RECENT DEVELOPMENTS IN ADMIRALTY JURISDICTION IN AUSTRALIA

BY

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Introduction

The concentration of this paper will be upon decisions made since 1 January 1989 with respect to the Admiralty Act 1988. There have been a plethora of cases on the Act, as my researches have shown, but several of some interest and importance to shipping practitioners. I intend to deal with the most significant of these cases. I have not alluded to the more recent statute - Limitation of Liability for Maritime Claims Act 1989, which came into force on 30 May 1991 - as this paper is, of necessity, time limited. In any case, I would consider that the changes wrought by that Act, although relevant to s. 25 of the Admiralty Act 1988 and some Admiralty Rules, to be worthy of separate treatment.

The Extent of Australian Admiralty Jurisdiction

The first case I wish to consider is Empire Shipping Co. Inc. v. Owners of the Ship "Shin Kobe Maru" (1991) 104 A.L.R. 489 which is a judgment of Mr Justice Gummow from which the report states there has been an appeal lodged. I have no details of that appeal. However, the judgment, which is very full, addresses in detail questions of the jurisdiction of the Admiralty Act 1988 and thus the courts of Australia in the setting of a complex and interesting maritime enterprise.

Basically, the plaintiff, a joint venture company, commenced an action in rem in the Federal Court pursuing a proprietary maritime claim against the ship "Shin Kobe Maru" of Japanese Registry, the action originally commenced when the ship was in the Australian territorial sea near Port Headland, Western Australia. The plaintiff agreed not to arrest the ship pending determination by the Federal Court of its claim upon the defendant's agreement to accept service of the writ (Rule 37 of the Admiralty Rules) on the basis that such service would be deemed to be service upon the ship and place the defendant in the same position as if service had been effected within Australia. The second condition was that the defendant agreed to provide security in the amount acceptable to the plaintiff and thus the ship continued to trade in Australian waters during the conduct of the proceedings.

The factual matrix giving rise to this claim is quite complex and I shall endeavour to simplify it as much as possible. The plaintiff and defendant entered into a joint venture whereby they each took 50% of the shareholding of an operator being a Liberian corporation which was formed for the purpose of owing and operating vessels jointly (U.T.I.) and which subsequently established another Liberian company (Seven Seas) to actually enter into a construction contract for the ship (an iron ore carrier of 116,000 tonnes) through which company the ship would be chartered through the defendant initially and ultimately through several sub-agents. It was a provision of this joint venture agreement between the plaintiff and the defendant that either party might, at the expiration of a certain period, cause Seven Seas to sell the vessel and divide the proceeds between the joint venture partners after discharging all debts.

In 1984, the defendant entered into an agreement with another company Van Shipping, Hong Kong (VAN) the latter of whom was allegedly acting as the plaintiff's agent, varying the joint venture agreement to provide for the transfer of the ship from the Liberian to the Japanese flag for certain trading conveniences and for the ship to be registered in the name of the defendant accordingly. This variation to the joint venture agreement reaffirmed the 50/50 ownership of the plaintiff and the defendant the right of Seven Seas to buy back the ship at book value after a period.

In 1987, when the original loan amount had been fully repaid, the plaintiff demanded of the defendant that the vessel be retransferred to the original joint venture operator Seven Seas or their nominee. The defendant refused to do so.

The plaintiff claimed a proprietary maritime claim by reason of s. 4(2)(a) and/or (b) of the Admiralty Act 1988 which conferred jurisdiction on the Federal Court by reason of ss. 10 and 16 of that Act. In other words, the plaintiff alleged that this was a claim relating to the possession of a ship, the title to, or ownership of a ship or share in a ship, or, alternately, a claim between co-owners of a ship relating to the possession ownership operational earnings of the ship pursuant to s. 4(2)(a) and (b) of that Act.

