

**THE COLLAPSE OF ABC CONTAINERLINE
THE MOVEMENT AND MANAGEMENT
OF VESSELS UNDER ARREST**

BY

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Introduction

During the past five years, Admiralty practitioners in Australia and New Zealand have witnessed the collapse or restructure of several international shipping operations including the Adriatic Tankers Group, ABC Containerline Group and Baltic Shipping Company. As a result, the Federal Court of Australia ("the Court") has had numerous opportunities to consider and exercise its powers under the *Admiralty Act 1988* ("the Act") and the *Admiralty Rules* ("the Rules") in relation to the management of arrested vessels, the entitlements of crew members and judicial sale.

The arrest of the "*Martha II*" and subsequent litigation presents an interesting case study of the problems and issues which may arise in proceedings *in rem*. In this paper I have focused on the Court's management of the "*Martha II*", in particular in permitting the vessel to undertake sea voyages while under arrest between Melbourne and Sydney, Port Jackson and Port Botany and Port Jackson and Newcastle.

Scope of this Paper

I do not propose to provide a "blow by blow" account of the proceedings from service of the arrest warrant up to the ultimate sale of the vessel and distribution of sale proceeds. In any event, my involvement effectively ceased upon the discharge of the last of the cargo at Newcastle. For the purpose of this paper, I will address the various aspects raised by the case under the following headings :-

1. The interests involved in the proceedings.
2. The interlocutory orders made by the Court in the proceedings.
3. The arguments for and against the movement and operations of the "*Martha II*".
4. Legal implications of the Court's management of the "*Martha II*".
5. Practical implications of the Court's management of the "*Martha II*".

6. The possible impact on future Australian Admiralty practice of the Court's management of the *"Martha II"*.

1. Interests Involved in the Proceedings

Apart from DNB, there was a complex array of interests involved in the fate of the *"Martha II"*.

- 1.1 At the time of the arrest, the *"Martha II"* was registered in Norway, owned by Combo Carriers (Luxembourg) S.A. ("Combo"), managed by Shipping Services A/S, demise chartered to Maritime Carriers (Luxembourg) S.A. and, in turn, time chartered to the Belgian-based ABC Container Line N.V. ("ABC"). Only Combo and ABC, however, formally entered an appearance in the proceedings.
- 1.2 Combined Shipping Services ("CSS"), a subsidiary of TNT Ltd, were ABC's local agents and generated a major component of their revenues from the ABC vessels. CSS demonstrated its keen interest in the outcome of the proceedings, and the fate of the *"Martha II"* and the ABC service generally, by offering various undertakings as security for the vessel.
- 1.3 The TNT Group also had a direct interest in the proceedings. TNT Express (UK) Ltd, held a 2nd registered mortgage over the *"Martha II"* and a caveat against the release of the vessel from arrest was filed on behalf of TNT Express.
- 1.4 Throughout the proceedings, the Court was pressed to make orders which would protect, as far as possible, the interests of shippers and owners of cargo on board the vessel. The ABC service was originally designed to serve particular long term and large volume shippers, and one of these, E I DuPont de Nemours & Co. Inc ("DuPont"), owned a parcel of mineral sands on board the *"Martha II"* for carriage to Gulfport, Mississippi.
- 1.5 The Court was also made aware of the wishes of two elderly fee-paying passengers on board the *"Martha II"*, who were keen to remain with the vessel until it returned to European ports.

