THE ROLE OF THE TRUSTEE
THE RELEASE FROM ARREST OF THE
M/V "CORNELIS VEROLME"

BY

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Turners & Growers Exports Limited v The ship "Cornelis Verolme"

[1997] 2 NZLR 110

A. Introduction

A1. The "Cornelis Verolme" was arrested on 3 April 1996 whilst in New Zealand waters near Auckland. Two days later on 5 April 1996 ABC Containerline NV, the ship's owner, was deemed bankrupt by the Eleventh Divisional Court of the Commercial Court of Antwerp. Messrs De Roy and van Doosselaere were appointed as trustees in bankruptcy.

A2. At the time of the bankruptcy container ships owned by the ABC group of companies were under arrest in ports around the globe:

M/V "Ellen Hudig"	-	Haifa, Israel
M/V "Antwerpen"	-	Singapore
M/V "Brussel"	-	Halifax, Nova Scotia

The M/V "Deloris" was arrested in the Bahamas a few days after the bankruptcy.[1]

A3. The claims against the "Cornelis Verolme" far exceeded those against the other vessels, both in number and amount.

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1 Refer to Appendix 1 which briefly summarises the eventual outcome in respect of each vessel.

A4. The company's indebtedness was massive. Claims against the "Cornelis Verolme" alone totalled c.NZ$123 million. Five admiralty proceedings were issued against the vessel. In one proceeding (AD 724) there were some 76 interveners.

A5. The "Cornelis Verolme" had been valued at c.$US9.5 million - that value was rapidly declining.

A6. On 21 March 1997 the "Cornelis Verolme" was released from arrest following the provision by the trustees of a bond of just NZ$400,000 and payment of the Registrar's costs. The ship has been sold by the trustees; the proceeds being received by the trustees for distribution in accordance with Belgian law.

A7. The judgment of Williams J dated 9 October 1996 which ordered the release from arrest is significant in that the approach adopted by His Honour suggests a cautious acceptance of the approach adopted by the US Courts so that the sanctity of the New Zealand admiralty regime may in the case of international insolvencies be required to defer to requests made by the foreign court overseeing the insolvent company's liquidation.

B. The Trustees' Role

B1. The trustees' role in the proceedings commenced in May 1996. The immediate concern of the trustees was to sell the worldwide assets of the ABC group. By far the most substantial assets were the vessels, of which the "Ellen Hudig" and the "Cornelis Verolme" had the greatest value.

B2. The trustees sought the assistance of the Belgian court in order to attempt to avoid what appeared in mid 1996 to be the inevitable sale by the New Zealand Court of the "Cornelis Verolme". Had the vessel been sold in New Zealand by Registrar's sale, none of the proceeds of sale would have been received by the trustees; the

proceeds would have been distributed in accordance with the usual rules of priority applied in admiralty proceedings.[2]

B3. The Belgian Bank, Nationale Maatschappij voor Krediet aan de Nijverheid, entered the fray in June 1996. It was imperative, as far as the trustees were concerned, that the Bank asserted its rights. Until June 1996 the Bank had played no part in the proceedings. Its claim was for a sum in the region of NZ$80 million.

B4. The significance of the Bank's intervention was that it focussed the minds of the other claimants; particularly those which did not claim a maritime lien, and those which purported to have a maritime lien but were perhaps uncertain as to whether a New Zealand court would uphold the lien asserted.

B5. In short, claimants having no valid maritime lien would fall behind the Bank in terms of priority - the extent of the Bank's claim would therefore have meant that such claimants would receive nothing from the ship's sale.

B6. The trustees filed an application to set aside writ in rem and warrant of arrest and for release from arrest on 10 May 1996. That application was heard in September. Between the filing of the application and its hearing, the trustees sought to enhance, what was in May 1996, their somewhat limited prospect of success in respect of the application. The following three steps were taken:

(a) First, because of the number and extent of the claimants it was desirable to ascertain which claimants alleged they were entitled to a maritime lien, and on what basis. To that end on 10 June 1996 the trustees obtained from the High Court an order requiring the claimants to file affidavits setting out the

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2 Those rules are outlined in M Perkins "The Ranking and Priority of In Rem Claims in New Zealand" (1986) 16 VUWLR 105, 115-116, and *ABC Shipbrokers v The ship "Offi Gloria"* [1993] 3 NZLR 576.

amount, and nature of the in rem claims they had against the vessel, and whether they intended to pursue their in rem claim.

The purpose of this order was to require claimants to "put up or shut up". The result was that a number of claimants filed requests for the withdrawal of their caveats.

(b) Secondly, the trustees called upon the support of ABC's largest creditor - the Bank.