The defendant applied for orders setting aside the writ on the basis that this claim did not attract the Admiralty jurisdiction of the Federal Court and was treated as a motion to strike out the statement of claim on the basis that the pleading failed to disclose a reasonable cause of action.

The plaintiff had also claimed some millions of dollars damages for loss of hire, loss of profit and charter hire since July 1987 and amended the statement of claim later to include an order for sale of the ship, the transfer of shares in the ship, and the delivery of ownership and possession of the ship to Seven Seas.

For convenience, I propose to deal with those aspects of the very lengthy judgment in the stages dealt with by the Court.

Procedure to be taken in admiralty when application brought to satisfy the writ on ground of no jurisdiction

The difficulty identified here is to determine whether or not an Admiralty Court is seized jurisdiction in circumstances such as the above, where it may be necessary in summary proceedings for the court to give detailed examination to the question of alleged title to, ownership of or shareholding in a ship. This may involve the court in consideration of extremely difficult questions of fact on affidavit evidence, usually in circumstances of urgency. In England, a plaintiff must discharge the civil onus of proof to the effect that the plaintiff enjoyed some beneficial ownership in the ship at the time the cause of action arose in order to invoke jurisdiction (Re Congreso del Partido [1978] Q.B. 500 at 535-537; The Aventicum [1978] 1 Lloyd's Rep. 184 at 186, 190). The further difficulty for any court is to decide how much reliance to place upon mere affidavit evidence and assertion of difficult concepts such as title, ownership or shares without a proper trial of the action.

In this case, given the lengthy history of the parties' arrangements and the complexity of the documentation, Gummow J. held that the plaintiff had discharged the burden of showing that on the consideration of the material before the court on the motion, there was a sufficiently strong argument to invoke jurisdiction, although, His Honour did say that the documentary evidence fell short of what might be expected at a trial to achieve an ultimate result. The plaintiff had thus met the first hurdle in gaining jurisdiction.

Jurisdiction in relation to a foreign ship

The plaintiff company was Panamanian, the defendant was a company incorporated in Japan and the ship was registered in Japan, the defendant presently being the registered owner. Section 5(1)(a) of the Admiralty Act 1988 provides that the Act applies in relation to all ships irrespective of places of residence or domicile of their owners. The result is that a foreign ship may be subject to Admiralty jurisdiction.

Gummow J. noted that the extended categories of maritime claims which may found an action in rem under the Admiralty Act 1988 are consistent with the statement in s. 6 of that Act whereby it is declared that the provisions of the Act should not have the effect to create a new maritime lien or other charge or a course of action that would not have existed if the Act had not been passed. The importance of this question relates to the constitutionality of the Admiralty Act 1988 in any particular circumstances when considering the ambit of s. 76(iii) of the Constitution by which the Federal Parliament can confers original jurisdiction upon the High Court, the conferral of admiralty and maritime jurisdictions through s. 77(i) empowering the Parliament to make laws defining the jurisdiction of any other federal court in those matters.

His Honour found, briefly, that s. 76(iii) of the Constitution was no longer to be read against a background of concurrently applicable Imperial law particularly through the repeal of the Colonial Courts of Admiralty Act 1890 by s. 44 of the Admiralty Act 1988. No constitutional objection to dealing with this claim was revealed.

Did the plaintiff have a true "proprietary maritime claim"?

Sections 4(2)(a) and (b) of the Admiralty Act 1988 were relied upon by the plaintiff to found jurisdiction. Paragraphs (a)(i) and (ii) define two species of "proprietary maritime claim" as a claim relating to "possession of a ship" or "title to or ownership of a ship" or "share in a ship". The plaintiff effectively asserted a beneficial interest in a ship and the question arose as to whether this was strictly a claim relating to possession, title or ownership within the meaning of that section. Likewise, s. 4(2)(b) of the Act spoke of a claim between co-owners relating to possession or ownership.

