THE MOVEMENT AND MANAGEMENT OF VESSELS UNDER ARREST: NEW ZEALAND

BY

TOM BROADMORE
CHAPMAN TRIPP SHEFFIELD YOUNG

THE MOVEMENT AND MANAGEMENT OF VESSELS UNDER ARREST: NEW ZEALAND

Background

The purpose of an arrest of a vessel the subject of an Admiralty action *in rem* is to ensure that the vessel will be available to meet the plaintiff's claim if it succeeds. Anything which derogates from that security poses a risk to the plaintiff.

In New Zealand, as in Australia, the traditional method of permitting a vessel to continue trading is for those interested in it to give alternative security for the plaintiff's claim. Rule 17 of the Admiralty Rules 1975 provides a statutory procedure for giving security; but this procedure is very rarely used in practice. In the case of claims covered by insurance, the vessel is almost always released on the basis of informal security provided by the insurers.

But where the claim is for a debt, or is not within the scope of any insurance policy, the persons interested in the vessel are thrown back upon their own resources to provide security for the release. The Court is then faced with a head-on conflict between a number of imperatives: a need to preserve the vessel as security for those with claims against it, the recognition that it cannot earn money to pay off its creditors whilst it is immobilised, and (as with the ABC vessels) the need to minimise inconvenience to third parties.

In New Zealand, the Courts have evolved two approaches to the problem. The first is to consider the release of the vessel upon terms which may not amount to security strictly so called. The second is to consider permitting the vessel to operate whilst under arrest.

Release from arrest

Rule 17(4) of the Admiralty Rules 1975 provides as follows:

> "A release may be issued at the instance of a party interested in the property under arrest if the Court so orders, or, subject to subclause (3) of this rule, if all the other parties to the action in which the warrant of arrest was issued consent".

The rule gives the Court a wide discretion to release a vessel under arrest on any terms at all, or indeed without conditions of any kind.

This jurisdiction was first identified in *The "Pacific Charger"* (1981, unreported). In that case, the claimants had declined to agree to the release of the vessel against the security of a P & I Club Letter. In the course of dealing with the application for

release on the terms of a Club Letter over the opposition of the claimants, Savage J. said this:

> "The Court has a complete discretion in the matter as there is no restriction on its power in the rules. The Court could, in my view, order a release without imposing any terms as to security at all if it chose and it might do so if the ship owner defendant was a New Zealand enterprise with ample assets in New Zealand to cover any possible judgment that the Court might give against it. The purpose of requiring security before a release is given is to ensure that the plaintiff who recovers judgment against a ship and its owners or charterers or others interested in it will be able to satisfy that judgment."

Although *The "Pacific Charger"* has been cited frequently in the New Zealand Courts and beyond, I am aware of only one case in which a vessel has been released from arrest without the posting of substantial alternative security. That case was *The "Steel Mariner"* (1997, unreported). The plaintiff's claim was for the balance of an account for repairs to a small commercial vessel. After the arrest, the vessel had remained beached at the Port of Tauranga. The Court was satisfied that it would remain deteriorating in that position unless released to resume trading and generate revenue. The Court was critical of the plaintiff's delay in bringing the case to a conclusion, leaving the Court to be responsible for holding the vessel indefinitely. In the circumstances the Court was prepared to order release against various protective undertakings from persons connected with the vessel. It appears that the vessel would be trading beyond New Zealand waters but generally based in New Zealand. Although the case seems for this reason to be right on the borderline of acceptable exercise of the jurisdiction, a person interested in the vessel was required to give a personal guarantee to the limit of the value of the vessel. Thus the case is perhaps more correctly classified as an example of release on the basis of informal security rather than without any security at all.

After almost exactly a year under arrest, the *"Cornelis Verolme"* was released under Rule 17(4) against the security for crew claims of a guarantee from ANZ Bank in Club Letter format. The Bank was acting as agent for the Belgian bank which held a mortgage over the vessel.

Vessel operating whilst subject to arrest

The more common situation is for the owner of a vessel under arrest to seek to operate it whilst the arrest continues.

Recognising that any movement of a vessel under arrest is a contempt of Court (Admiralty Rules 1975, Rule 15(10)) it is customary in the first instance to approach the Registrar for permission. The rule provides as follows:

"It shall be contempt of Court for the master of a ship, after notice of the issue of a warrant of arrest of that ship has been communicated to him, to move that ship from where it is lying except with the consent of the Registrar".

Where the proposed movement is within the confines of a port - from one berth to another, or from a berth to an anchorage - then the Registrar, after consultation with all interested parties, will normally approve the movement without further ado.

However, persons interested in vessels under arrest have sometimes sought permission to allow the vessel to continue trading. A practice has grown up of a Judge being asked, in effect, to exercise the jurisdiction under Rule 15(10), the Registrar being directed to act in accordance with the judgment.