2. Interlocutory Orders Made in the Proceedings

- 2.1 At 4.50 pm on 14 February 1996 the "*Martha II*" was arrested at Melbourne by the Deputy Sheriff of the Victorian District Registry of the Federal Court of Australia, on the motion of DNB as the plaintiff in proceedings *in rem* against the vessel. DNB alleged that Combo had defaulted in relation to a 1st registered ship's mortgage dated 22 April 1992 over the "*Martha II*" and sought recovery of the principal amount of the loan of US\$14,900,000.00, together with interest. At the time of the arrest, the "*Martha II*" was carrying a mixed cargo of general and refrigerated containers, for both import and export, a parcel of liquid bulk cargo and a parcel of 10,700 MT of ilmenite mineral sands.
- 2.2 The amount and nature of the claim threatened the continued viability of the ABC service. Sufficient funds or security would not be available to obtain the release of the "*Martha II*" unless the loan by DNB was refinanced, in which case the claim would be resolved in any event. The Court was informed that Combo and ABC were negotiating the refinancing of the vessel, that such refinancing was imminent and, accordingly, that the vessel would shortly be released.
- 2.3 In the period prior to the release of the vessel, however, ABC and Combo sought to minimise the damage caused by the arrest to the reputation of the ABC service, and the commercial damage to the operations of CSS and the various owners of cargo on board the vessel. Accordingly, various applications were made to the Court to allow for the continued, if limited, operations of the "*Martha II*", which I would briefly outline as follows:

First Application by Combo/ABC

On 21 February, Combo made urgent application to the Court for orders permitting the "*Martha II*" to sail, while under arrest, from Melbourne to Sydney and there conduct scheduled cargo operations. DNB vigorously opposed the proposal, while the Deputy Sheriff would not consent without formal orders.

Justice Olney granted the application, subject to certain undertakings, and and custody of the vessel to the NSW Registry of the Court. A copy of Olney's orders is attached as Annexure 1.

On 22 February 1996 the "*Martha II*" sailed from Melbourne to Sydney accompanied by representatives of the Marshal's office and DNB, and armed officers of the Australian Protective Services.

Variation of Orders

The "*Martha II*" arrived at Port Botany, Sydney, on 24 February 1996 and conducted certain cargo operations. The same day, however, Justice Sheppard varied Justice Olney's orders to direct that the vessel not load any further cargo, and proceed from Port Botany to Port Jackson to berth or anchor in the custody of the Marshal. Justice Sheppard's orders were made by consent and a copy is attached as Annexure 2.

Second Application by Combo/ABC

On 1 March 1996, Combo and ABC applied to Justice Sheppard for orders for the discharge of the remaining cargo of containers and bulk liquid at Port Botany and the mineral sands at Newcastle. The application was supported by cargo owners who had filed applications for discharge under Rule 49, but was opposed by DNB.

Conflicting affidavit and oral evidence was given to the Court on 1 March regarding the adequacy of facilities at Port Jackson, Port Botany and Newcastle for the discharge of the cargo remaining on the "*Martha II*". Justice Sheppard considered it appropriate, therefore, to obtain an opinion from a court-appointed independent marine surveyor and adjourned the matter to a hearing at Melbourne on 5 March 1996.

After hearing further argument on 5 March 1996, and after considering the report of the independent marine surveyor, Justice Sheppard made orders

and delivered a written judgment¹ on 6 March 1996 permitting the "*Martha II*" to sail from Port Jackson to Port Botany to discharge the containerised and liquid bulk cargoes. Justice Sheppard refused, however, to permit the vessel to sail to Newcastle to discharge the mineral sands. A copy of the orders of 6 March is attached as Annexure 3.

The "*Martha II*" discharged its containerised and liquid bulk cargoes at Port Botany, and then returned to Port Jackson. DuPont, however, was not prepared to discharge the ilmenite sands at Port Jackson, as it regarded the facilities as clearly inappropriate.

Application by ABC/DuPont

On 20 March 1996 a further application was made to Justice Sheppard, supported by an application under Rule 49 by DuPont, for discharge of the mineral sand cargo at Newcastle. Justice Sheppard made orders on 21 March granting the application, and a copy of these orders is attached as Annexure 4.

- 2.4 Combo and ABC ultimately declined to defend the proceedings, and a receiver to the ABC Group was appointed on or around 5 April 1996. DNB was granted judgment in default of defence on 10 May 1996, and the vessel was sold by the Admiralty Marshal in due course.

3. Justification for the Operations of Vessels under Arrest

I set out below the major arguments put forward by (or available to) the parties in relation to the movement and operations of the "*Martha II*":-

¹ **Den Norske Bank Luxembourg S.A. v The Ship "*Martha II*"**, No. VG 70 of 1996, Justice Sheppard, 6 March 1996 (unrep).

