AUSTRALASIAN ADMIRALTY JURISDICTION – CURRENT ISSUES

A Commentary

INTRODUCTION

Like Justice Tamberlin's paper to which it is intended to be a companion piece, this commentary is divided into two main sections. First, it offers additional comment from a New Zealand standpoint on some of the matters traversed in Justice Tamberlin's paper. Second, it comments on some aspects of the approach of the courts on both sides of the Tasman to the processes of ship arrest and sale.

1. *COMMENTARY*

1.1 Rights In Rem

It remains to be seen whether Australasian courts will adopt the approach taken in "*Indian Grace*", and, if so, whether only in circumstances equivalent to section 34 of the Civil Jurisdiction and Judgments Act 1982 (UK), or across the board. English courts have in the past taken varying views on the nature of an action in rem, dependent upon which legal doctrine was being invoked at the time. An assessment (and criticism) of Lord Steyn's analysis by reference to those other dimensions of admiralty cases forms the basis of the Lloyd's Maritime and Commercial Law Quarterly ("LMCLQ") article by Nigel Teare Q.C., referred to in Justice Tamberlin's paper.

It may be fair to characterise the jurisprudence on sovereign immunity in the admiralty context as the fore-runner of the "robust" view of in rem proceedings embraced by Lord Steyn in "*Indian Grace*". Leaving aside distinctions between governmental activity of states (to which sovereign immunity attaches), and commercial activity of states (to which it does not), actions in rem against (and the arrest of) government ships have for a long time been viewed as impleading the foreign sovereign. The courts have tended to view as artificial any distinction between an action against the foreign state, and an action against its property.

One of the New Zealand sovereign immunity cases, *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738, takes that view perhaps as far as it reasonably can be taken. In the New Zealand case, a warrant for arrest was executed against a Hughes 500 helicopter located at the time of the arrest on board a United States government ship. The helicopter had been placed on board as part of a rescue mission to Antarctica, to retrieve personnel stranded by the sinking of a research vessel chartered to the West German government. A successful plea of sovereign immunity was invoked, resulting in setting aside of the proceedings, notwithstanding that the United States ship itself was not under arrest, and that the helicopter was privately owned and merely bailed or otherwise made available to the mission. The facts that the helicopter was sufficiently in the possession or control of the United States government, and that the United States government ship could not depart from the port of Lyttelton without meeting the plaintiff's demands for security (or removing the helicopter) were held sufficiently to implead the United States government in its governmental activities to found a plea of sovereign immunity.

Another of Nigel Teare's criticisms of the "*Indian Grace*" analysis relates to the doctrine of *res judicata*. Although conceptually there is a broad similarity between such a plea, and a statutory mechanism to avoid multiple proceedings and double jeopardy such as section 34 of the UK Act at issue in "*Indian Grace*", the New Zealand court has up to this point shown some willingness to maintain the distinction between judgments in rem and judgments in personam. A quartet of mid-19th century cases, including two decisions of "the celebrated Dr Lushington", to the effect that judgments in personam did not give rise to *res judicata* in respect of the same claims against the owner's *res* (and vice versa) were given some weight in *Reef Shipping Limited v The Ship "Fua Kavenga"* [1987] 1 NZLR 550.

The case is mentioned further below, in relation to the question of arrest of surrogate ships. Incidentally, it also involved an unsuccessful plea of sovereign immunity. However it is referred to in this part of this commentary as a New Zealand illustration of the point that Nigel Teare makes, concerning rights in rem not merging in judgments in personam (and vice versa).

It arose out of successive bareboat charters of a general cargo ship by two Tongan government-owned trading corporations. Following breaches of the charterparties (including failure to comply with owners' request that the charterers' engine room crew desist from cooking fish on the main engine casing), the New Zealand-based owners invoked various procedures in personam against charterers. A charterparty arbitration resulted in an award in favour of owners, which was subsequently registered as a judgment of the New Zealand High Court. Pursuant to reciprocal enforcement of judgments arrangements in place between the two jurisdictions, the New Zealand judgment based on the arbitration award was then registered as a judgment of the Tonga Supreme Court. The collapse of the chartering entities then led to an action by owners against the government of Tonga, pursuant to government guarantees of the charterers' obligations. On appeal to the Privy Council (the Tongan Privy Council, that is, whose membership included a member of the Tongan government who was not only a director of both defaulting chartering entities, but also a signatory to the guarantee) the guarantee claim was (not surprisingly) rejected.

As a last ditch recovery attempt, owners then invoked the New Zealand admiralty jurisdiction against another ship beneficially owned by the Tongan government and on the New Zealand coast at the date of commencement of the owners' action. The plethora of either unmet or adverse judgments in personam (involving just about every "personam" who could have been sued up to that point) was held not to be a bar to the action in rem.

