

**THE DEMISE OF ABC CONTAINERLINE  
THE ROLE OF THE MARSHAL**

**BY**

**MICHAEL WHITEHEAD  
FEDERAL COURT OF AUSTRALIA**

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**MICHAEL WHITEHEAD  
ADMIRALTY MARSHAL  
FEDERAL COURT OF AUSTRALIA**

**Introduction**

My brief today is to speak about the role of the Marshal of the Federal Court of Australia in the demise of ABC Containerline (ABC). The Marshal's role in relation to any vessel under arrest pursuant to a warrant issued under the *Admiralty Act 1988* is to retain safe custody of and to preserve the vessel<sup>1</sup>. In this paper I will not attempt to describe the nature of that custody apart from suggesting that the Marshal has certain obligations and interests in the vessel for the benefit of the plaintiff, those interested in the vessel and third parties such as cargo owners.

The chronology of what has been described as the demise of ABC has been documented by people who know a great deal more about the matter than I do and I will not restate in great detail matters of history that have been explored today. My personal involvement as the Admiralty Marshal in the Principal Registry of the Court arose when the vessel berthed in Sydney on 21 February 1997 after sailing from Melbourne. The day to day conduct of the arrest was carried out by a Deputy Sheriff in the NSW District Registry of the Court, the file having been transferred there by Justice Olney.

I would like to the opportunity today to address several of the issues that arose during the arrest of the *Martha II* and the developments that have taken place in the practice of the Federal Court Marshal since that time, particularly

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<sup>1</sup> Rule 47 of the Admiralty Rules

in relation of the movement of vessels under arrest. I trust that what I have to say may be of benefit to parties contemplating the arrest of a ship in the Federal Court and those interested in the ship and any cargo on board.

### **Payment of the Marshals fees and expenses**

The Marshal will usually require that an applicant for arrest pay the sum of AUS\$5,000 into the Federal Court of Australia Trust Fund and Other Trust Moneys Account in the name of the vessel to be arrested on account of the Marshal's fees and expenses. At the time of arrest this sum is required to cover the cost of expenses such as insurance and berthing fees. Rule 41 of the Admiralty Rules provides that the application for the arrest warrant constitutes an undertaking to the Court by the applicant or the solicitor to pay to the Marshal on demand an amount equal to the fees and expenses of the Marshal in relation to the arrest. The undertaking is found in the Form 12 application for issue of arrest warrant<sup>2</sup>.

The Marshal is entitled to make demands for interim payment on account of those fees and expenses<sup>3</sup>. The Marshal is always concerned to be secured in respect of the fees and expenses incurred while a ship is under arrest and is very risk averse in relation to security for those expenses.

Even if funds have not been provided the Marshal will always arrest a ship but is not in a position to assess or take a risk on the security for the payment of the fees and expenses. A party should expect that a demand will be made to deposit funds shortly after the arrest if they have not been provided prior to the arrest of the vessel. If the demand is not complied with the request will be relied on by the Marshal in enforcement proceedings.

In the *Martha II* the solicitors for the arresting party paid funds on account of the fees and expenses until such time as the vessel was sold and the sale proceeds received. Thereafter the Marshal felt more comfortable about the liability for outstanding expenses as he then had a fund of money which could be applied to pay those expenses. After the determination of priorities the Marshal paid most of the net proceeds to the plaintiff. A sum of US\$270,000 was retained in the fund to secure the Marshal in respect of outstanding fees

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<sup>2</sup> Schedule to the Admiralty Rules

<sup>3</sup> Rule 78 of the Admiralty Rules

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and expenses and to meet the outstanding wages claims by the crew should they be successful in those claims. It was agreed that such claims would probably rank above the plaintiff.

While the issue did not arise in the Martha II, the Marshal is often requested to execute orders for release after an order has been made by a Registrar under Rule 51 or a Judge under Rule 52. The Marshal has on many occasions faced the prospect of dealing with parties who have resolved a matter, obtained an order for release and not addressed the problem of securing the Marshals fees and expenses.