The immediate question for Gummow J. was to give some meaning to the expression "relating to" in ss. 4(2)(a) and (b) of the Admiralty Act 1988. His Honour concluded that a claim may relate to possession of a ship or title to or ownership of a ship, within the meaning of the Act, where the source of the entitlement upon which the claim rested is found in a beneficial interest in a ship which is asserted by the claimant. The beneficial interest in this ship was divided between two parties, one of whom was also the registered owner. Thus, any dispute between them, His Honour said, may also give rise to a claim between co-owners within the meaning of s. 4(2)(b). Thus, the concept of ownership would not be confined in either paragraph to those claimants having legal registered title as opposed to some other form of beneficial title. Looking at the documentation in detail, His Honour was prepared to find the existence of jurisdiction in the Federal Court in relation to the subject matter of this dispute.

Unfortunately, because of obvious constraints, it is not possible to rehearse the detailed arguments put to Gummow J., but his conclusion is of interest. His Honour said (at 521):

> "I accept that the use of the expression 'admiralty and maritime jurisdiction' in s. 76(iii) obviates argument that the power of Parliament is restricted to the jurisdiction of the High Court of Admiralty in England at any particular time. I also accept, consistently with the submissions for the plaintiff, that this provision extends to empower the Parliament to make laws conferring jurisdiction with respect to 'matters' arising out of controversies relating to or dealing with commerce or navigation of the sea, including the means by which all, with the assistance of which, those activities may be conducted. The reasoning reflected in the submissions put nearly 70 years ago in the case of John Sharpe & Sons Ltd v. The Ship 'Katherine MacKall' (1924) 34 C.L.R. 420 at 423-424, is in my opinion sound. On that footing, the provisions of the Act upon which the plaintiff places reliance to found jurisdiction in the present matter are, when construed in the manner indicated, plainly within the power."

This decision raises squarely the overarching constitutionality of the application of the Admiralty Act 1988 in certain defined circumstances. Given that the Act does not confer jurisdiction upon a court in a matter which is not of a kind mentioned in s. 76 of the Constitution [s. 13 Admiralty Act 1988]. Given the constraints of s. 6 of the Act, the restriction of s. 13, whilst Gummow J's view may have to be considered by an appellate court, I would respectfully suggest that his findings in this case are sound. Thus, the Federal Court was seized of jurisdiction.

Release of vessel from arrest

The Full Court of the Supreme Court of Queensland has recently considered the relationship between a cause of action in rem and a cause of action in personam in circumstances where the defendant was seeking to release a vessel from arrest. The facts of Ocean Industries Pty Ltd (Receivers and Managers Appointed) Trading as Markwell Chandlery v. Owners of the Ship "M.V. Steven C." are relatively uncomplicated. The plaintiff had commenced an action in rem against the ship M.V. Steven C. An appearance was entered to this action by the defendants as owners of the vessel. A statement of claim for the sum of $17,690 was met with a defence. The claim was for money due and owing for the price of goods and material supplied for the vessel for its operation and maintenance.

The plaintiff had earlier entered judgment against the defendants in the Magistrates Court for the same debt in respect of the same cause of action as that alleged in the instant statement of claim. The defence claimed that the plaintiff was thereby estopped and precluded from maintaining the action against the vessel. If the judgment in the Magistrates Court barred the action in rem against the ship, the latter action in rem would be res judicata and the vessel would have to be released from arrest.

McPherson A.C.J. identified the cause of action being the price of goods and materials being supplied to the vessel for its operation and maintenance as being capable of being made the subject of proceedings in rem as a general maritime claim within s. 4(3)(m) of the Admiralty Act 1988. His Honour also identified s. 17 of that Act where, in relation to a general maritime claim concerning a ship or other property, "a relevant person" was, when the cause of action arose, the owner or charterer of or in possession or control of the ship or property and is, when the proceedings commenced the owner of the ship or property, a proceeding on a claim may be commenced as an action in rem against the ship or property. The expression "relevant person" is defined to mean, in s. 3(1) of the Act, "in relation to a maritime claim, a person who would be liable on a claim in a proceeding commenced in action in personam".