Nigel Teare's other concern with the overall approach in "*Indian Grace*" is its apparent incompatibility with forms of maritime lien which are not dependent upon a personal liability of the owner – although it is fair to record that Lord Steyn specifically qualified his rejection of the personification theory by not purporting to venture into the complexities of maritime liens. The concern Nigel Teare expresses in his article in relation to maritime liens may, given some recent cases, assume increasing importance in the New Zealand jurisprudence. This is because claimants in admiralty continue to push the limits of what may give rise to a maritime lien.

Admittedly, aspirations of counsel in this regard can outstrip the willingness of judges to move on the nature and extent of maritime liens. Such an example was *Leonard & Dingley Limited v The Ship "Jackson Bay"*, unreported, AD 606/92 (Auckland Registry), 18 September 1992 per Fisher J. The case involved claims by stevedores against the bareboat charterer of the defendant ship for unmet stevedoring accounts. At the time the action was commenced, our Admiralty Act 1973 expressly excluded any right of arrest in relation to stevedoring claims, in favour of an obscure and much less user-friendly mechanism for statutory detention buried at the back of our then Shipping and Seamen Act 1952. Nonetheless, the stevedores eschewed this mechanism in favour of an action in rem and a writ of arrest. Having failed to persuade the judge who heard owners' subsequent strike out application, that the stevedoring claims fell within some of the other legislative provisions creating the statutory in rem jurisdiction, counsel for the stevedores proposed that the judge exercise some hitherto unheralded inherent jurisdiction to conjure up a new category of maritime lien, specifically in relation to stevedoring claims. The judge declined to do so.

There has however been a measure of success (in principle, at least) in relation to the extent of damage liens, and seafarers' wages liens. In *Fournier v The Ship "Margaret Z"*, unreported, AD 59 (Whangarei Registry), 1 April 1999, per Fisher J, the conventional damage or collision lien was held (for the first time since the coming into force of our Admiralty Act 1973) to be available in respect of personal injuries to crew. Four principle

elements were held necessary to give rise to such a lien. First, some physical part of the ship or its gear must play an essential part in the chain of events which leads to the personal injury. Second, the part played by the ship or its gear must be significant, rather than the ship merely being the environment in which the injury takes place. Third, human conduct must play an essential, contributory part. Fourth, that conduct must be in the nature of the crew's active operation of the ship or its gear. On the facts of this case, those requirements were not satisfied, but they point the way towards future, more successful such claims.

In an August 1999 decision in the South Pacific Shipping Limited ('SPS") litigation, *Mobil Oil New Zealand Limited v The Ship "Rangiora"*, unreported, AD No. 877 (Auckland Registry), 9 August 1999 per Fisher J, the judge was prepared to break with the tradition of "*Tacoma City*" and to include claims to redundancy compensation within the term "wages" for the purposes of a seafarer's wages lien. He saw no distinction between non service based "wages", such as damages for wrongful dismissal or sick leave entitlements, which have in past cases been held to give rise to a maritime lien, and redundancy compensation, which hitherto had not. Again however, in these particular cases, the crew were unable to relate their contractual claims for redundancy compensation to specific ships. The claims derived from, and were attributable to over-arching employment contracts, and not the seafarers' engagement from time to time on the particular ships against which they asserted such liens.

1.2 Damages For Wrongful Arrest

The unsatisfactory limits on recovery for wrongful arrest have also recently been the subject of judicial comment in New Zealand. In another of the judgments arising out of the collapse of SPS, and claims by creditors of the defunct sub-demise charterer against the ships chartered by it, the issue cropped up somewhat indirectly. Owners of the ships made (unsuccessful) applications to have the arrests set aside, resulting in the July 1998 judgment of Giles J in *Mobil Oil New Zealand Limited v The Ship "Rangiora"* (cited and referred to in the final, demise charter termination section of Justice Tamberlin's paper).

The issue was raised by Giles J in the context of discussing the difficulties which generally face owners in reaching the appropriate jurisdictional threshold for a strike out of proceedings in rem - the "*1 Congresso Del Partido*" / "*Shin Kobe Maru*" / "*Samarkand*" debate. In recognising the considerable procedural obstacles which face such owners confronting even questionable actions in rem, the judgment bemoaned the lack of a ready remedy for unwarranted or, to use the 1999 Arrest Convention terminology, "unjustified" arrest. The judge specifically noted the terms of the Australian statute as a more satisfactory position.

