BENEFICIAL OWNERSHIP OF VESSELS – NAVIGATING THE MAZE LITIGATION ASPECTS

JAMES ALLSOP, SC
SYDNEY

Beneficial Ownership of Ships and Arrest

By James Allsop S.C.

Under the Admiralty Act, 1988 (Cth) (the Act) it is necessary to consider the notion of "ownership" of a ship for a number of reasons, in a number of contexts. The words "owner" and "ownership" are not defined in s.3 of the Act.

Recently, the word "owner" has been considered by Sheppard J in *The Iron Shortland* (1995) 59 FCR 535 in the context of the arrest provisions of the Act. The meaning of the word "owner" in that context is the subject of this paper. Before examining *The Iron Shortland*, the context of the problem should be set.

I propose to concentrate on the position under the Act, though reference is made to the Admiralty Act, 1973 (NZ) (the NZ Act) and the Supreme Court Act, 1981 (the English Act). I attach in appendix 1 the text of the relevant arrest provisions of the three Acts, and the relevant predecessor provision in England, from the Administration of Justice Act, 1956.

Section 4 of the Act deals with proprietary maritime claims and general maritime claims, being the two classes of maritime claim recognised by the Act. Included within the meaning of the phrase "proprietary maritime claim" are claims involving owners or ownership: paras 4(2)(a)(ii) and (b); and note s.33. Likewise, included within the meaning of the phrase "general maritime claim" are claims involving owners or ownership: paras 4(3)(b), (d)(i) and (iii).

Among the provisions of the Act providing for proceedings *in rem* against a ship or other property (see generally Part III, ss.14 to 26) are ss.17, 18 and 19 dealing with the arrest of a ship in relation to a general maritime claim against the owner of the ship (s.17), the arrest of a ship in relation to a general or proprietary maritime claim against the demise charterer of the ship (s.18) and the arrest of a surrogate ship in relation to a general maritime claim against the owner of the surrogate ship (s.19).

The issue as to who is an owner of a ship is central to these arrest provisions of the Act, and, in particular ss.17 and 19.

Applications for arrest and release often come on in court with great urgency. Evidence may have to be prepared in somewhat of a hurry. Although in some circumstances there may be time for careful planning of a swift and decisive legal manoeuvre, quite often, evidence is put together with the utmost dispatch when the ship in question comes within the jurisdiction of a particular admiralty court. Whatever be the availability of preparation time, a clear understanding of the elements to be proved in an arrest is essential for success and essential to avoid damages under s.34 of the Act for unjustified arrest.

Before dealing with ownership, it may be worthwhile to remind oneself of the elements which may have to be the subject of evidence. I will concentrate on ss.17 and 19, they being the sections to which the notion of ownership is most relevant.

Of course, to effect an arrest the application and affidavit must be in accordance with Forms 12 and 13 of the Rules. There is no substantial evidential requirement at this point. However, a challenge may thereafter be made to the arrest warrant or the writ on jurisdictional grounds, or to the underlying claim on the basis of its weakness. References hereafter to the need for evidence presuppose the likelihood of a challenge of some kind.

There are a number of common elements within ss.17 and 19. First, each employs the phrase "relevant person" as defined in s.3: "in relation to a maritime claim means a person would be liable on the claim in a proceeding commenced as an action *in personam*."

The purpose of this definition is to identify the person or persons whose ship may be arrested. Even if a challenge is brought on jurisdictional grounds, it is not necessary to prove the claim against this person in the arrest proceedings. It is enough that the claim as made can be seen as one which leads to the liability of the relevant person on the hypothesis of its success: *The Owners of MV Iran*

Amanat v *KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130, applying *The St. Elefterio* [1957] P 179, 185-6 and *The Moschanthy* [1971] 1 Lloyd's Rep 37, 42; and see generally Australian Law Reform Commission Report No. 33 (ALRCR), paras. 118 and 124.