The defendants, as owners of the vessel at the time, were held not to be "relevant persons" by de Jersey J. in first instance. De Jersey J. found that the owners were not within the definition because the definition did not say "who would be liable or who is liable". His Honour concluded that the definition of "relevant person" contemplated that there would be judgment in one action or another and, in this instance, there had been judgment in the action in personam in a Magistrates Court and the action in rem could not succeed.

Cause of action in rem compared with cause of action in personam

The cause of action in rem is different from a cause of action in personam and does not merge in a judgment in personam but remains available to the person who has it so long as and to the extent that such a judgment remains unsatisfied [The Nordglint [1988] Q.B. 183 at 201-202]. McPherson A.C.J. found that there was no reason to suppose that the same principle did not apply to proceedings in rem under the Admiralty Act 1988.

This matter has been considered in other circumstances. There is clear authority that an action in rem, being an action against the ship, is not against the owners and is different in kind from an action in personam against the owners under the general law [The Burns [1907] P. 137 at 149-150]. However, as Stuart-Smith L.J. said in The Deichland [1990] Q.B. 361 at 380, once an owner acknowledges service, the action becomes an action in personam. However, there are conflicting dicta as to whether or not the action continues as an action in rem. The duality of the action may depend upon whether the vessel remains under the control of the court (under arrest) or whether or not it had been released upon appearance by the defendant shipowner and the posting of security. It seems clear that, whilst the action remains as an action against the ship or against the proceeds of the sale of ship, it will remain an action in rem. (For example, The Nordglint [1988] Q.B. 183).

The situation is slightly different in the instant case. Here, there was a judgment in personam arising from an action in personam against the owners and an action in rem arising from the same set of facts and for the same claim. McPherson A.C.J., considered that the combined effect of s. 3(1), being the definition of "relevant person" and s. 17 of the Admiralty Act 1988 was that for proceeding on a claim such as the present claim to be commenced by action in rem, there must be a person who both when the cause of action arose was, and also when the proceeding in rem is commenced is, the owner of the ship and who would be liable on the claim in the proceeding commenced as an action in personam. His Honour thought that the function of the requirement that there be a person who is both the owner and liable in an action in personam is to preserve "the general rule of Admiralty that an action in rem cannot be maintained when there is no liability in the owners".

In this case, the defendants were, at all relevant times, the owners of the vessel both when the cause of action arose and when the proceeding in rem was commenced. They were certainly liable in proceedings in personam for the price of goods and materials supplied. The real question for the court was whether they were "relevant persons" of whom it could be said "would be liable on the claim in a proceeding commenced as an action in personam". His Honour found that it was splitting hairs to distinguish between the expression who "would be liable" rather who "is liable". Thus, the defendants were held liable in personam and remained liable both when the cause of action arose and when the proceedings in rem commenced.

The expression "the person who would be liable on the claim on an action in personam" identifies the person or persons whose ship or ships may be arrested in relation to the right of arresting a sister ship. The relevant person therefore, is a person whose ship may be arrested in respect of any particular claim. The person must have a sufficient connection with the ship so as to render him or her personally, and consequently the ship herself, liable for the claim. The expression is not concerned with the question whether in a particular case, the defendant in an action in personam is liable in fact and in law but only whether or not there is a necessary relationship. Thus, the definition "relevant person" in s. 3(1) is concerned with the hypothetical rather than an actual liability, that is, in the event that the person might ultimately be found to be liable in person. His Honour found that the defendants in this case fitted that description not only hypothetically but in reality and were therefore relevant persons within the meaning of s. 3(1) of the Act. The action in rem was therefore sustainable and the ship would remain under arrest until the entire judgment was satisfied.