ARGUMENTS FOR

3.1 The Court has the power under the Act and the Rules to order the movement and operations of an arrested vessel.

It was accepted by both Justice Olney and Justice Sheppard, and not seriously disputed, that the Court and the Marshal had the power under the Act and Rules to carry out cargo operations and undertake sea voyages with an arrested vessel. It is arguable, in any case, that this statutory jurisdiction simply reflects the powers Australian Admiralty courts prior to the commencement of the Act.²

The powers of the Court and the Marshal are set out in sufficiently broad terms to justify the orders made in relation to the "*Martha II*". In particular, Rule 49 prescribes the specific powers and duties of the Marshal and the Court regarding the discharge of cargo from arrested vessels;³ Rule 50 provides the Court with a general power to "*make appropriate orders with respect to the preservation, management or control of a ship...that is under arrest*"; and Rule 47 empowers the Marshal to "*take all appropriate steps to retain safe custody of, and to preserve*" a ship which is under arrest, itemising the discharge and storage of cargo and the movement of an arrested vessel.

3.2 The movement and operations of an arrested vessel is supported by precedent and consistent with international practice.

(a) In the "*Iron Shortland*" case⁴, Justice Sheppard approved orders permitting the movement of an arrested vessel between Port Hedland in Western Australia and Port Kembla in New South

² C Clausen Dampskibs-Rederi A/S v The Ship "*Om Alqora*" (No. 2) (1985) 38 SASR 494, considering the powers of Australian Admiralty courts prior to the *Admiralty Act 1988*.

³ Sheppard J expressly refers to Rule 49 at page 8 of the judgment.

⁴ *Malaysia Shipyard v "Iron Shortland" as surrogate for the "Newcastle Pride"* (1995) 131 ALR 738.

Wales. A copy of these orders dated 24 August 1995 is attached as Annexure 5.

In relation to the "*Martha II*" DNB argued that the precedent of the orders approved in "*Iron Shortland*" case should be distinguished on the bases that those orders were dealt with by consent, and that undertakings were provided by Australian 3rd party charterers. Justice Sheppard agreed, but also noted that the "*Iron Shortland*" case involved "public interest" considerations, namely a potential shortage of iron ore at the Port Kembla steelworks.

(b) There is English authority regarding the movement of an arrested vessel, including **The "*Myrto*"**⁵ in which an arrested vessel was permitted to sail from Sunderland to London, and **The "*Bazias III*" & "*Bazias IV*"**⁶ in which the Court of Appeal prevented the continued trading of cross-channel ferries while under arrest. The UK courts appear to distinguish between:

- the movement of an arrested vessel within the territorial jurisdiction of the court (The "*Myrto*"⁷), which is permitted; and
- the movement of an arrested vessel outside the territorial jurisdiction of the court (The "*Bazias III*" & "*Bazias IV*"⁸), which is not permitted.

This distinction is justified by a purported jurisdictional "*contradiction in terms*" for an Admiralty court to maintain custody of an arrested vessel through its Marshal if that vessel ventures outside the limits of the court's physical jurisdiction.⁸ The English cases would therefore appear to support the movement of the

⁵ [1978] 1 Lloyd's Rep 11 (CA).

⁶ [1993] QB 673

⁷ See also **The "*Mardina Merchant*"** [1974] 3 All ER 749.

⁸ **The "*Bazias III*" & "*Bazias IV*"**, per Lloyd LJ at p 679.

"Martha II" between Australian ports within the territorial jurisdiction of the Court.

- (c) Finally, the 1952 Arrest Convention⁹ ("the Convention"), to which the United Kingdom is a signatory but Australia is not, expressly permits the courts of contracting states to order arrested vessels to continue trading,¹⁰ both within and outside the jurisdiction of the court in question.¹¹

Professor Berlingieri, in his review of the law and practice of various signatories to the Convention, notes that the Admiralty courts of at least France, Greece, Italy¹² and Portugal have rules permitting the trading of vessels while under arrest, subject to certain conditions. The United Kingdom is the only Convention country identified as not permitting the trading of vessels out of the jurisdiction while under arrest.