However, if a motion is brought alleging that the arrest should be discharged because of the weakness of the claim, the mere existence of the claim on the writ, sufficiently identified, may not be sufficient to ward off such a procedural attack. In these circumstances, as a matter of forensic defence, it will be necessary to be able to meet this challenge as one would in any summary dismissal proceedings. The Full Court of the Federal Court in *The Iran Amanat* (1997) 75 FCR 78 at 85 observed that when hearing an application for release of a vessel from arrest based on the weakness of the underlying claim the relevant question is whether there is a serious question to be tried on the plaintiff's claim. Sometimes, motions are brought in terms of striking out the underlying claim and sometimes they are brought for the release of the vessel or release of the security on the basis that the arrest should be set aside based on the weakness of the claim. Tamberlin J noted the separate nature of the tests in these circumstances in *Sun Lucky Co.* v. *Mu Gung Wha* [1999] FCA 220. While the test in *General Steel Industries* v *Commissioner for Railways* (1964) 112 CLR 125 is theoretically different from that set out by the Full Court in *The Iran Amanat* above, in practice, they will be very much the same. If a challenge is made to the arrest because of the weakness of the claim, evidence will probably have to be brought by the plaintiff and legal argument deployed to substantiate the claim, at least at a prima facie level. That is as far as the court should go in this limited role: *Sun Lucky*.

Secondly, where one has a general maritime claim concerning a ship and a relevant person (in the sense discussed above) who would be liable on the claim if it were to be made out, one can arrest either the ship in question (that is concerning[1] which the claim is made) under s.17 or another ship (the surrogate ship), under s.19[2]

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[1] As to the word "concerning" see Lord Diplock in *The Escherscheim* [1976] 1 WLR 430 dealing with the phrase "in connection".

[2] One must be careful using the phrase "surrogate ship" in respect of s.19. It appears in the heading above the section, but the phrase is not used in s.19, although s.19 is referred to in the definition of the phrase "surrogate ship" in s.3(6). See *Laemthong International Lines* v. *BPS Shipping* (1997) 190 CLR 181, where the importance of the conclusion that the definition of the phrase "surrogate ship" in s.3(6) does not control the operations of s.19 is explained: that, for s.19 to apply, there need not be a first ship against which there could be an in rem claim, that is there need not be a wrongdoing first ship. In *Laemthong International* the claim for the purposes of s.19(a) was by the disponent owner against a voyage charterer of the (first) vessel. So there was, and could be, no "first ship" to arrest.

In the operation of each of s.17 and 19 there is a two step process under paragraphs (a) and (b). The first step is assessed at the time the cause of action arose. This temporal element should not be glossed over. Careful thought should be given to the nature of the cause or causes of action underlying the maritime claim and when it or they arose. Recourse may need to be had to the law on cognate areas such as service *ex juris* and other private international law fields. The identification of when any cause of action arose governs the relevance of evidence about the next matter: whether, at that time, the relevant person was the owner, charterer, or in possession or in control of the ship or property (for ss.17 and 18) or the first-mentioned ship (for s.19).

"Charterer" means not only demise charterer, but it includes time charterers: *The Span Terza* [1982] 1 Lloyd's Rep 225 and voyage charterers: *Laemthong International Lines* v. *BPS Shipping.* It has also been held to include slot charters: *The Tychi* [1999] 2 Lloyd's Rep 11[3].

"Owner" has a meaning to which I shall come.

The second step is assessed at a time entirely within the control of the plaintiff - the commencement of the proceedings. At this time, the relevant person proven for paragraph (a) must be the owner of the ship or property (for s.17) or the demise charterer of the ship (for s.18) or the owner of the second ship (for s.19).

Before coming to discuss the meaning of "owner" one must bear in mind some essential forensic considerations. The matters which need to be shown in applications under ss.17, 18 or 19 are facts and states of affairs upon which jurisdiction depends. If jurisdiction is challenged, that challenge can only be resisted by establishing (if it requires evidence to establish) the relevant jurisdictional facts, on the balance of probability in the light of all the evidence: *Owners of Shin Kobe Maru v Empire Shipping Co.* (1994) 181 CLR 404, 426. From the nature of the task referred to in *The Shin Kobe Maru* at p.426: that is establishing the necessary facts as a preliminary issue on the balance of

[3] See the note at 116 LQR 36.

probabilities, the onus is on the plaintiff. Also, to this effect see *The Aventicum* [1978] Lloyd's Rep 184, 186 and the Full Court in *The Ship Zoya* (1997) 79 FCR 71, 75. This is the position in Australia. It appears to be the position in England: *The Aventicum* [1978] 1 Lloyd's Rep 184. The position in New Zealand may be somewhat different.[4]