Distribution of proceeds for sale of arrested ship - reimbursement of arresting parties costs and expenses of arrest and preservation

The unreported decision of Alexander Watt & Co. Pty Ltd v. The Ship "Oceania Trader" (unreported, Federal Court of Australia, Brisbane Registry, Q.G. 139 of 1990, 9 January 1992, Drummond J.) concerns the destination of proceeds from the sale of an arrested ship under the auspices of the Admiralty Marshall. The plaintiff claimed a total sum of $438,000 approximately from the proceeds of the ship, $204,000 of which were payments made on behalf of the defendant charterers, and insurance on the ship. The application before Drummond J. was for payment out of a larger sum within 3 days from the fund held by the Marshall from the sale after payment of the broker's account. Other parties interested in the proceeds of the sale were served with the notice of the plaintiff's motion. A significant component of the figure was a series of payments made by the plaintiff to a security service for maintaining security over the vessel from the date of arrest to the sale and the costs and outlays incurred by the Marshall in connection with the arrest of the ship. Further sums included costs incurred by the plaintiff, at the Marshall's request, for wages of a caretaker crew and insurance.

Essentially, the plaintiff applicant claimed that it was entitled to the sum claimed in priority to all other claims from the proceeds of the sale after the Marshall's own costs and expenses of arrest and sale. There were two objections raised to this. Firstly, the master, officers and crew of the ship submitted that the caretaker crew were employed by the plaintiff rather than the Marshall and secondly, at that stage, the Marshall's costs and expenses were not authorised until an account of sale had been filed in compliance with Rule 71(c) of the Admiralty Rules and the Marshall's fees and expenses taxed under Rule 72.

Drummond J. rejected the submission that nothing could be disbursed from the proceeds of sale in respect of any of the Marshall's costs and expenses of arrest or sale until an account for the sale had been taxed under Rule 72. His Honour referred to Rule 71 which provided in paraphrase that the Marshall shall "as soon as practicable after the sale of a ship or property file a return of the sale, pay the proceeds of sale into court and file an account of sale in support of an account for taxation". In support of this latter provision, Rule 72 provides that the Registrar shall tax the fees and expenses of the Marshall in connection with the valuation and sale of the ship or other property and a person who is an interested person in relation to the proceeds of sale may appear before the Registrar on the taxation. His Honour said that the Rules require the Marshall to file only an account of sale and for a taxation only of that particular account. No rule imposed an obligation on the Marshall to file an account that covers the fees and expenses in relation to the arrest or to his custody of the vessel between arrest and sale and Rule 71 and 72 could not be so read. Drummond J. continued that Rule 71(b) interpreted the words "the proceeds of sale" as the entire proceeds of sale without deduction and this followed standard Admiralty practice.

Any interim funds required, for example for advertising the sale, may be accessed through the party applying for the sale and would be claimable by the Marshall upon demand pursuant to Rule 69(4). Any party with any complaint as to the Marshall's action in relation to the payment of interim charges or unauthorised deductions may apply under Rule 48 to the court for directions with respect to the ship and further, under Rule 65 upon an application with any person with sufficient interest, the Court, on it own motion could order the taking of an account by the Registrar of what is properly chargeable by the Marshall in respect of his fees and in relation to arrest and preservation.

In relation to the fees and expenses of arrest and preservation up until the date of release or sale, the

Marshall is always entitled to obtain payment of those fees and expenses by making demand on a party who procured the arrest in reliance on the undertaking given by that party by force of Rule 41. Once paid to the Marshall, those costs become that party's own costs of arrest and preservation.