Rule 53 of the Admiralty Rules provides that:

*“53. The Marshal may refuse to release a ship or other property from arrest in accordance with an order under this Part unless arrangements satisfactory to the Marshal have been made for the payment of the fees and expenses of the Marshal in connection with the custody of the ship while it was under arrest.”*

Depending on the amount outstanding, the Marshal will request the deposit of funds prior to the release of any vessel. Justice Tamberlin addressed this issue in the “Zoya Kosmodemyanskaya”<sup>4</sup> where he said that the Marshal was entitled to a cash deposit. This may be compared with the approach taken by Justice Cooper in the “Cape Don”<sup>5</sup>.

**Credit bids**

Rule 70(2) of the Admiralty Rules provides that a judicial sale shall be by public auction unless the court orders otherwise. The Marshal's broker in the Martha II, Austral Chartering Pty Limited, a subsidiary of Horace Clarkson plc of London, recommended that the most appropriate method of sale was for a bidding process to be conducted by sealed tender. Justice Sheppard made an order that the ship be sold in this manner. The Skulptor Konenkov and the Skulptor Vuchetich had also been sold in this manner during 1995.

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<sup>4</sup> Lloyd Werft Bremerhaven GmbH -v- The Owners of the Ship “Zoya Kosmodemyanskaya” (Tamberlin J 16 May 1997, NG 311/97)

<sup>5</sup> Bayside Air Conditioning Pty Limited -v- The Owners of the Ship “Cape Don” (Cooper J, 15 August 1997 QG 27/97)

One of the first issues that arose after Den Norske Bank (Luxembourg) S.A. obtained judgment against the Martha II, and an order for sale made, was their entitlement to make a credit bid for the ship during the tender process. The Bank sought to make a credit bid for the vessel on the basis that they would be entitled to the net proceeds of sale after payment of the Marshal's fees and expenses.

This issue of credit bids will be dealt with today by Mr Douglas Coleman, the solicitor who acted on behalf of the Admiralty Marshal on the sale of this vessel and the Skulptor Kononkov and Skulptor Vuchetich in Sydney over the last two years. It is sufficient for me to say that the Marshal will generally oppose the making of credit bids by mortgagees during the tender process. The reason for this approach is that it is quite possible that during the determination of priorities a creditor ranking higher than a mortgagee may claim against the proceeds of sale and the Marshal needs funds to pay out any such party.

### **Movement of the Martha II**

The risks of a vessel continuing to operate whilst under arrest are obvious. The vessel may flee the jurisdiction, may be lost or damaged at sea or be involved in an incident that will bring further claims against the ship.

The movements of the Martha II in my view occurred for two reasons. The first movement from Melbourne to Sydney was early in the arrest and appeared to be based to some extent on assertions by ABC that the matter may soon settle. After the vessel sailed to Sydney and discharged cargo in Port Botany it was moved to Port Jackson. This was for security and safety reasons as there was no suitable berth for the vessel to lay-up at Port Botany.

The subsequent movements from Sydney to Port Botany and Sydney to Newcastle were for the purpose of discharging the cargo. The applications were made by ABC and some cargo interests and the funds to pay for the discharge were received I believe from ABC, through the ships agents. If ABC had not met the costs of discharging cargo the Marshal would have required all cargo owners to make application in accordance with Rule 49 and Form 17 which result in the giving of an undertaking to pay the Marshals fees and expenses of complying with the application. Even if that undertaking was

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given the Marshal may still have been concerned about the ability to recover the costs of discharge pursuant to that undertaking, particularly if the cargo interest had no assets in the jurisdiction. The Marshal may have asked the cargo owner to pay the costs of discharging the cargo prior to the discharge, as was done in this matter by ABC.

