the '*relevant person*'⁸³ is in fact liable for the claim alleged.⁸⁴

However, that is not to say that the strength or otherwise of the plaintiff's claim may not be relevant to an early determination by the Court as to whether the *in rem* proceeding should be allowed to proceed or a vessel under arrest in that proceeding remain under arrest. As the Full Court of the Federal Court observed in *Iran Amanat v KMP Coastal Pte Limited*:

The owner of a ship under arrest would be entitled to move for summary dismissal of proceedings on the ground that they were vexatious or frivolous or disclosed no reasonable cause of action. Further, when hearing an application for release of a ship from arrest, the court may be entitled to consider the strength of the plaintiff's claim. If the court were satisfied that there was no serious question to be tried as to the plaintiff's claim, the court may be loath to maintain the arrest or to require security for the claim.⁸⁵

This is especially so in light of section 31A of the *Federal Court of Australia Act*, particularly if effect is given to the intention behind the introduction of that section (as referred to in the explanatory memorandum of the legislation by which it was introduced) namely to allow the court greater flexibility in giving summary judgment and to broaden the ground on which federal courts can summarily dispose of unsustainable cases.⁸⁶

⁸¹ *Owners of the ship 'Shin Kobe Maru' v Empire Shipping Inc* (1994) 181 CLR 404 at 427.

⁸² (2006) 154 FCR 439 at [75].

⁸³ That is, the person who it is alleged would be liable for the claim if the action had been commenced as an action in personam (see definition in section 3(1) of the Act).

⁸⁴ *Iran Amanat v KMP Coastal Pte Limited* (1999) 196 CLR 130.

⁸⁵ 1997 144 ALR 720 at 727.

⁸⁶ See *J F Keir Pty Ltd v Sparks* [2008] FCA 611 at [10] – [11].

An example of an instance where an application for summary dismissal of an *in rem* proceeding on the grounds of the weakness of the underlying claim was successful and both the *in rem* proceeding and the arrest of the ship in that proceeding were set aside on this basis can be found in the judgment of Hely J in *Vilona v the ship "Anilham"*.⁸⁷

A number of further points might be made following on from the above comments in relation to the preparation of the documents commencing *in rem* proceedings and for the arrest of a ship in those proceedings, given the possibility of a jurisdictional challenge.

First, the formulation of the potential cause of action may have a considerable impact in determining whether or not jurisdiction to pursue that claim might be found to exist. Accordingly, it is important that each cause of action to be relied upon is clearly and correctly formulated from the outset, including in particular in the Writ in Rem (by which the *in rem* proceeding is commenced).

Moreover, secondly characterising each cause of action as a claim within those categories of claims that might properly be the subject of *in rem* proceedings should be apparent from the particulars of the claim set out in the Writ, as well as in any subsequent pleading and the affidavit in support of the application for the arrest of the ship. If more than one cause of action or type of claim is to be asserted, then each should be readily apparent on the face of these documents. Similarly, if the claim made is able to be characterised by reference to more than one of the categories of claims listed in sections 4(2) or 4(3) of the Act, then each of those characterisations should also be readily apparent on the face of these documents.

Thirdly, the affidavit required to be filed in support of the application for an arrest warrant must comply with Form 13 of the Rules. That form requires the deponent to address in the affidavit a number of specific matters. Each of these matters must be dealt with. I have already commented on the need for the plaintiff to disclose all relevant material in relation to those matters which the affidavit in support of the application for an arrest warrant must deal with. The deponent of the affidavit is under a similar duty.

Importantly, the affidavit must include a description of the claim in respect of which the arrest is sought. Note 3 to Form 13 sets out the obligations that must be met by the deponent of that affidavit in this regard. It reads:

set out short particulars of the claim and necessary facts that would entitle an action in rem to be brought, in accordance with the Admiralty Act 1988, in respect of the claim.

This is reinforced by rule 39(3) which is in the following terms :

The affidavit [in support of the application for an arrest warrant] must be in accordance with Form 13 and must set out particulars of the claim and any necessary facts that would entitle an action in rem to be brought in accordance with the Act, in respect of the claim.