The Marshall has a claim for the fees and expenses of arrest and preservation up to sale as part of his entire fees and expenses in priority to all other claims against the ship. Following that is the claim of the persons who have caused the ship to be arrested and sold to payment of the sale proceeds of the costs of arrest and sale up until the completion of the sale. His Honour found jurisdiction to order a payment out to a claimant who has obtained a judgment even though other claims have not proceeded to judgment where the priorities are clear [The "World Star" [1987] 1 Lloyd's Rep. 452 at 454]. Drummond J. found good reasons for the practice to order payment out at that stage, of any amount claimed by the Marshall in respect of fees and expenses in relation to arrest, valuation and sale, provided there had been a taxation of the account of sale, and also payment out of sale proceeds of the cost of arrest and sale of the parties who procured each of those actions.

In the present case, the plaintiff had paid the two amounts claimed with borrowed monies and His Honour found an entitlement to recoup those borrowing costs as the interest accruing would further erode the benefit of the proceeds of sale if relief was denied. The defendant shipowners and charterers opposing this application could not make out a claim that the arrest was in bad faith or unnecessary nor could they sustain an argument which would assail the plaintiff's priority in these circumstances.

In this case, the framing of the orders made with respect to the proceeds at an earlier date which orders were not challenged absolved the Marshall from the need to comply with Rule 71(b) and (c), in respect of those amounts, and from the need to tax.

In the absence of taxation, the Judge ordered that any additional fees or expenses of valuation or sale should only be paid after the Marshall has given an appropriate written notice to every party interested so they might have an opportunity to challenge the payment.

The affidavit of the Marshall in these proceedings were treated by the court as satisfaction of Rule 71 whereby the Marshall was obliged to file a return of sale. The payment of wages and goods for the caretaker crew was held by His Honour not to be part of the Marshall's costs of arrest and administration of the ship. These expenses were held to be part of the plaintiff's own costs of arrest and preservation of the ship which the plaintiff was entitled to recoup from the proceeds of sale, once taxed, subject only to the Marshall's priority to his own fees and expenses in both arrest and sale being protected.

Only insurance costs, taken out by the plaintiff, which could said be said to benefit the other claimants to the fund by protecting the ship, would be recoverable from the fund as part of the cost of arrest in priority to other claims. The plaintiff's claim for interest was held recoverable on the basis that it was part of the funds borrowed to effect the arrest and preservation of the vessel providing the actual cost to the plaintiff for the borrowings can be shown before recoupment.

The plaintiff's claim for legal costs of arresting and maintaining the ship whilst under arrest were held to stand on the same footing as the wages of the caretaker crew paid by the plaintiff. These costs formed part of its own costs of the arrest and preservation of the ship and was entitled to payment of these costs once taxed but only on a party to party basis and not on the more generous basis claimed directly out of the proceeds of sale.

This decision is of great benefit to shipping practitioners particularly in identifying the difference between the party's costs of arrest, sale and preservation of a ship and that of the Admiralty Marshall's costs. These matters are particularly important, as is obvious, in considering priorities on the proceeds of sale. Also important is the question of who actually employs a caretaker crew and who is directly responsible for insurance and other direct costs of a preservation like a security. The test would appear to be that those costs incurred by the plaintiff which preserve the ship and its property for the benefit of other creditors who may have an interest in the proceeds of the fund will be treated as having some priority over other expenditure which is part of the plaintiff's action against the ship. However, the first bite at the cherry is still the privilege of the Admiralty Marshall to the extent that any costs can said to be the costs of valuation and expenses of arrest and sale incurred directly by the Marshall either at the request of a party or otherwise.

Claim by purchaser of ship for specific performance of bill of sale of foreign ship and issues relating to arrest and release

A novel point arose for the decision of Gummow J. in the unreported decision of Bakri Navigation Company Ltd v. Ship "Golden Glory" and Glorious Shipping S.A. (unreported, Federal Court of Australia, Sydney Registry No.G199 of 1991, 2 May 1991). The plaintiff, a Saudi-Arabian corporation, thought the release of Panamanian registered ship from arrest in Port Jackson pursuant to Rule 52 of the Admiralty Rules. The basis of the application was that the plaintiff had no general or proprietary maritime claim against the ship.