3.3 The movement and operations of the *"Martha II"* would not remove the arrested vessel from the physical jurisdiction of the Court.

Justice Sheppard appears to have considered this a significant factor, noting the authority of *The "Bazias III" & "Bazias IV"*. Justice Sheppard concluded that the proposed sea voyages of the *"Martha II"* were unlikely to involve the vessel sailing beyond the Australian territorial limit of 12 miles,¹³ and therefore there was no question of the vessel departing from within the Court's physical jurisdiction. Accordingly, Justice Sheppard was not required to decide whether such a departure would have been fatal to the proposed orders, although during argument noted that if this issue

⁹ **The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952.**

¹⁰ Berlingieri, Berlingieri on Arrest of Ships - a Commentary on the 1952 Arrest Convention (2nd Edn) 1996, Lloyds of London Press, London; pages 129-131.

¹¹ Ibid, page 129

¹² Berlingieri, p 130, notes that Italian courts add "*freight earned...to the proceeds of forced sale*".

¹³ At p 13 of Justice Sheppard's judgment.

had been raised in the case of the *"Iron Shortland"* Justice Sheppard may have refused to consent to orders allowing the extended operations of that vessel.

3.4 Funds could be provided up-front to avoid any increase in the liability of the Marshal or the Plaintiff for the costs of arrest.

ABC funded the majority of the movements and cargo operations of the *"Martha II"* via the establishment of various funds held and administered by the Marshal. The actions of the Court in permitting the vessel to undergo the various operations sought by ABC had the ultimate effect of increasing DNB's recovery, as the costs of arrest including the costs of discharge of cargo were partially paid for by ABC rather than from the fund.

3.5 The movement and operations of an arrested vessel will reduce damage to "innocent" 3rd parties and unnecessary commercial harm to a defendant.

Justice Olney considered that the movement of the *"Martha II"* from Melbourne to Sydney would be warranted in the interests of reducing the commercial damage to innocent third parties affected by the arrest. Justice Olney placed particular emphasis on the problems posed by the Australian commercial environment, with Australia's major economic centres separated by large expanses of land and sea.

It was accepted by Justice Sheppard also that the interests of 3rd party cargo owners would be best protected if the *"Martha II"* conducted its discharge operations at the most appropriate berths or ports. Justice Sheppard made clear that *"in a perfect world"*, Newcastle was the only satisfactory place for discharge of the mineral sands.¹⁴

¹⁴ At p. 6 of Justice Sheppard's judgment.

Further, as Berlingieri observes, an arrest may cause undue hardship if the arrested vessel is prevented from continuing to trade¹⁵, in that the shipowner's main income-generating asset is frozen, thereby preventing them from obtaining the necessary funds to procure the release from arrest of that asset.

3.6 Undertakings could be provided that the arrested vessel would remain within the jurisdiction of the Court and not flee Australian waters.

Certain undertakings were provided by ABC and CSS that the "*Martha II*" would not flee the jurisdiction during the various sea voyages. The ultimate value or worth of such undertakings, in circumstances where they were not supported by irrevocable bank guarantees, is doubtful.

ARGUMENTS AGAINST

3.7 A sea voyage risks the vessel fleeing the jurisdiction.

This contention was strongly put forward by DNB, and acknowledged by Justice Sheppard as a major factor in the decision to initially prevent the "*Martha II*" from sailing to Newcastle to discharge the mineral sands, noting the natural temptation for the vessel "*to make a run for an overseas sanctuary*."¹⁶

3.8 A sea voyage would expose the vessel to the perils of the sea.

DNB argued that any movement or operations, let alone a sea voyage, by the "*Martha II*" would put the value and existence of their security interest at risk. Justice Sheppard again acknowledged this as a significant consideration.

¹⁵ Berlingieri, at p 131

¹⁶ At pp 7 & 8 of Justice Sheppard's judgment.

3.9 An arrested vessel should not depart the close custody of the Marshal without acceptable alternative security for the total amount of the claim.