The question of counter security mentioned in the second section of Justice Tamberlin's paper has also been the subject of judicial consideration in New Zealand, in *Mannix v The Ship "Nam Sang"*, unreported, AD No. 3/92 (Tauranga Registry), 3 February 1994, per Hillyer J. In advancing the usual form of application for security for costs (that is, designed to thwart a deserving plaintiff of limited means ...), counsel for the defendant ship is recorded as having asserted that "the admiralty jurisdiction .. is predisposed towards security in a way no other jurisdiction of the High Court is", and that "requiring security for costs from the plaintiff would [have] merely put the parties on an equal footing". Perhaps not surprisingly, in rejecting that submission the judgment is a reminder of the quite separate bases upon which security by way of arrest of a ship (or bail bond in lieu) on the one hand, and security for costs against an insolvent or foreign domiciled plaintiff on the other hand are obtained.

1.3 Arrest Of Surrogate Ships

Justice Tamberlin's paper also touches on the arrest of what are referred to as surrogate ships under the Commonwealth Admiralty Act 1988, or sister ships as they are called in the case law which has developed under equivalent provisions of the New Zealand Admiralty Act 1973 and its United Kingdom progenitors. The different terminology may reflect a modest difference in substance between the two jurisdictions - although the term sister ship is strictly

speaking a misnomer, being the misapplication of shipbuilders' terminology for largely identical ships built from the same plans.

Looking at the Australian position, the legislation seems to contemplate that an action in rem is maintainable against a ship which is either owned by the debtor in personam or is on demise charter to the debtor in personam. The surrogate ship is merely another ship against which the same claim may be maintained in rem, because the debtor in personam either owns or demise charters that ship also. It seems to be the case that a ship on demise charter to a debtor in personam can be surrogate for a ship either previously or contemporaneously owned by the debtor, and vice versa. In any event, surrogacy is an apt term to describe transference of rights from one finite class of vessel (i.e. owned or demise chartered) to another (correspondingly owned or demise chartered).

In New Zealand the situation is marginally different. A ship owned or demise chartered to the debtor in personam is amenable in rem to claims in respect of other ships owned or demise chartered by that debtor, as under the Australian statute. However, the requisite nexus between the claim and the delictual ship is more widely stated under the New Zealand legislation. It extends to causes of action in respect of ships of which the debtor in personam was either beneficial owner, or "charterer", or "in possession or control". This opens up the possibility that the debtor might only have been time charterer of the delictual ship, or was even in some more remote relationship with it - albeit sufficiently to constitute "possession or control". This was the approach taken, at least on a threshold basis, in *Reef Shipping Limited v The Ship "Fua Kavenga"*, supra.

The New Zealand court elected to adopt this more expansive approach in conformity with decisions from each of Hong Kong and Singapore, and a somewhat dubious decision of the English Court of Appeal. The extent of the court's admiralty jurisdiction in each of those three locations, particularly in respect of sister ship arrests, was enacted in almost identical terms with New Zealand's Admiralty Act 1973. In "*The Sextum*" [1982] 2 Lloyd's Rep 532, the Hong Kong Court gave the term "charterer" an unqualified meaning, not limiting it to demise chartered delictual ships, and so did the Singapore Court in "*The Permina 108*" [1978] 1 Lloyd's Rep 311. The English Court of Appeal came to the same view in "*The Span Terza*" [1982] 1 Lloyd's Rep 225, albeit on an ex parte basis, and by a majority for whom a retired family court judge delivered the judgment, in the face of dissenting orthodoxy from Lord Justice Donaldson.

1.4 Sale By The Admiralty Court

The inter-relationship between statutory powers of detention and forfeiture on the one hand, and rights in rem (usually perfected by court ordered sale of a ship) on the other hand has also recently been considered by the New Zealand High Court. However, the New Zealand example contrasts in a significant factual respect with the "*Alicia – Glacial*" case in Western Australia referred to in his paper by Justice Tamberlin. In the New Zealand setting, statutory detention and forfeiture following conviction for Fisheries Act offences were in train, or had already taken place when various categories of in rem claims were advanced.

The litigation arose following the seizure of five Russian owned fishing vessels, chartered to and operated by a New Zealand fishing company. The so-called "O" ships, "*Om*", "*Olokova*", "*Ognokova*", "*Osha*" and "*Olenino*" became the subject of protracted litigation brought by the former owners' crew. A question arose as to whether their usual seafarers' maritime liens for unpaid wages could survive forfeiture of the vessels. At the time the question first came before the court in early 1999, in *Udovenko and Others v A O Karelrybflot*, unreported, AD 90/98 (Christchurch Registry), 27 April 1999, per Young J, the judge provisionally determined that forfeiture had extinguished the seafarers' maritime liens. This was consistent with a previous decision of our Court of Appeal in *Equal Enterprises Limited v Attorney-General* [1995] 3 NZLR 293, which had held that a ship mortgage was extinguished by subsequent forfeiture of the vessel under the Fisheries Act.