If the vessel and cargo had been abandoned the cost would have fallen on the arresting party as a cost of the arrest, until such time as the Marshal could recover the costs by selling the cargo.

The requirement that ABC provide funds to cover the costs of discharging cargo is a reflection of the Marshal's desire to be secured in respect of the cost of such operations. The cargo fell into two categories. The first was the container cargo that could be removed at Port Botany. This was seen as the most suitable site having regard to the undesirable disruption of moving the cargo from the Port of Sydney through the centre of Sydney to Port Botany by road. The vessel had been moved from Port Botany to Sydney following its arrival from Melbourne as there was no suitable lay-up berth or buoy at Port Botany. In an ideal world the vessel would have been moored at Port Botany and the container cargo discharged at that port.

While Justice Sheppard originally declined to allow the movement to Newcastle the trip was made to discharge the 10,700 tonnes of ilmenite mineral sand. This was also seen as the most suitable site and followed extensive consideration of the suitability of the facilities available. At all times the Court was concerned to ensure that the vessel did not move outside territorial waters during the cargo discharge operations.

### **Movement of vessel under arrest - is the movement necessary "for the purposes of the arrest"**

Since the arrest of the "Iron Shortland", the "Skulptor Konenkov", the "Skulptor Vuchetich" and the "Martha II" the Marshal has considered the movement of a number of arrested vessels and applications to carry out work on arrested vessels. Parties often ask whether the Marshal will oppose the movement of a vessel while it is under arrest. The requests are for various reasons and in response we have adopted a policy I would describe as the "necessity for the purposes of the arrest" test. I am not suggesting that this is

the test that the Court would or should apply. This is a reflection of matters that the Marshal considers when responding to the question whether he consents to the movement of a vessel while it is under arrest. The Marshal will also consider this when making decisions to move vessels other than on the application of a party or other interested person.

Since the arrest of the *Martha II* I cannot recall any arrest where a Judge of the Federal Court has delivered a written judgment on the issue of vessels moving for the purpose of continuing operations or otherwise. I am also unaware of the issue being considered by the other superior courts exercising jurisdiction under *Admiralty Act*. The most recent judgment would appear to be that of Justice Sheppard delivered in the *Martha II* on 6 March 1996. Justice Sheppard originally declined to allow the ship to move to Newcastle for the purposes of discharging the bulk mineral sand on board. The ship was subsequently allowed to sail to Newcastle for this purpose subject to the provision of sufficient funds to cover the costs of the trip and discharge operations. The trip to Newcastle did not require the ship to travel outside territorial waters.

The matters since March 1996 where the issue has arisen, and the approach taken by the Marshal, are as follows:

**Broken Hill Proprietary Co. Limited -v- The Ship "Giga II"  
(Federal Court of Australia VG 676/96)**

In this matter the vessel was under arrest in Port Kembla following an allegation of injury to several workers on board when a bulkhead collapsed. The owner sought permission to commence repair work on the vessel while it was still under arrest. This was opposed by the Marshal as there was a real risk that another worker may also be injured when working on the vessel. Further, and this was crucial to the position taken by the Marshal, the work was not necessary for the purposes of maintaining the vessel while it was under arrest. The Marshal did not wish to expose his insurer to risks that were unnecessary for the purposes of maintaining the vessel under arrest.

Justice Ryan heard from the Marshal, the solicitor for the Marshal and the solicitors for owners during the Friday night and Saturday prior to the commencement of the work. He directed that work would be allowed to commence subject to the owners providing an indemnity for a sum that would

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provide cover to the Marshal in the event that a worker was injured. Evidence was provided by the contractor that he had sufficient insurance for this purpose and the work commenced.

If the matter had not resolved and an order for sale made, the Marshal would then reconsider whether the work was worthwhile for the purposes of increasing the commercial value of the vessel after taking advice from the broker and/or an engineer. If there was no commercial gain to be achieved the Marshal would sell the vessel "as is where is". If the work had been of some commercial benefit to the value of the vessel the Marshal would consult with the arresting party and other creditors to seek their views on the matter as it would obviously impact upon the proceeds available for distribution if repairs were undertaken and no value added to the vessel.