Justice Sheppard observed that both Combo and ABC were foreign companies who had provided no evidence of any assets within the jurisdiction apart from the "*Martha II*".¹⁷ Neither had they provided appropriate or sufficient undertakings to substitute for DNB's security interest in the "*Martha II*".¹⁸ This factor was clearly significant in Justice Sheppard's reasoning.

This contention, with respect, overlooks the underlying circumstances of the applications. If owners are willing and able to procure sufficient security for a claim, they are likely also to be willing and able to procure the actual release of an arrested vessel in accordance with the Rules.

3.10 The movement of an arrested vessel puts at risk the Marshal's duty to retain the vessel in safe custody.

The Deputy Sheriff of the Victorian Registry considered that a sea voyage made it inherently difficult to perform the Marshal's statutory obligation¹⁹ to maintain safe custody of the "*Martha II*".

In relation to the proposed sea voyage from Melbourne to Sydney, Justice Olney considered that any genuine risk of the vessel fleeing the jurisdiction could be averted by practical security measures.

The above contentions were put to both Justice Olney and Justice Sheppard, but each reached a different conclusion, at least initially, regarding the advisability of an arrested vessel to undertake an extended sea voyage.

¹⁷ At p 3 of Justice Sheppard's judgment.

¹⁸ At pp 7 & 8 of Justice Sheppard's judgment.

¹⁹ See, for example, rules 47(1) & (2).

Justice Olney concluded that a reduction in the commercial damage to innocent 3rd parties justified the "*Martha II*" being permitted to sail from Melbourne to Sydney, and any prejudice or risk to the security interests in the vessel could be protected by appropriate safeguards.

Justice Sheppard concluded on 6 March 1996 that the movement of the "*Martha II*" was not contrary to legal principle and that a short voyage to Port Botany was justified in the circumstances. At that time, Justice Sheppard considered that a longer sea voyage to Newcastle was not justified due to the increased risk to the Marshal's custody of the "*Martha II*" and to DNB's security interest, and clearly Justice Sheppard would not have permitted the "*Martha II*" to sail from Melbourne to Sydney. Some 14 days later, however, Justice Sheppard allowed the "*Martha II*" to sail from Sydney to Newcastle to discharge the mineral sands.

4. Legal Implications of the Court's Management of the "*Martha II*"

Irrespective of the merit of the above justifications for the movement and operations of an arrested vessel, I consider that allowing an arrested vessel to engage in extended operations may be inconsistent with the statutory framework for the conduct of arrest proceedings; with the past approach of Admiralty courts to the release of defendant vessels; and with the theoretical justifications for *in rem* proceedings and arrest.

4.1 Statutory Framework for Arrest

An Australian court's power to issue proceedings *in rem* and arrest warrants is governed exclusively by the Act and the Rules.²⁰ A prospective plaintiff makes application to a Registrar of an Admiralty court for an arrest warrant, generally on an *ex parte* basis, with an affidavit in support making full disclosure of the material circumstances of the plaintiff's claim. Unless later challenged, a Registrar's issue of an arrest warrant is not subject to any examination or confirmation by a Court.²¹

²⁰ Sections 5 & 14 of the Act.

²¹ In contrast to the procedure in Greece and the USA - Timagenis "*Arrest of Ships in Greece*" [1984] LLMCLQ 90; Friedell & Healy "*An Introduction to In Rem Jurisdiction and Procedure in the United States*" (1989) 20 JMLC 55; Culp "*Charting a New Course...*" (1984) 15 JMLC 353.

The actual arrest is effected by the Marshal, usually in conjunction with the service of the writ *in rem*, and must be effected within the physical jurisdiction of the Australian Admiralty courts, defined as the limits of the territorial sea of Australia²² (12 miles from the low water mark²³).