However, that was not the end of the matter. Later in the year, in accordance with an available mechanism under the Fisheries Act, ownership of the ships was redeemed. Presumably on the basis that the Minister of Fisheries does not actually want to go fishing, it is possible for the owners of forfeited vessels to buy them back from the Crown. However, perhaps for the specific purpose of protecting the ships against the resurrection of pre-existing in rem claims, an entity related to but separate from their original owners purchased them back from the Crown. Statutory in rem creditors, essentially trade creditors of the original owners, seized what appeared to be a fresh opportunity to pursue their claims. While the outcome of the case (which is subject to various appeals to the Court of Appeal) has yet to be determined, Young J took the view that pre-existing statutory in rem claims could be pursued following redemption of the vessels.

His determinations in regard to the statutory in rem claimants are spread over two judgments, *Wallace and Cooper Engineering Limited and Another v The Fishing Vessel "Orlovka" and Others*, unreported, AD Nos. 93-99/98 (Christchurch Registry), 19 July and 20 August 1999, per Young J. At the end of the first hearing of the matter before him in July 1999, he took the view that the claimants' case did not merit being struck out, but nonetheless needed to be further developed and argued. When the parties came back before him in mid-August 1999, he characterised acquisition of ownership by the company related to the original owner as a transaction intended to defeat creditors. He consequently held that those same creditors retained their original rights against the ship.

His analysis in the earlier of these two judgments suggests that statutory in rem claimants might, in circumstances of forfeiture and redemption, be better able to preserve their original position than maritime lien claimants. This is on the basis that maritime lien claimants have a type of proprietary interest, which, once extinguished by forfeiture, cannot automatically revive upon redemption – although the Court of Appeal had left open such a possibility in respect of mortgages in the *Equal Enterprises* case.. By contrast, the analysis for statutory in rem claimants is much more straight-forward. They need to show that the party liable to them in personam was the owner of the ship at the time their claims arose; and they need to show that the party liable to them in personam is owner of the ship at the time they commence their action in rem. On this basis, forfeiture and redemption is in substance, for the statutory in rem creditors, no different from sale and re-purchase of the delictual ship. Of course, it should not be overlooked that crew, even if deprived by forfeiture of their maritime lien, would upon redemption by the original owner usually regain statutory rights in rem in respect of wages deriving from any employment contracts with owners.

Another aspect of sales of ships in admiralty in New Zealand arose out of the SPS litigation after orders for appraisement and sale pendente lite of three defendant ships had been made. Disputes arose in August 1998 between the parties to the litigation, and the Registrar of the High Court, regarding the appropriate method of sale and who should broker such sales. That dispute resulted in a further decision, being *Mobil Oil New Zealand Limited v The Ship "Rangiora" and Others*, unreported, AD No. 877 (Auckland Registry), 28 August 1998, per Giles J. This decision is discussed further below in the second part of this paper.

1.5 Admiralty Marshall's Fees And Expenses

The regime in New Zealand in relation to the fees and expenses of the Registrar in admiralty seems (to this commentator, at least) to be less problematic than that provided for in respect of the Admiralty Marshall in the Australian Federal Court. The observation of those New Zealand practitioners whose clients (whether vessel interests, or creditors of SPS) were involved in the SPS litigation running in parallel on both sides of the Tasman was that the detail of the Australian procedure in this regard added to the difficulty and expense for all parties. Indeed, there could be said to be an element of bureaucratic paranoia in what seem to be outrageously expensive insurance arrangements insisted upon by the Federal Marshall in arrest cases; there is perhaps injustice in the apparent requirement that an aggrieved owner applying to strike out proceedings should first have to offer undertakings to bear the costs of the course of conduct (i.e. arrest) challenged as unjustified – especially since the Marshall already has the security of the ship; and there appears to be an uncharacteristic absence of pragmatism in forms of security required to procure release of the arrested ship. Some of these allegations are particularised in the second section of this paper.

As regards what may fall within fees and expenses recoverable by the Registrar in terms of the indemnity given to him by the arresting party, that issue has also recently been considered by the New Zealand court. Some of the difficulties in dealing with the ships formerly operated by the now defunct ABC Containerlines, two of which were arrested in each of Australian or New Zealand waters in 1997, will be recalled. In relation to the ship arrested in New Zealand, an issue arose regarding insurances put in place by the Registrar, primarily in relation to successive partial discharges of cargo which necessitated bringing the ship in from an anchorage in the approaches to the Port of Auckland, offloading numbers of containers, and returning it to anchorage. In *Turners & Growers Limited v The Ship "Cornelius Verolme* (1996) 9 PRNZ 409, those insurance premia were held to be within the scope of the arresting party's original indemnity to the Registrar, although the insurance itself was sought and obtained at the behest of all the parties to the litigation, not just the arresting party.