**Schiffskommerz GmbH -v- The Ship "Cape Cleveland"  
(Federal Court of Australia NG 876/96)**

In this matter the vessel was under arrest in Townsville. An application was made to Justice Tamberlin seeking permission to move the vessel from one berth to another so that loading of cargo could commence as soon as the vessel was released. The release was considered imminent. Once again the Marshal opposed the move until the security was provided for the value of the vessel to cover the contingencies of loss or damage to the vessel or the property of others. While the parties managed to resolve the matter by not moving the vessel Justice Tamberlin indicated that the Marshal was entitled to the security that he requested prior to the vessel moving.

**Cahalan -v- The Vessel "Elle Racing"  
(Federal Court of Australia NG 27 of 1997)**

This Whitbread 60 yacht was arrested at the National Maritime Museum in Sydney on the application of her former master. The yacht had been on display and shortly after the arrest the berth was required for another vessel. The need for the berth to be vacated is a common problem for the Marshal which often occurs shortly after arrest, particularly when a vessel is ready to sail. The Marshal decided that for the convenience of the owner of the berth the vessel would be moved to a berth at Birkenhead Point which was a more suitable long term mooring. This movement did not require the vessel to be



moved out of the arrest port and was done in consultation with the parties. This was considered necessary for the purposes of the arrest.

**Mairena -v- The Ship "Hunter"  
(Federal Court of Australia NG 57/97)**

This vessel was arrested approximately 4 km off shore at Newcastle, some 80 km by air from Sydney. The Marshal decided to move the vessel into the Port of Newcastle for safety reasons, however by the time the Master got the anchor chain up we had missed the tide and by the next tide the matter had settled. I believe that it is preferable for vessels under arrest to be moved into the port of arrest if that is feasible rather than allowing them to stay even a short distance off shore. This is not possible in all Australian ports but it allows the Marshal to better service the vessel and allows the crew to venture ashore for short periods more easily. Once again this was considered necessary for the purposes of the arrest.

**Marine Trade Consulting GmbH -v- The Owners of the Ship "Kareliya"  
(Federal Court of Australia NG 685 of 1996)**

This cruise liner was arrested at Circular Quay in Sydney. The operator sought to have the vessel released on the basis that it was not owned by the company allegedly indebted. During the course of the hearing before Justice Sheppard the operator sought to have the vessel proceed on the voyage due to commence that afternoon with the many passengers waiting at Circular Quay to board the ship. The Marshal opposed the vessel sailing while under arrest as it would be leaving the jurisdiction. While I do not recall that the argument was raised at the time, this operation was not necessary for the purposes of the arrest and I would anticipate that the point would be taken if a similar situation arose again. Justice Sheppard allowed the vessel to sail with liberty being granted to the plaintiff to re-arrest the vessel when it returned to Sydney.

While I am unable to speculate on the position that a Judge may take the next time the matter is considered by the Federal Court I can say that if a proposed movement does not fall into the category of one necessary for the purposes of the arrest of the vessel it will be opposed by the Marshal.

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Applying this test to the Martha II, the Marshal's position would have been not to oppose the moves, subject to provision of funds or security for the cost of the movement.

**Insurance taken out by the Marshal**

During the arrest of the Martha II the Chief Justice issued Practice Note 12 dealing with the insurance taken out on an arrested vessel by the Marshal of the Federal Court. While this did not affect the Martha II, the Marshal now takes out indemnity insurance to cover his own risks. An arresting party should take out its own cover if it desires coverage for the vessel. A copy of that Practice Note is attached to this paper and it can be found in most of the loose leaf services covering Federal Court practice.