A claim arose out of an alleged contract between the plaintiff and the defendant for the purchase and sale of the ship. The initial relief sought being a declaration that a contract for the sale of the ship from the defendant to the plaintiff was valid and binding and an order for specific performance of that contract. The plaintiff claimed that the action constituted was one for a proprietary maritime claim said to be one relating to the possession of a ship or more strongly, title to or ownership of a ship.

The present proceedings could be regarded as an action in rem although the usual exercise of jurisdiction in specific performance is essentially one in personam. In response to the plaintiff's claim, the defendant, in support of the application to release the ship, claimed that there had been no concluded contract to sell the ship. This involved a determination of law which Gummow J. said would be in accordance with applicable New South Wales law as the Court was sitting in accordance with s. 79 of the Judiciary Act 1903.

The second issue concerned the question as to whether the contract for the sale of the ship was susceptible to an order for specific performance rather than damages which was a matter of some significance as the procedure whereby release from arrest was effected upon the giving of security was more readily adapted to a situation where the substance of the proceeding was a recovery of money rather than delivery of a chattel.

The third issue before the court enlivened His Honour's sense of urgency. At the time of arrest and at the application, the ship was carrying a cargo of creosote oil, cotton seed oil and tallow for ports in South Korea and Taiwan and was scheduled to load from the bulk liquids berth at Botany Bay. Further cargoes were to be discharged in Japan. The continued arrest of the vessel meant that the immediate time charterers could expect to receive claims for damages in respect of the late delivery of these cargoes.

With respect to the first matter, His Honour found that any seagoing ship may be treated as having sufficiently unique characteristics to attract a remedy of specific performance. This ship in particular was unusual in that it was capable of carrying almost any chemical cargo and 24 grades of cargo at the same time. The second question was more difficult and required consideration of whether or not there was a contract between the parties. Gummow J. considered that there was a real question as to the existence or non-existence of this contract, but even if there was a contract, the defendant contended that the claim was not a proprietary maritime claim within the meaning of s. 4(2) of the Admiralty Act 1988 in that it was not a claim relating to title to or ownership of a ship. His Honour found that a claim for specific performance such as this was in a higher category than an action for possession of a ship by a claimant and ultimately concerned matters of title. In support of this, Gummow J. relied upon a decision of the Supreme Court of Canada, <u>Antares Shipping Corporation v. The Ship "Capricorn"</u> (1979) 111 D.L.R. 3d 289 cited in the Australian Law Reform Commission Report No.33 on Civil Admiralty Jurisdiction where the court entertained an action for the specific performance of a concluded contract for the sale of a ship requiring delivery and then execution of a bill of sale to be transferred to the legal title. Thus, His Honour found that there were a number of issues which might well be properly litigated in this jurisdiction.

The question arose as to whether to release the ship or not. No undertaking had been given by the defendant as to damages and, if the ship were released, there was considerable doubt as to whether the plaintiff's secured position would be maintained once the ship left the Australian jurisdiction.

His Honour made an order releasing the ship from arrest on conditions that the defendant generally cooperate in the pursuit of the action, not sell, mortgage or otherwise deal with the ship in any manner inimical to the plaintiff's potential interest, and that the defendant procure the delivery of a deed to the plaintiff's solicitors making provision for a guarantee by the defendant's parent company (a Japanese corporation of substance and reputation) for the performance of these conditions.

In consideration of the defendant and defendant's parent company guaranteeing these obligations, the plaintiff agreed to leave the ship free in any port which it might visit subject to a right ~~and~~ for the plaintiff to arrest the ship in connection with any further claim for damages which might arise as a result of the delay experienced by the arrest.

This decision raised a number of unusual matters. Although, an extempore judgment was given because of urgency, the result must be considered satisfactory for the plaintiff. As a matter of interest, the proper law of the deed was stated to be that of England so that any future proceedings arising out of this claim would no doubt be litigated in the United Kingdom.