With respect to the adequacy or suitability of security offered by owners to procure release of their ship, the approach of the Australian Federal Court in *Owners of the Ship "Carina" v Owners or Demise Charterers of the Ship "MSC Samia"*, 26 September 1997 would be viewed with some surprise by New Zealand practitioners. Relatively early in the jurisprudential life of our Admiralty Act 1973, our courts showed a willingness to consider the issue of security (other than a formal bail bond) for release of a ship. It did so in connection with cargo claims arising out of the grounding of "*Pacific Charger*" at the entrance to Wellington harbour. The lawyer acting for cargo claimants argued against the adequacy of a P&I Club letter of undertaking offered to the Registrar by vessel interests, on some of the same sorts of grounds apparently advanced against the foreign underwriters' guarantee in the Australian decision. The New Zealand judgment is *General Motors New Zealand Limited v The Ship "Pacific Charger"*, unreported, AD 135/81, (Wellington Registry), 24 July 1981, per Savage J. The first instance decision was immediately upheld on appeal to our Court of Appeal.

Generally, the court took it upon itself to accept the security of a recognised P&I Club undertaking, reposing as it does in the P&I Club's obvious self-interest in being as good as its word. That reasonably robust optimism seems to have been vindicated: this commentator is unaware of any P&I Club undertaking ever having been breached, although on several occasions local lawyers have tried to wriggle their owners off procedural hooks (more specifically, submissions to jurisdiction) which often accompany such undertakings. More recently, the guarantee of a Japanese mutual insurer was held to provide acceptable security in *Sea Tow Limited v The Ship "Katsuei Maru No 8 KXN"*, unreported, AD 736 (Auckland Registry), 8 May 1996, per Salmon J., although this was a decision under the tonnage limitation regime of our Maritime Transport Act 1994 rather than our Admiralty Rules.

2. *ARRESTS AND SALES*

This part of this paper comments upon, and in some respects questions the conduct of the relevant courts in both jurisdictions in dealing with ships under arrest, and actually selling them. The stance of the courts sometimes appears not be entirely justified by the applicable procedural rules. In making that comment, there are two matters of "first principle" which should be borne in mind.

2.1 Nature of Arrest

The first, harking back to the "*Indian Grace*" judgment with which Justice Tamberlin commenced his paper, is the fundamental rationale for arrests of ships. Broadly speaking, a warrant of arrest is executed against a ship so as to bring its owners before the Court, and to secure the plaintiff's claims against an inherently transportable owners' asset. For all the other criticisms and issues surrounding Lord Steyn's judgment, once those steps have been taken, it is generally right to say that the litigation should continue on much like any other civil action.

The second stepping off point for the present thesis is the warrant of arrest itself, and what it entails. The operative text of the form of warrant of arrest used in New Zealand (form 74 in the first schedule of our High Court Rules, themselves a schedule to our Judicature Act 1908) reads as follows:

> "*To the Registrar of the High Court at [Registry] and to the Registrar's appointed officers or agents.*
>
> *You are directed to arrest the [named ship or property] and keep it under safe arrest until you receive further orders from the Court.*"

As I understand the form of arrest warrant utilised in the Australian Federal Court, (form 14 in the schedule to the Admiralty Rules), the operative wording is even more confined, as follows:

"*To the Marshall:*

Arrest [name of ship and port of registry, or description of property]

Warrant taken out by [name of party, or its solicitor]"

Of course, these documents do not in themselves tell the whole story. Pursuant to various sub-paragraphs of rule 776 of our High Court Rules, it is expressed to be a contempt of court for the master of the ship or any other person having notice of its arrest to move the ship from where it is lying without the consent of the Registrar. The Registrar must, simultaneously with execution of the arrest warrant, also post a notice of arrest containing the following message:

"1. *The ship named (or property described) above is in custody or possession of the Registrar of the High Court of New Zealand by virtue of a warrant from this Court.*

2. *All persons are cautioned not to attempt to remove the property or interfere with it without the written authority of the Registrar, or of the Registrar's officers or agents, otherwise they will be in contempt of Court.*"

As Justice Tamberlin's paper records, rule 47 of the Federal Admiralty Rules provides that the Marshall who arrests a ship has custody of it, and subject to other court orders, shall take appropriate steps to retain safe custody of, and to preserve the ship or property.

However, neither the New Zealand form of Registrar's notice of arrest, nor the more expansive provisions of rule 47 of the Federal Court Admiralty Rules derogate from the underlying principle that an arrest in admiralty merely vests custody over the ship in the Registrar. Cases such as "*The Queen of the South*", referred to in Justice Tamberlin's discussion of the "*Alicia-Glacial*" case, and "*The Arantzazu Mendi*" [1939] AC 256 still appear to have currency. However, if one had to articulate the criticisms in this section of the paper on a strictly legal basis, it might be argued that the word "preserve" in the introductory words of sub-paragraph (2) of Rule 47 of the Federal Admiralty Rules is being given undue weight.