(c) Thirdly, on 9 August 1996 the trustees obtained from the Belgian court an order which requested that the New Zealand courts release the "Cornelis Verolme" from arrest. The orders were in the following terms:

> *"1. Order that the M/V "Cornelis Verolme" located in the port of Auckland, New Zealand, be delivered without delay into the possession of the trustees in bankruptcy, the present petitioners, appointed by the judgment in bankruptcy dated April 5, 1996, so that they can proceed to the sale of the vessel in question, locally or in any other place they deem more appropriate, and to the division of the proceeds amongst the creditors in observance of all their rights and in conformity with Belgian legislation.*
>
> *2. Order that, in compliance with Belgian legislation measures of seizure against the M/V "Cornelis Verolme" be suspended and that every movable legal claim may only be prosecuted, introduced or executed against the trustees in bankruptcy.*
>
> *3. Requests that in accordance with the generally accepted principles of international private law as applicable in Auckland, New Zealand, all Courts in Auckland, New Zealand, under whose*

jurisprudence, assets of the bankruptcy be located, amongst others the M/V "Cornelis Verolme", recognise the aforementioned petitioners qq in their capacity of trustees in bankruptcy with the power and the duty to take possession of, to realise and to confirm all assets of the bankruptcy wherever they should be located.

4. *Request that those same Courts assist - in accordance with the aforementioned principles of common law - the Belgian Courts in compliance with and the execution of the present decision."*

B7. At this point the scene was set for the trustees to pursue their application for release. A week before the hearing the application was opposed by 11 claimants - with claims totalling c.NZ$9.5 million. An application for an order for appraisement and sale had been filed.

B8. By the conclusion of the hearing in September all of the claimants, with the exception of the Master and crew, had withdrawn their oppositions to the trustees' application. Most reserved their right to assert their claims in the event that the vessel was not released.

B9. A few creditors questioned the validity of the Bank's claim. Those arguments were not pursued at the hearing.

C. The Argument

C1. The matters which His Honour Williams J was required to consider in his judgment of 9 October 1996 are fascinating to any maritime, insolvency, or conflicts of law practitioner.

C2. By the time of the hearing in September 1996 Williams J was more than familiar with the interests of all the parties involved and had an intimate knowledge of the

background to the trustees' application. By calling telephone conferences with counsel on a regular basis His Honour ensured that the matter was disposed of as efficiently as possible. This was a fine example of the merits of having a specific Judge allocated to manage a case.

C3. The main thrust of the trustees' application for release was as follows:

(a) The Belgian bankruptcy should be recognised by the New Zealand courts. The Belgian bankruptcy regime is substantially similar to New Zealand liquidation procedures - both encourage equal distribution between creditors; both seek to preclude execution processes post liquidation.

(b) The New Zealand court should extend comity, and provide judicial assistance, to the Belgian judgment of 9 August 1996 which, amongst other things, requested the New Zealand courts to release the "Cornelis Verolme". This would give international effectiveness to the Belgian bankruptcy. Reliance was placed on the grounds upon which the Belgian judgment was based, being:

(i) the international scale of the bankruptcy;

(ii) the fact that ships belonging to ABC were located in ports in different jurisdictions;

(iii) the rights of preferential creditors would be prejudicially affected by the forced sale of the ship;

(iv) the Belgian Bankruptcy Code (art 453) stops all seizures from the date of bankruptcy, unless the date of the forced sale of previously seized property had already been determined;

(v) the trustees were responsible for the realisation of the assets (including those subject to securities) worldwide, and the distribution of the proceeds;

(vi) the trustees were responsible to the totality of creditors.

(c) The effectiveness of the priorities/liens claimed by the creditors/claimants would be determined by the Belgian trustees and the Belgian courts.

(d) A sale by the trustees should result in far greater net proceeds being realised, than a forced sale in New Zealand. A forced sale in New Zealand would prejudice other creditors.

(e) Providing judicial assistance would prevent creditors, many of whom were foreign creditors, from seeking to obtain an advantage to the detriment of other creditors. The creditors had contracted with ABC, a foreign corporation. They should therefore have no complaint at being subject to the laws of the Belgian bankruptcy.

(f) The trustees should be able to fulfil their obligations in an expeditious and economical manner, so as to assist the systematic and orderly liquidation of ABC's assets.

(g) An attempt should be made to ensure that the Belgian bankruptcy is able to be conducted without the unnecessary intervention of courts in other jurisdictions which could result in the piecemeal distribution of assets.