Effective service of a writ *in rem* on the defendant vessel gives the Court jurisdiction over that vessel, while an actual arrest gives the plaintiff security for its claim.²⁴ The importance of the custody of the vessel to the jurisdiction of the Court and the security of the plaintiff is reflected in the strict requirements for obtaining release from arrest.²⁵

4.2 Traditional Approach to Release

Admiralty courts are reluctant to relinquish control over an arrested vessel, being either jealous of their own jurisdiction, protective of the plaintiff's security, or both. This reluctance is highlighted by the attitude of Admiralty courts to independent or pre-existing arbitration proceedings regarding a claim which is the subject of the arrest of a defendant vessel.

The Admiralty courts of Australia and England will not strike out proceedings *in rem*, and release a defendant vessel from arrest, simply because a valid and otherwise binding arbitration agreement exists between the plaintiff and the owners of the vessel, even if litigation or arbitration proceedings have already commenced elsewhere.²⁶ Rather, Admiralty courts will stay the proceedings *in rem* but retain the defendant vessel under arrest,²⁷ a practice expressly sanctioned by the Act.²⁸ This

²² *Aichhorn & Co KG v The Ship MV "Talabot"* (1975) 132 CLR 449 & ss 22 & 23 of the Act.

²³ By proclamation under the *Seas and Submerged Lands Act 1973*, in *Gov. Gazette* S297 (1990).

²⁴ Hartley *"The Effect of the 1968 Brussels Judgments Convention on Admiralty Actions in Rem"* (1989) 105 LQR 640, 643; Hill *Arrest of Ships* (1985) Lloyds of London Press, London, at p 13.

²⁵ See Rule 44 and Division IV of the Rules.

²⁶ *The "Amanda N"* (1989) 90 ALR 391; *The "Jalamatsya"* [1987] 2 Lloyds Rep 164.

²⁷ *The "Amanda N"*; *The "Rena K"* [1979] 1 QB 377.

²⁸ Section 29 of the Act.

approach is justified either on the basis that the proceedings against the vessel are independent of any *in personam* rights which the plaintiff may have against the defendant's owners, and that the proceedings *in rem* may therefore need to be resumed at a later date, or on the grounds that the plaintiff should be permitted to retain as security for the proceedings *in personam* its security interest in the defendant vessel arrested in support of the proceedings *in rem*.

4.3 Theoretical Justifications for Arrest

Both of the main analyses of *in rem* proceedings, the "personification" and the "procedural" theories,²⁹ revolve around the Court's close control of an arrested vessel.

On one hand, the "personification" approach regards a defendant vessel as the wrongdoer and true defendant in the proceedings irrespective of the interests of, or later intervention in the proceedings by, third parties. Accordingly, the arrest of a vessel constitutes an "appearance" to the proceedings by the defendant, and a submission to the Court's jurisdiction. If the Court risks its custody of an arrested vessel, it also risks losing its jurisdiction over the defendant to the proceedings *in rem*.

The "procedural" approach, on the other hand, views proceedings *in rem* and the arrest of a defendant vessel as a procedure available to a claimant to obtain security for its claim and to force the arrested vessel's owners or operators to submit personally to a court's jurisdiction.³⁰ The Court's leverage to force the "real" defendant to provide security for the plaintiff's claim or submit to the Court's jurisdiction is diminished if the Court gives up some element of control over an arrested vessel.

²⁹ Rogers "*The Action in Rem and Mareva Injunction...*" (1983) 14 JMLC 513.

³⁰ The "*Dictator*" [1892] P 304; The "*Deichland*" [1989] 2 Lloyds Rep 113; & The "*Laemthong Pride*" (1995) 5 NTLR 59. See also Hill pp 5-6; and Thompson "*Actions In Rem - Arrest of Ships - Maritime Liens*", in White (Ed) Australian Maritime Law (1991) The Federation Press, Sydney.

5. Practical Implications of the Court's Management of the "*Martha II*".

The arrest of a defendant vessel fundamentally alters the respective positions of the parties on a practical level. I consider that permitting an arrested vessel to continue operations may cause a further dislocation to the rights and interests of the various parties affected by a proceeding *in rem*.

5.1 Implications of an Arrest for Owners / Combo

When a vessel is arrested, effective control passes from the vessel's owners or operators to the relevant Admiralty court, notwithstanding that theoretically all possessory and property interests remain unaffected.³¹ The Admiralty court assumes physical custody of the defendant vessel, via the Admiralty Marshal,³² and thereby maintains its interest in the vessel as the defendant in and security for the proceeding *in rem*.