The concept of preservation, either of property or evidence, is well recognised throughout procedural rules of the kind adopted in superior State or Federal courts of Australia, and the New Zealand High Court. For example, under Rule 331(1) of our High Court Rules, the court may in any proceedings make orders for "the detention, custody, or preservation of any property". In construing that form of provision over the years in relation to all manner of goods or property subject to litigation (everything from a tape recording of a speech, to a villa in Monte Carlo), the courts in their civil jurisdiction have regarded as the ultimate consideration protection of the property concerned so that determination of the proceeding should not be abortive. This has clear echoes of the claims securing rationale for arrests in rem. In none of those civil jurisdiction scenarios would the court countenance putting itself, or the parties to the trouble and expense with which the admiralty courts in our jurisdiction throw themselves into the process of arrest and sale of ships.

2.2 Insurance

The approach of the Australian Federal Court to insurance of a defendant ship may be a prime example of this perceived excess. By and large, ships worth arresting have liability cover; the ports at which they are arrested have business interruption or wreck removal cover; the steps which the Federal Marshall is empowered to take in terms of sub-Rule 47(2) of the Federal Admiralty Rules are well within the scope of those existing covers; and, actuarially, there are unlikely to be many safer places for a ship than under court arrest. Nonetheless, I

understand that the Federal Marshall insists upon insurance. His insurance may or may not imperil existing covers, by reason of double insurance. Underwriters must surely regard it as their easiest, most lucrative business, with massively inflated premiums for extremely short periods on risk, and zero loss ratios. It is difficult to see why either the owners of the ship (who will bear the loss if it is sold, and the proceeds available to creditors are accordingly diminished), or claimants against the ship (who can, if they perceive risk, insure their contingent interest in the ship) should unilaterally be put to that insurance cost.

It is an approach which contrasts with other forms of custody or preservation of property which is the subject of litigation. A party which obtains a mareva injunction against some land-based machinery (for example), which may have a significantly higher risk profile than a ship under arrest, would not be expected to fund court insurance of the chattel. Parties are expected to take their security, or the subject matter of the litigation if that is what the property represents, as they find it.

Indeed, the intervention of the courts in the name of "preserving" ships sometimes goes beyond insurance. A claimant who injuncts the transfer of real estate (for example) would not be expected to ensure, far less pay for continuing regulatory compliance in respect of the land at issue. Irrespective of whether or not some failure to comply with a regulatory regime might vitiate insurances, the courts in their comparable civil jurisdiction would simply assume that the landowner would continue to meet all due obligations, and would suffer the consequences if it did not. However, when it comes to admiralty arrests the courts seem only too willing to trouble themselves with classification, survey and port bylaw issues, even though owners retain their pre-existing responsibilies in those regards, and even though the court is least qualified or equipped to deal with them. Inevitably the court has to engage consultants to advise it on shipkeeping issues, adding to the costs and delays inherent in the process, when really it should be for the parties to judge what the protection of their respective positions demands.

From the Federal Marshall's standpoint, it is also somewhat difficult to identify any risk that he personally, or the court itself needs to insure against. If the ship did go up in flames (say), then that is simply the litigants' loss: plaintiffs lose the ability to enforce their claims, and owners lose their property. If it sinks at anchor in the fairway to a busy port (for example), the Federal Marshall (who strictly speaking only has custody and not possession of the ship anyway) no doubt has statutory immunities available to officers of the court in discharging their usual duties. Indeed, it might be argued that proactivity of courts personnel in what is fundamentally a formalistic and mechanical custodial task may actually increase exposure: the more "hands on" the approach to arrest and sale, the greater the accountability assumed.

2.3 Crew Issues

The manning of ships is another aspect of ship arrests in respect of which I think the courts are at best inconsistent, and at worst misapprehend the nature of the arrest. In making these assertions, it may be helpful to tie them to some of the more typical scenarios which develop with ships under arrest and their crew.

One is the unhappy circumstance of total abandonment of a ship by owners. Non payment of crew, and a total failure to take any responsibility for them upon arrest of the ship often forms part of the wider collapse of owners' interests which has precipitated creditors' action against the ship in the first place. Some way distant along the spectrum from that scenario are the cases where owners choose to stand and fight to protect their asset, and their ongoing commercial position. Sometimes they will do so without simplifying matters by the provision of a bail bond – at the very least, the ship may remain under arrest for a period of delay between execution of the warrant and the provision of security to enable its release. A third variant, somewhere between these two, arises where a ship is arrested by the creditors not of its solvent owners, but of its insolvent demise charterers – the SPS litigation on both sides of the Tasman is a clear example of this category of case, as might have been the

circumstances of the "O" ships mentioned above had not the Ministry of Fisheries beaten everyone to the punch with detention and eventual forfeiture.