C4. The argument against the application for release was summarised by Williams J as follows:

The Master and crew had security in New Zealand for their claims pursuant to the Admiralty Act 1973 and the Admiralty Rules 1975. If the court was to order the release of the vessel, their security would be lost and replaced only by a claim under Belgian bankruptcy and labour law with resulting uncertainties as to time and amount of payment. Given the involvement of the Belgian Government with the Bank and ABC, it was suggested that the Master and crews' priority might even by altered by legislation.[3]

D. The Judgment

D1. In his judgment Williams J considered:

(a) the Belgian Bankruptcy Code - comparing it with the New Zealand liquidation regime;

(b) the fact that ABC had not been placed into liquidation in New Zealand as an overseas company;[4]

(c) the Belgian Sea Law (which determines priorities in admiralty claims), and contrasted it with the New Zealand admiralty legislation, and common law rules of priority applicable in New Zealand;

(d) British authorities;[5]

(e) the writings of various commentators;

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[3] At page 115.

[4] Section 342 of the Companies Act 1993 (NZ) provides the procedure whereby an overseas company can be placed into liquidation by the New Zealand courts. Refer to Appendix 2.

[5] Refer to Appendix 3

(f) US authorities;[6]

(g) Canadian authorities; and

(h) the draft judgment of *Fournier v The ship "Margaret Z"*.[7]

D2. In short His Honour extended comity to the judgment of the Commercial Court and recognised the liquidation. He held that if the vessel was released against adequate security for the Master and crew to ensure that any judgment ultimately given could be satisfied, then that would comply with the Court's obligation of active assistance.[8]

D3. It would appear from the approach taken by His Honour that he would not have given other claimants the protection afforded to the Master and crew, and would have acceded to the trustees request for release even in the face of opposition by other claimants; particularly if those claimants were not New Zealand creditors.[9]

E. Conclusion

E1. As a result of the judgment the trustees have been able to obtain the release from arrest of the vessel, its sale, and to receive the proceeds of sale which will ultimately be distributed under the direction of the Belgian Court. Most of the claimants have taken steps to prove in the Belgian bankruptcy.

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6 Refer to Appendix 4.

7 (Unreported High Court, Whangarei Registry, M. 59/96, Salmon J); now reported at [1997] 1 NZLR 629.

8 The decision is found at pp 125 to 128. Relevant extracts are found in Appendix 5 to this paper.

9 There were two addendums to Williams J's judgment (dated 9 December 1996 and 17 March 1997) which address issues regarding the provision of the bond.

E2. The significance of the judgment is twofold:

(a) First, it clarifies the position of the status in New Zealand of foreign bankruptcies, and the appropriateness of judicial assistance in international insolvencies.

(b) Secondly, it is an example of a commercial response to the uncomfortable relationship between the strict admiralty regime and the flexible notion of judicial co-operation in international insolvencies.

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APPENDIX 1

Canada: M/V "Brussel"

- judicial sale

Bahamas: M/V "Deloris"

- arrested **after** bankruptcy
- released to the trustees

Singapore: M/V "Antwerpen"

- application for release refused
- judicial sale

Israel: M/V "Ellen Hudig"

- security provided
- sold by trustees

USA: Temporary restraining order

APPENDIX 2

RECOGNITION OF BANKRUPTCY : JUDICIAL ASSISTANCE

Points to note:

- Section 342 of the Companies Act 1993 allows for an application to be made to the High Court for the liquidation of the assets in New Zealand of an overseas company. The trustees did not file such an application. It was suggested by various interveners that it was necessary for the trustees to apply under section 342. However, it was submitted on behalf of the trustees that it was not necessary for an application to be made under section 342 for the Belgian bankruptcy to be recognised in New Zealand. This was accepted by Williams J who noted that common law principles could be applied to recognise the bankruptcy.

- Section 135 of the Insolvency Act 1967 obliges the Court in matters of bankruptcy to act "in aid of and be auxiliary to" any Commonwealth Court exercising similar jurisdiction, and provides that "an order of any other such Court requesting aid is sufficient to enable this Court to exercise jurisdiction" as if the matter had arisen within New Zealand. The Insolvency Act applies only to bankrupt individuals - it does not apply to corporate entities. Interestingly there is no comparable provision in the New Zealand companies legislation (such a provision is found in the UK and Australian legislation). Nevertheless that did not preclude Williams J from applying flexible common law principles to recognise and assist with the Belgian bankruptcy.

APPENDIX 3

BRITISH AUTHORITIES

1. *Felixstow Dock Co v US Lines Inc* [1988] 2 All ER 77 (Hirst J)

   - a US company was subject to a Chapter 11 proceeding (rehabilitation proceeding).

   - Hirst J allowed a Mareva injunction over English assets of the company to continue contrary to a US freeze on attachment proceedings.

2. *In Re Suidar v International Airways Ltd* [1951] 1 Ch 165.

   - a company incorporated in South Africa was wound up in South Africa after which an English creditor levied execution on the company's property in the UK. Although the execution was void under South African law, it was held that was not material in deciding whether the creditor should be allowed to keep the fruits of his English execution.