In the case of the "*Cornelis Verolme*", there was no difficulty about moving the vessel, after its cargo had been discharged because all that was involved was a move from a commercial berth in the Port of Auckland to the anchorage off Rangitoto Island, within the confines of the port. There it remained under arrest until its eventual release. There was no intention to operate the vessel for any purpose.

I have been involved in several negotiations where, in the end, consent orders have been made permitting the continued operation of vessels under arrest. The conditions imposed in such instances have customarily been strict, and have included the following:

- vessel to remain within New Zealand waters;
- trading revenues or catch proceeds to be paid into an agreed account;
- passports of crew members to be deposited with a solicitor or independent party;
- both the Court and the plaintiff to be regularly informed as to the vessel's whereabouts;
- insurance policies to be assigned for the benefit of the plaintiff;
- undertaking to be furnished by the Master and any party with an interest in the vessel as to the observance of the conditions agreed.

There have been two cases in which the plaintiffs could not be brought to agree to the continued operation of the vessel, so that formal permission had to be sought from the Court. In the first case, the application succeeded. In the second, it failed.

The first case was *Marine Expeditions Inc.* v *The Ship "Akademik Shuleykin"* (1994, unreported). Marine Expeditions commenced an action against the *"Akademik Shuleykin"* and a number of sister ships in pursuance of its claim that the Russian owners had failed to honour an agreement to charter the vessel for tourist voyages. The first vessel the plaintiffs were able to arrest was a sister ship, the *"Akademik Shokalskiy"*. At the time of the arrest, the vessel was being used by a sub-charterer, Southern Heritage Tours Limited, on a cruise around New Zealand's sub-Antarctic islands and the South Island fiords. The cruise, not to say the fortunes of Southern Heritage and the vacation plans of a boatload of rich Americans, would have been wrecked had the vessel not been able to continue to operate.

It was apparent that Marine Expeditions was resisting any movement of the vessel for two reasons - first, it wished to maintain commercial pressure on the owners even if that meant financial catastrophe for an innocent third party; and secondly, it was concerned that if the arrest could not take effect until after the charter had been completed the owners might have been able successfully to raise a plea of sovereign immunity. This on the basis that the vessel would no longer have been engaged in commercial activity.

However, the judge was sympathetic to the plight of Southern Heritage and eventually permitted the vessel to operate, provided that the operation of the vessel under arrest should cease one day before the charter ended. That would preserve whatever merit there might have been in the sovereign immunity argument.

The second case was *The "Ivan Korobkin"* (1996, unreported). In that case the plaintiff Korean shiprepairers had arrested the vessel in respect of a debt for some US$2 million. The vessel was worth no more than US$1 million, but the owners were unable to post security for even that sum. They sought orders permitting the vessel to operate whilst under arrest, or alternatively releasing it from arrest. They wished to go fishing in New Zealand's exclusive economic zone, beyond the twelve mile territorial limit, and hoped to earn enough from fishing to pay off their debts over a period of three or four years. They offered undertakings along the lines outlined earlier.

The judge was unimpressed. He accepted that Rule 15(10) gave jurisdiction to permit limited movement of vessels whilst under arrest. However he concluded

that the jurisdiction did not extend beyond permitting vessels to operate within territorial waters. It is a contradiction in terms to say that the vessel remains within the custody of the Registrar when it is outside the territorial jurisdiction of the Court. He agreed with and followed the decision of the English Court of Appeal in *The "Bazias 3"* (1993) QB 673, which declined to permit the continued operation of vessels whilst under arrest in a cross Channel ferry service.

The judge also declined to release the vessels from arrest without security, although he accepted, following *The "Pacific Charger"*, that he had the jurisdiction to do so. Fundamentally, he was not convinced that the vessel could generate enough catch revenue to pay off the undisputed debt due to the plaintiff within a reasonable period of time.

Conclusion

Experience over the last year or two suggests the following principles:

- The Court may reluctantly be persuaded to exercise its jurisdiction to authorise vessels to operate under arrest;

- The jurisdiction is unlikely to be exercised where the vessel is to depart territorial waters, although a temporary excursion in the course of a coastwise voyage is unlikely to cause concern;

- Some substantial benefit from the operation of the vessel must be shown;

- Adequate protective measures must be put in place, such as the surrender of crew passports, reporting procedures as to the vessel's position, undertakings from those connected with the vessel, provisions for dealing with revenue from the vessel's operations, and appropriate insurance arrangements;

- The case will be stronger if continued detention of the vessel will adversely affect innocent third parties.

And, from a professional point of view, it is more profitable to act for plaintiffs.

T J Broadmore
Chapman Tripp Sheffield Young
September 1997