To summarise for ss.17 and 19, the following elements exist.

	s.17		**s.19**
1.	That there is a claim which is a general maritime claim.	1.	The same.
2.	That the claim is concerning a ship or other property.	2.	The same in respect of the first ship
3.	That a particular person would be liable on the claim on the assumption that the claim is successful: the relevant person.	3.	The same.
4.	When the cause(s) of action arose the relevant person was: • owner • charter • in possession • in control of the ship or property.	4.	The same in respect of the first ship.
5.	When the proceedings were commenced the same relevant person was the owner of the ship or property.	5.	The same is respect of the second ship.

[4] There are a number of New Zealand authorities which cast upon the owner or party who seeks to set aside the arrest, the burden of establishing that the plaintiff had no arguable case for the arrest: *Marine Expeditions Inc.* v *The Ship Akademik Shokalskiy* [1995] 2 NZLR 743 and *Reef Shipping Co.* v *The Ship Fua Kavenga* [1987] 1 NZLR 550. The Court of Appeal appeared to reject this approach (at least in respect of jurisdictional facts concerning ownership and the like) in *Baltic Shipping Co.* v *Pegasus Lines SA (The Samarkand)* [1996] 3 NZLR 641 at 648, where, in discussing the need to prove ownership, rather than just deal with it on the pleadings, McKay and Henry JJ referred to the views of the High Court in *The Shin Kobe Maru* (see above). See also McGechan J at 655-56. Doogue J in *Sovryblot* v *The Ship Efim Gorbenko* [1996] 2 NZLR 727 distinguished the *Samarkand*. Nevertheless the question of ownership was decided on the merits on the evidence, though with the challenging party bearing the onus. Giles J in *Mobil Oil NZ* v *The Ship Rangiora*, Auckland, 14 July 1998 and Laurenson J in *Vostok Shipping* v *The Ship Kapitan Lomaeo* Auckland, 10 September 1998 appear to agree with Doogue J that the onus is upon the owner or challenger to prove that necessary jurisdictional facts are unarguably absent. See generally 1999 New Zealand Law Review pp.393-397.

As to the 1. to 3. above, there is no need to prove the liability of the relevant person. What is required, at least initially, is that the claim be sufficiently precise to satisfy these matters: i.e. that the claim exists which will lead to the liability of the relevant person, if successful. However, should there be a challenge to the claim based on its weakness, whether by strikeout or for release of the vessel, sufficient evidence should be available underpinning it to establish, on a prima facie basis, the nature of the claim, that it is a general maritime claim for the purposes of the Act and that the person who will liable upon it, if it is successful, is the person identified. This kind of evidence is likely to be within the ken of the plaintiff. However, as referred to above, some care and thought should be given to identifying the cause of action and its date of commencement, because it is in respect of that date that 4. must be proved.

Both 4. and 5. are facts which must be proved, on the balance of possibilities: the jurisdictional facts referred to in *The Shin Kobe Maru*. It was held by the Full Court of the Federal Court in Australia in *The Ship Zoya* (1997) 79 FCR 71 that the matter before the Court, being a notice of motion to set aside the writ of arrest on the grounds of lack of jurisdiction, was final in character. This being so, it was held that the evidence to be adduced must be in accordance with strict rules of evidence, without the leeway given by the rules in an interlocutory hearing.[5]

On the approach of the Full Court in *The Ship Zoya*, the evidence of 4. and 5. must be gathered with an eye to its admissibility on a final basis. As to 1. to 3. these will probably be argued as an interlocutory matter, since they only become relevant as underlying facts in a species of summary disposal. In any event they are matters within the ken of the plaintiff and little trouble should be encountered in proving them, at least on a prima facie basis. The matters in 4 and 5 might well be a different kettle of fish.