As Williams J noted, both decisions have been criticised by commentators:

Harmer	"International Insolvencies"
Smart	"Cross-Border Insolvency"

APPENDIX 4

US AUTHORITIES

Re Modern Boats Inc 775 F.2d 619 (1985)
Re Louisiana Ship Management 761 F.2d 1025 (5th Cir 1985)
Cunard SS Co v Salen Reefer Services AB 773, F.2d 452 (1985)
Canada Southern Ry v Gebhard 109 US 527 (1883)
Victrix Steamship Co, SA v Sales Dry Cargo AB (1986)

1. The judgment in *Cunard* aptly illustrates the liberal approach now adopted in the US in providing assistance in the case of foreign liquidations. It was a decision of the United States Court of Appeal for the Second Circuit. Its relevance was acknowledged by Williams J.

2. In *Cunard* the issue was whether an American court, as a consequence of a Swedish court's adjudication of the insolvency of a Swedish business entity, should vacate an admiralty attachment. The admiralty attachment was vacated through the proper extension of comity to the Swedish bankruptcy.

3. The court stated that it had not been demonstrated that the laws of public policy of the US would be violated by according comity to the Swedish bankruptcy proceedings. The public policy of the US would best be served by recognising the Swedish proceedings and thereby facilitating the orderly and systematic distribution of the assets of the bankrupt entity. The creditors of the insolvent foreign corporation could be required to assert their claims against a foreign bankrupt before a duly convened foreign bankruptcy tribunal.

4. Williams J cited a series of passages from the *Cunard* judgment, including the following:

> *"The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than a haphazard, erratic or piecemeal fashion. Consequently, American Courts have consistently recognised the interest of foreign Courts in liquidation or winding up the affairs of their own domestic business entities...*
>
> *It has long been established that foreign trustees in bankruptcy were granted standing as a matter of comity to assert the rights of the bankrupt in American Courts... Although the early cases upheld the priority of local creditors' attachments, the modern trend has been toward a more flexible approach which allows the assets to be distributed equitably in the foreign proceeding."*

APPENDIX 5

Turners & Growers Exports Limited v The ship "Cornelis Verolme"
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Extracts from the judgment of Williams J:

> *"For decades, the masters and crews of ships have had the protection and the security of direct recourse to their ship as an immediate source of payment for money due to them. That priority and privilege is so deeply embedded both in the common law and in New Zealand law that only legislation could uproot it. Further, that priority and privilege is well recognised internationally and is vouchsafed by numerous legal systems around the world, not least Belgian Bankruptcy Law and Belgian Sea Law. It guarantees the masters and crew a claim in priority to almost all other claims on the vessel, certainly a claim in priority to those of secured and other creditors of the ship.*
>
> *But it also needs to be recognised, in this Court's view, that whilst those priorities and that recourse being available to the complement of the ship were manifestly appropriate, in days gone by when the vessel and her crew were wholly or largely out of contact with the owners, and others with an interest in her for lengthy periods, it may be questionable whether that necessity remains so appropriate today when not merely the master and the owner but every member of the crew can be instantly in touch with whomsoever they wish at any time and in virtually every part of the globe.*
>
> *That is not to say that the ancient priorities legally accorded to the master and crew should be now set aside. What it does indicate is that courts should be prepared to fashion solutions to claims such as this which will fully protect the claims of the master and crew, but will also recognise the rights of others with an interest in the vessel."* (p 125)

"In a bankruptcy with international ramifications such as this and with the trustees dealing with assets of considerable value scattered about the world, it is not difficult to accept the trustees' submission that they need to manage the liquidation from a worldwide standpoint. They are much better placed than the master and crew or this Court to decide which ships should be sold, when and whence. They are likely to have a much better appreciation than the master and crew or this Court of the world market for ships of the varying types in the ABC fleet. It is only they who have the funds required to reposition ABC's ships to other ports if they consider it necessary in the interests of all the creditors to undertake such an expensive exercise in order to enhance sale prices. Provided, therefore, that this Court and, through it, the master and crew can be assured that payment to them of the amounts due can be secured other than by preserving their direct access to the ship, the rights and obligations of the trustees should be respected." (p 126)

"The third factor in this balancing exercise is the international. When fortunes cross international boundaries at the click of a mouse, when the scale of international transactions - and the consequent scale of international bankruptcies - is as vast and instantaneous as it is, and when the courts and litigants in one country can have confidence that their rights and obligations will be properly acknowledged by courts and litigants in other countries, in this Court's view, it is appropriate that solutions to the legal problems created by international transactions, and by cross-border insolvencies in particular, should reflect modern international commercial practice and not be anachronistically encumbered by dictates from another age derived from different circumstances." (p 126)