Both the note and rule 39(3) highlight the need not only for particulars of the plaintiff's claim, but also for identification in the affidavit (even if only on a hearsay basis at this early stage) of those facts that would entitle an action *in rem* to be brought in accordance with the Act in respect of the claim or claims that are to be pursued in the proceeding. These would include the facts that the plaintiff would have to prove on a final basis in the event that there was a jurisdictional challenge.

This may require for instance a statement or evidence establishing the requisite connection between the '*relevant person*' (that is the person who it is alleged would be liable for the claim if the action were pursued as an action *in personam* and who must be identified in the writ in rem) and the ship the subject of the proceeding that satisfies the requirements of paragraphs (a) and (b) of sections 17, 18 and 19, where the proceeding has been commenced pursuant to one or other of those sections. In particular, where the proceeding has been commenced pursuant to section 17 of the Act the affidavit should include evidence that the '*relevant person*' was the owner of the ship at the time the proceeding was commenced and an

⁸⁷ [2001] FCA 411.

owner, charterer or person in possession or control of that ship at the time the cause of action arose. The former may be done at least in the first instance by annexing an up to date search of the ship with either Lloyd's Register or the registry of the State in which the ship is registered.

However, ship names can be changed swiftly. Any search of the owner of a ship relied upon in support of the commencement of proceedings should be up to date. The risk of an out of date search can be seen in *the 'Zoya K'*⁸⁸ where the solicitor for the plaintiff relied solely on what was subsequently shown to have been out-of-date listings in the Lloyd's Register. As Tamberlin J said in that case, after referring to the observations of Hobhouse J in *the Nordglimt*:⁸⁹

The caution sounded in the above decisions must be carefully borne in mind by parties who institute proceedings for the arrest of a vessel, namely that the arrest of a ship in trade is a drastic measure and there should therefore be a thorough and careful investigation as to ownership before arrest proceedings begin.

Commencing an action *in rem* and arresting a ship without such an inquiry having been first made and evidence of the result of that inquiry annexed or exhibited to the affidavit in support of the application for an arrest warrant may expose the plaintiff not only to an inability to maintain jurisdiction in respect of the proceeding (and the arrest of the ship in that proceeding) if challenged but also the risk of a claim for damages under section 34 of the Act.

But even an up to date search of the Register may not be conclusive of the identity of the owner (as proved to be the case in *Tisand Pty Ltd v Owners of the Ship MV 'Cape Moreton' (Ex 'Freya')*).⁹⁰ Accordingly, surrounding corporate relationships may also require close examination.

Where a challenge to jurisdiction is made whilst a ship is under arrest then (unless an agreement is reached for security to be put in place pending the outcome of that challenge) the challenge will normally be brought on by the Court very quickly. Again as Tamberlin J said in *the 'Zoya K'*⁹¹ the arrest of a ship in trade is drastic. The application needs to be dealt with urgently in order to mitigate the drastic hardship and financial consequences which can flow from an arrest to numerous parties interested in the vessel and its cargo. This is especially bearing in mind the test for damages for wrongful arrest under section 34 of the Act and the difficulties a shipowner may have in recovering damages for the arrest of its ship under arrest even if the arrest is set aside or the Plaintiff's claim ultimately unsuccessful.

If a challenge to jurisdiction seems likely or if there is an apprehension by those representing the plaintiff that such a challenge might be made in the event that proceedings are commenced, then it is important that the plaintiff be in a position to establish jurisdiction and adduce any evidence that might be required of it (and available to it) in that regard at the time the proceedings are commenced, so that it can deal with (if not dispose) of that challenge quickly and effectively.

Admittedly this will not always be possible. Instructions are often received at short notice and action must be taken before the ship departs the jurisdiction, otherwise the right to pursue the claim against that ship *in rem* may effectively be lost (unless there is a prospect that the ship will return to the jurisdiction). But even in those circumstances where time is of the essence, the above matters should still be considered and all appropriate inquiries that are capable of being made quickly be undertaken.

⁸⁸ [1997] FCA 379.

⁸⁹ [1988] QB 188.

⁹⁰ (2004) 210 ALR 601).

⁹¹ [1997] FCA 379.