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[5] I do not propose to discuss this case. However, there may or may not be ways around it (to obtain an interlocutory hearing) e.g. by filing an in personam writ and having it consolidated with the in rem writ. In those circumsances, though jurisdiction for the in personam claim may be doubtful and service not yet effected, the dismissal of the arrest writ, if seen as security for the in personam writ, may be seen as not to deal with all the rights of the parties. This approach would rely upon the views of the House of Lords recently expressed in *Republic of India* v *India Steamship Co. (The Indian Grace)* [1998] AC 878 to the effect that the fiction of the separate personality of the ship can be looked through for forensic and procedural purposes. One then might be able to say that a dismissal of the arrest is not of itself final in the sense understood in Australia in such cases as Carr v. FCA (1981) 147 CLR 246. I note that in New Zealand courts approach the arrest as interlocutory eg. *Baltic Shipping* v *Pegasus Lines* [1996] 3 NZLR 641 at 656.

What is an "owner"?

The English and New Zealand provisions (s.21(4) of the English Act and s.5(2)(b) of the NZ Act) draw a distinction between "owner" of the first ship for the first limb of the test, at the time when the cause of action arose, and the "beneficial owner" of the ship at the time the action was brought.

In England, the word "owner" where it first appears has been construed by the Court of Appeal to mean only registered owner: *The Evpo Agnic* [1988] 1 WLR 1090 (leave to appeal to the House of Lords being dismissed [1989] 1 WLR 127). It appears that the point has not been reconsidered in England. However, in 1993 the Singapore Court of Appeal in *The Ohm Mariana ex Peony* [1993] 2 SLR 698, dealing with legislation relevantly the same as the English Act, expressly disagreed with, and declined to follow, *The Evpo Agnic*. Thean J on behalf of the Court said at p.711 that "owner" means someone vested with such ownership as to have the right to sell, dispose of, or alienate the ship, who may or may not be the legal owner or registered owner.

The phrase "beneficial owner" where it appears in the second limb of the English Act and like Acts has been examined in a number of cases. Before the introduction in 1981 in the English Act of demise charterer arrest in s.21(4)(i), there was a difference of authority as to whether the phrase "beneficial owner" in s.3(4) of the Administration of Justice Act, 1956, or perhaps more accurately, the phrase "beneficially owned as respects all the shares therein", included demise charterer. Hewson J in *The St. Merriel* [1963] P.247, Goff J in *I Congresso Del Partido* [1978] QB 500, Sheen J in *The Father Thames* [1979] 2 Lloyd's Rep 364 and the Singapore Court of Appeal in *The Permina 3001* [1979] 1 Lloyd's Rep 327 were of the view that it did not. Brandon J in *The Andrea Ursula* [1973] QB 265 was of the view that it did. In the present context of the structure of all the Acts which include demise charterer arrest: s.21(4)(i) of the English Act, s.18 of the Act, and s.5(2)(b)(i) and (ii) of the NZ Act (the NZ Act extending to arrest of a surrogate ship which is on charter by demise; cf. article 3(4) of the 1952 Convention), it appears clear that "owner" or "beneficial owner" is not intended to encompass demise charterer: *The Union Darwin* [1983] HKLR 248; *The Loon Chong* [1982] 1 MLJ 212; and *Colombo Drydocks* v *The Ship Om Al-Quora* [1990] 1 NZLR 608.

Beneficial ownership was said by Goff J in *I Congresso Del Partido* to refer to cases of equitable ownership. It was not a phrase which entitled a court to lift the corporate veil in circumstances where the law would not otherwise allow that: *The Aventicum* [1978] 1 Lloyd's Rep 184; *The Maritime Trader* [1981] 2 Lloyd's Rep 153; and *The Saudi Prince* [1982] Lloyd's Rep 255. I will return to this question of "lifting" or "piercing" the corporate "veil."

The Act does not use the phrase "beneficial owner" in the second limb. It repeats the word "owner". For an examination of its meaning one turns to *The Iron Shortland*.