This last category perhaps illustrates best some of the concerns which can arise – although specific comment in relation to the SPS experience in Australia is necessarily limited by the fact that crew claims and related issues are still extant. Nonetheless, the parallel New Zealand litigation, and other not dissimilar cases have thrown up examples of avoidable detriment to all parties.

One issue is whether the court should ever countenance crew on board the ship under arrest, who become litigants against it, remaining on board – at least contrary to the wishes of owners. In the unhappy event of being parties to litigation against a ship, its former crew are nonetheless in a uniquely advantaged position. They have by operation of law a preferred and secured position, namely their maritime lien rights. As was acknowledged by the court in yet another of the SPS decisions in New Zealand in March 1998, *Partenreederei MS "Takitimu" v The Ship "Takitimu" and Others*, unreported, AD No. 882 (Auckland Registry), 23 March 1998, per Giles J, it is simply unnecessary for former crew to remain on board either to assert or protect their rights. Just as a mortgagee (say) would not be allowed to enter into possession or exercise powers adverse to the Marshall's or Registrar's custody; and just as a trade creditor (for example) asserting a retention of title clause would not be permitted to unbolt ship's equipment pending determination of its claims; it seems wrong in principle that seafarers should be permitted to remain on board to try and force acceptance of their claims.

Injury to all creditors is added to insult if such seafarers are then permitted to assert further claims for the period during which they remain on board against the owners' wishes. It seems surprising to this commentator that the courts should do nothing about this category of already preferred creditors in effect ratcheting themselves yet further forward in their claims by what is essentially the self help remedy of a sit-in or occupation of the ship. It is moreover a self help remedy that, to the extent it inflates the seafarers' claims, is adverse to the interests of all other creditors who might reasonably expect even-handed treatment. It seems to have been these issues which lay behind the arguments before the Full Federal Court in *United States Trust Co v Master and Crew of the Ship "Ionian Mariner"* [1997] 909 FCA, although the basic proposition was complicated in that case by issues of representation. The Full Court did at least acknowledge that repatriation should occur (or subsistence should cease) within a reasonable time of the means of repatriation (in the form of an interim distribution of funds) being available.

In fairness, the other, often harsher side of the coin needs also to be recognised. Whatever may be the abstract rights and relative priorities of litigated claims, local courts obviously have limited ability to protect the interests of seafarer claimants, other than in respect of the res arrested within their territorial jurisdiction, and to the extent that such claimants have local representation before the court. Given that individuals' livelihoods (and, one suspects, in respect of certain jurisdictions, their personal well-being and safety) are at issue, it is perhaps unsurprising that any interim doubt is resolved in favour of the seafarers.

However, acquiescence in what I have described as unwarranted resort to the self help remedy should not be the invariable rule, as may perhaps be the case at present. Moreover, in the particular scenario of stranded seafarers, there is some basis for taking issue with Justice Tamberlin's otherwise unexceptional observation that the Marshall (or the Registrar) is not a financier.

There are far too many instances of unpaid crew languishing aboard ships whose fate lies solely in the hands of creditors. This is the first category of case postulated above, and it is hardly surprising that unpaid and sometimes abandoned crew are a by-product of an owners' insolvency. There is however I think both a moral and a legal case for the courts to step in sooner rather than later, and repatriate such seafarers using government funds if need be. It may sometimes be the case that the seafarers do not wish to go, as with crew on board some

of the "O" ships mentioned above, who literally barricaded themselves inside the ships at Lyttelton (albeit that the ships were subject to Ministry of Fisheries detention, not admiralty arrest). Generally however, officers and crew will wish to be provided with the means to return home to their families, and resort to government funding in the short term for this purpose has more to commend it than many other forms of government expenditure. The dollars spent are usually well invested, and secured against the ship under arrest (including, if the ship realises a sufficient sale price, interest on the funds used). They accelerate and often optimise the process of sale, for the benefit of all creditors. They also staunch at least one of the financial wounds which can often continue to bleed through the protracted process of an admiralty arrest and sale. Expressed in terms of the "*Ionian Mariner*" decision, the court ought of its own motion to make the cut off point as early as possible, simply by funding repatriation up front. There used to be statutory recognition of this possibility in our (now repealed) Shipping and Seamen Act 1952, with section 124 of that Act expressly contemplating the expenditure of government funds to bring "distressed" seafarers home.

A final aspect of manning worthy of comment, particularly having regard to the essentially custodial function of the court, concerns the extent to which owners can and should be permitted to continue to manage their ships whilst under arrest, including manning of them. It is not unknown for the court to take upon itself the manning of ships, notwithstanding that owners are ready and willing to do so, usually at less cost than is otherwise achievable.