This loss of effective control also acts to freeze a major income-producing asset or income stream, with potentially serious consequences for the owners' financial position generally. Thus, the arrest of one vessel within a fleet will cause a significant interruption to cash flow and may also precipitate the arrest of other vessels within a fleet as creditors (including financiers) wary of an imminent collapse seek to secure their claims.

In relation to the "*Martha II*", however, Combo and ABC were able to continue cargo operations at Melbourne, sail to Sydney, and then organise and pay for an orderly discharge of the majority of cargo at various ports in Sydney. This meant that they could make substantive efforts to minimise the short-term commercial damage of the arrest both to the ABC service and their customers. They also gained some real satisfaction, no doubt, from frustrating for some time DNB's recourse to arrest proceedings in order to resolve the dispute.

³¹ *The "Gay Tucan"* [1968] 2 Lloyds Rep 245 & Hill p 131; *The "Arantzazu Mendi"* [1939] A.C. 256, & Jackson Enforcement of Maritime Claims (1985) Lloyds of London Press, London, p 176.

³² Rule 47(1).

5.2 Implications for a Plaintiff / DNB

With the arrest of the "*Martha II*", DNB froze the operations of the vessel, gained security for its claim and jurisdiction for the Federal Court by virtue of a simple *ex parte* and procedural application. Under Australian law, a plaintiff is not required to show that the arrest was necessary to either procure jurisdiction for the Court or obtain security for its claim. Nor is a plaintiff required to provide security for the damage or loss caused by the arrest to the owners or operators of a defendant vessel, or the owners of cargo on board,³³ even if they are a foreign company with no assets in the jurisdiction.

- (a) DNB's greatest concern regarding the movement of the "*Martha II*" appeared to be the risk that its security interest would be impaired due to the disappearance of the vessel from Australian waters. Such a risk is undeniable and can never be entirely eliminated with physical security measures, financial disincentives and undertakings or other preventative steps.³⁴

However, the risk of an arrested vessel fleeing the Australian jurisdiction can easily be overemphasised given the commercial realities facing a trading vessel laden with cargo, the relative isolation of Australian ports. While Justice Sheppard appears not to have been convinced, Justice Olney considered that the risk could be sufficiently alleviated by the Marshal's employment of armed security personnel on board.

- (b) In my view DNB, the Admiralty Marshal and the Court should have been more concerned with the risk that the "*Martha II*" might cause damage to itself or to others, or otherwise incur further liabilities during cargo operations or at sea, and with the commensurate risk of a diminution of its value. P&I and Hull

³³ Contrast Hill at pp 55 & 57, and Hosoi & Tsurusakai "*Arrest of Vessels in Japan*" [1981] LLMCLQ 359, on the practice of German and Japanese Courts, respectively.

³⁴ Creative suggestions might include a limitation on the quantity of fuel carried on board or, as in The "*Martha II*", confiscation of crew identity documents.

Insurance was in place throughout the operations of the "*Martha II*", but such insurance should not be relied upon to cover every contingency. Irrespective of insurance, the loss or damage caused by an arrested vessel could involve the Court, the Marshal and the plaintiff in costly and complicated additional litigation.

- (c) DNB had to undertake to indemnify the Marshal for the costs of arrest, being all expenses properly incurred in respect of the arrest and maintenance of the "*Martha II*"³⁵. Given the Marshal's wide powers³⁶ and the Court's attitude to the Marshal's "costs of arrest",³⁷ a plaintiff's potential liability under such an undertaking is considerable.

The operation of the "*Martha II*" while under arrest, and subject to DNB's undertaking involved an inherent increase in DNB's potential liability to the Marshal. The Court was, however, careful to minimise this effect, requiring ABC or other parties to provide up-front funds to finance the proposed operations.

- (d) Finally, allowing the "*Martha II*" to continue some limited operations while remaining under arrest deprived DNB of the unspoken but palpable benefit of interrupting ABC's operations.