**Service of documents on the Marshal**

While a vessel is under arrest it is often necessary to serve documents such as entered orders on the Marshal. I can only encourage solicitors to ensure that when documents are filed in a registry of the Federal Court that a covering letter be taken to the registry and a copy of the document left for the Marshal. It should not be assumed that the document will otherwise come to the attention of the Marshal with the conduct of an arrest simply because the document is filed in the registry.

Documents such as notices of appearance should also be served on the Marshal as he may have submissions to put to the Court in relation to the identity of the party appearing.

I would also draw your attention to the provisions of Rule 48(3) of the Admiralty Rules which require notice of an application, not being an application for release from arrest of property, to be served on the Marshal.

While this was not a problem in the Martha II it certainly has been in other matters over the last few years.

*R.48. - Notice of Appeals in respect arrested vessels should be served on Marshal, as well as filed in Court.*

### **Payment of the Marshal's legal fees on a solicitor/client basis**

The Marshal with the conduct of an arrest will often incur legal fees in being represented before the Court when applications concerning a ship are made. Justice Cooper has held that the Marshal is entitled to have those costs paid on a solicitor/client basis<sup>6</sup>.

The Marshal would also seek to extend this argument to other disbursements incurred that might in other proceedings be assessed on a party/party basis. Subject to arguments on taxation as to the need to incur expenses in relation to the arrest, we will argue that the Marshal is entitled to be reimbursed in total for the cost of such expenses as the Marshal is holding the vessel for the benefit of the parties to the proceedings and the Commonwealth should not be out of pocket.

### **Repatriation of the crew and long term mooring of an arrested vessel**

After an order for sale had been made and the Martha II moved to a long term berth at White Bay in Port Jackson most of the crew were repatriated to their home ports and a small crew retained on board. The site for the long term lay-up of a vessel and the repatriation of the crew is a function of the cost of suitable berths and the need to have sufficient crew members to move a vessel at short notice should that need arise. After consultation with the solicitors for the arresting party it was agreed that the costs would be minimised if a skeleton crew were retained and the vessel berthed along side at White Bay. From my experience the Court will order the Marshal to move a vessel to a berth that he considers suitable and the choice will also be affected by the need to allow the remaining crew to be able to come and go from the vessel.

Repatriation of a crew can be expensive and the Marshal will consult with the arresting party particularly to ascertain if they have contacts that might reduce the cost of airfares for the crew.

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<sup>6</sup> Bayside Air Conditioning Pty Limited -v- The Owners of the Ship "Cape Don" (Cooper J, 15 May 1997, QG 27/97)

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**Summary**

Ship arrest activity in the Federal Court of Australia has increased dramatically over the last two years and I trust that this is a reflection of the expertise that we have developed from our experience in these matters. I have been able to touch on several matters that arose during the Martha II arrest. Each arrest poses its own problems and I would conclude by encouraging arresting parties and those interested in an arrested vessel to feel free to contact the Marshal to discuss any problems that arise during an arrest.

**Michael Whitehead  
Admiralty Marshal  
Federal Court of Australia**



Practice Note No. 12

INSURANCE OF PROPERTY ARRESTED UNDER THE  
*ADMIRALTY ACT 1988*

The *Admiralty Act 1988* (Cth) provides for the arrest of property (including vessels) by the Marshal in actions *in rem*. The Marshal will obtain indemnity insurance for the period the vessel is in the possession of the Marshal. The cost of that insurance will be an expense incurred by the Marshal payable by the party issuing the writ for the arrest of the vessel. The Court may require that party to undertake to pay the cost of that insurance at the time the writ is issued.

The Marshal does not at any time during the period of arrest hold commercial insurance for the benefit of any person who has an interest in the arrested property including cargo. Persons with an interest in the arrested property and their solicitors may wish to consider the question of insuring the amount of their interest against consequential risks, including risks occasioned by any movement of the vessel.

M.E.J. BLACK

Chief Justice

10 May 1996