This can be another area where the intervention of the courts is unnecessary and counterproductive, and where unrealistic expectations abound. A port company, used to having ships lying alongside with a token watchkeeping presence aboard whilst most of the crew are on leave ashore, suddenly notifies the Marshall or the Registrar that optimum manning levels for all sorts of unlikely eventualities are required; crewing agencies seize the chance to promote greater numbers of their personnel than are absolutely necessary; expensive consultants (some even as expensive as lawyers) advance counsels of perfection for the continuing manning and management of the ships; and the court willingly agrees to spend more of the creditors money than is necessary or desirable in what is inherently a situation of diminishing returns.

2.4 Sale

At the risk of relitigating an issue which cropped up in the New Zealand part of the SPS litigation, even the process of sale has provided illustration of an unduly interventionist approach to the process. These were the issues that fell to be considered in the August 1998 judgment mentioned in section 1.4 of this paper above, *Mobil Oil New Zealand Limited v The Ship "Rangiora" and Others*, unreported, AD No. 877 (Auckland Registry), 28 August 1998, per Giles J.

The Registrar at Auckland, who jokingly (but with ample justification) describes himself as having one of the biggest fleets in New Zealand (his registry alone can have up to a dozen ships under arrest at any one time), sought to instruct a local broker to sell the three German-built, Antigua and Barbuda-registered 250-350 TEU feeder container ships arrested in the New Zealand litigation. The broker concerned is an experienced yachtbroker, and has also had some success in selling inshore fishing craft. It was keen to expand its business to such commercial tonnage as occasionally comes on the market in New Zealand from time to time, although up to that point the biggest vessels with which it had been involved were a small LPG tanker, and a de-commissioned Royal New Zealand Navy hydrographic ship (a general cargo ship conversion).

None of the parties to the litigation (ranging from the ship's existing owners to former officers and crew, mortgagees, statutory in rem or trade creditors, interveners, or caveators – it was fair to assume in this case that there were no other interested parties) had confidence that the local broker was the appropriate appointee. Representations were made to the Registrar at Auckland that he should engage established European brokers to effect sales of

the ships. However, through an unfortunate sequence of events, the Registrar had made a commitment to his usual local broker. In the face of such opposition, the Registrar declined to replace the local broker, and instead counsel appeared for him to meet an application to a judge by parties to the litigation that European brokers be used.

Perhaps not surprisingly, given their disparity, the parties to the litigation advanced a number of different propositions. Some focussed on the perceived adequacy (or inadequacy) of the respective candidates, and the appropriate marketing emphasis. Owners advanced the proposition that the Registrar could have no interest independent from the parties to the litigation, so that if all of the parties wanted the matter dealt with in a particular way then there could be no valid reason for not doing so. One of the statutory in rem claimants with not much prospect of recovering against the proceeds of sale (by virtue of its low ranking priority position), but with some broking experience, argued for the opportunity to recoup some of its losses by broking the sale for the benefit of all parties. In response, counsel for the Registrar argued that he was entitled to put in place and use a methodology of sale appropriate not just to these particular ships, but expedient and convenient to him across the board. Essentially, he wanted to establish and operate a standard system, methodology, and brokerage for use in all sales (of which his registry conducts the majority in New Zealand).

Giles J accepted none of these competing assertions in their entirety. Rather, he resolved the matter on the basis of the terms of his order for appraisement and sale, which the Registrar had failed strictly to comply with. Specifically, the Registrar had been directed to consult with the parties before issuing any commission for appraisement and sale, but had not done so – although it did not follow from the judge's finding that he was bound to have done the parties' bidding, merely to hear what they had to say.

It remains the view of this commentator that it is inappropriate for the court to set its administrative agenda above the interests of individual litigants involved with a particular ship under arrest, when undertaking its function of selling the ship. It is also difficult to see what independent interest Marshalls or Registrars are entitled to have, far less give effect to, when all of the parties to the litigation are united in their views as to how their collective interests would be served. Whilst it is unlikely that the Registrar will expose himself to this kind of dispute in future, the case was an unfortunate (and, for the litigants, costly) instance of unnecessary intervention. It was moreover intervention predicated on matters outside the scope of the litigation, and perhaps symptomatic of the courts seeking to take a more proactive stance than justified by the applicable procedural rules.

In summary, all of this leads to the proposition that the courts should endeavour to take the most limited custodial role possible, recognising that it is for the parties to protect their respective positions against the background premise that the ship (or security in lieu of it) isn't going anywhere until all claims are dealt with. Whilst the suggestions made in this paper in respect of repatriation of crew appear to go in the opposite direction, their effect would usually be to simplify and cheapen the process, and they are one of the few instances where proactivity by courts personnel may be justified.

John Gresson
September 1999

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