5.3 Implications for 3rd Parties

The arrest of a vessel "*inevitably tends to affect third parties*",³⁸ as an arrest can only dislocate their interests in a defendant vessel or its cargo. The arrest of the "*Martha II*" ultimately led to the demise of CSS, as well as the various entities within the ABC Group. Further harm was caused to the operations of the owners of cargo on board the vessel.

³⁵ Rule 41.

³⁶ See ie *The "Om Alqora"*.

³⁷ *Marinis Ship Suppliers (Pty) Ltd v The Ship "Ionian Mariner"* (1995) 59 FCR 245, where expenses incurred to provide the crew with entertainment were allowed as costs of arrest.

³⁸ ALRC Report No. 33, para 117, page 85.

The orders permitting the operations of the "*Martha II*" were clearly intended to reduce the prejudice sustained to the 3rd party cargo owners. Justice Olney emphasised the practical realities of Australian commerce and appeared particularly interested in the rights of 3rd parties affected by the arrest rather than the rights of the parties themselves. Accordingly, 3rd parties to arrest proceedings can look to the Court's approach in the case of the "*Martha II*" as an indication of an accommodating attitude in future applications.

5.4 Implications for the Court

The Court's orders permitting the "*Martha II*" to conduct extensive operations may reflect a more "activist" role in the maintenance and management of arrested vessels generally. The Court is taking a commercial approach to the practical ramifications of the arrest of vessels, while the office of the Marshal appears to be continually developing its role as the instrument of the Court's powers.

Some may be uncomfortable with the Court's activism in relation to its jurisdiction, manifested in its willingness to sanction and oversee proposals of some complexity and its apparent interest with the minutiae of the affairs of property which has not yet been divested from its actual owners. Any increase in the involvement of the Court, via the Marshal, necessarily increases the impact of an arrest upon the interests of the parties and 3rd parties, if only due to an increase in the Marshal's costs of arrest.

6. Possible Impact on Australian Admiralty Practice

The orders of the Court in relation to the "*Martha II*" could be analysed as a straightforward exercise of the Court's jurisdiction and the duty of the Marshal to discharge the vessel, at the most convenient or appropriate facilities, in readiness for a judicial sale. Such a view would be inconsistent with the circumstances of the various movements of the "*Martha II*" which were applied for and funded by, Combo and/or ABC. I consider that the Court's handling of the "*Martha II*" litigation in fact constituted a return to the owners of the arrested vessel some degree of direct managerial control over the fate of their property.

The movement and operations of vessels while under arrest is in accordance with the Court's powers under the Act and Rules, and consistent with international practice and precedent. The adoption of the practice seems to be a genuine attempt by the Court to take a commercial approach to the balancing of the various interests involved in the arrest of a defendant vessel and, in particular, appears designed to reduce the disruption caused by an arrest to the interests of 3rd parties. In my opinion, however, the Court may have failed to adequately consider the necessary implications of permitting the "*Martha II*" to engage in extensive operations while under arrest, in particular the inconsistency of this practice with the Court's traditional approach to proceedings *in rem*.

I further consider that the Court's approach to the movement and operations of the "*Martha II*" between Australian ports may, in an appropriate case, lead to the trading of an arrested vessel beyond Australian territorial limits. The doctrinal distinction drawn in the English cases between intra- and inter-jurisdictional trade has not yet been tested let alone approved in Australia. In any case, I consider such a distinction may be of more theoretical than practical significance to a Court which is prepared to risk its own jurisdiction over, and the plaintiff's security interest in, a defendant vessel simply by permitting such a vessel to undertake an sea voyage.

Finally, I consider that the owners of an arrested vessel should recognise that the movement and operations of a vessel without obtaining its release is a genuine alternative in the defence or management of arrest proceedings, and one which may return to such owners some control over the fate of their vessel. Equally, it is clear that a prospective plaintiff to proceedings *in rem* issued in the Australian jurisdiction is now at risk of dramatically increased complications and cost should they seek to obtain security by arresting a defendant vessel.

Charles Ritchie