In *The Iron Shortland* Sheppard J held that "owner" where it appears in s.19 means or includes beneficial or real or true owner of the ship who or which may or may not be the registered owner[6]. The plaintiff claimed to be unpaid for repairs performed in Jahor between December 1994 and January 1995 on a ship called the *"Newcastle Pride"*. The registered owner of the "*Newcastle Pride*" (the first ship for the purposes of s.19) was a company called Newcastle Pride Co. Inc. which was a wholly owned subsidiary of a Netherlands Antilles company, Capeco Maritime NV (Capeco Maritime). The registered owner of the *"Iron Shortland"* was another Netherlands Antilles, Everbird Corporation NV (Everbird) which was also a wholly owned subsidiary of Capeco Maritime. The registered owner of the *"Iron Shortland"* had been BHP Transport Pty Ltd (BHPT). On 9 February 1992, BHPT agreed to sell the *"Iron Shortland"* to Everbird, delivering her at sea on 11 March 1992. By documentation drawn up in February 1992, Everbird bareboat chartered the ship to another Netherlands Antilles company, Curstein Corporation NV (Curstein) which was a wholly owned subsidiary of Everbird, and Curstein bareboat chartered the vessel to BHPT, delivery under that bareboat charter also taking place on 11 March 1992. None of these transactions was said to be a sham. The ship had been, and had continued to be, used by BHPT on the Port Hedland to east coast of Australia run, carrying iron ore.

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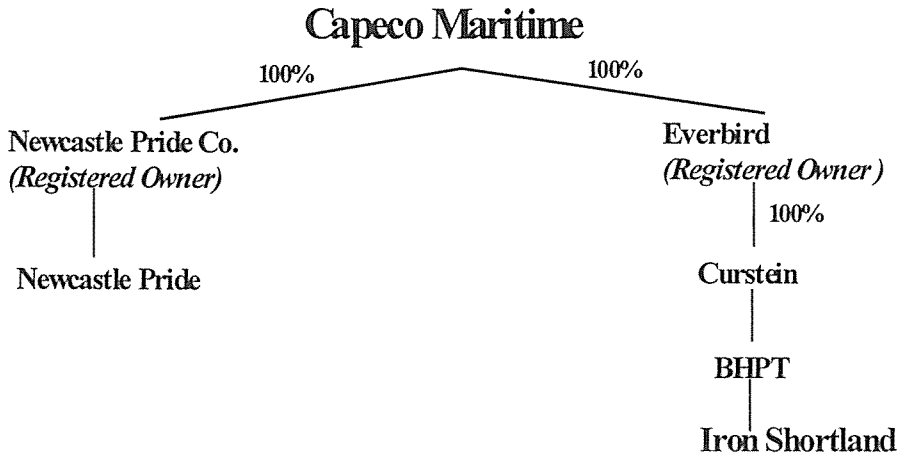
[6] The case has been followed: *Nautilus Australia* v *The Ship Rossel Current*, [1999] QSC 39, Ambrose J, Queensland Supreme Court 9/3/99 in a s.17 arrest; *Marine Trade Consulting* v *The Owners of the Ship Kareliya* Federal Court 5/9/96 in a s.17 arrest; *The Ship Zoya* [1997] FCA 1162; 79 FCR 71 in a s.19 arrest; and see also *Swards* v *The Owners of the Ship Pyungwha* Tas. S.Ct. 22/10/96, Slicer J.

The structure of the ownership was therefore as set out below:



The general maritime claim was in respect of repair and equipping of and goods, materials or services supplied to the *"Newcastle Pride"* (see paras 4(3)) (m) and (o) of the Act).

The relevant person was said to be the parent, Capeco Maritime. It was said that Capeco Maritime was the beneficial owner of both vessels (the *"Newcastle Pride"* and the *"Iron Shortland"*) for the purpose of the first and second limbs of s .19.

The *"Iron Shortland"* was arrested and BHPT sought its release, the setting aside of the arrest warrant and damages under s.34 of the Act. No one representing the owners, whoever that may have been, appeared.

Sheppard J examined many of the authorities referred to above, the judgments of the High Court and the Federal Court in *The Shin Kobe Maru* (1994) 181 CLR 404, (1991) 32 FCR 78 and (1992) 38 FCR 227 and the relevant parts of the ACLRCR. In *The Shin Kobe Maru* the word "ownership" in s.4(2) was held to include "beneficial ownership". Further, assisted by the ALRCR Sheppard J found that word "owner" extends beyond registered owner to include beneficial or real or true owner, but that (as with the English phrase) there was no warrant in the Act to "lift the corporate veil" beyond steps which a court would, in any event, take under the general law to do so.

It is not entirely clear what the words "beneficial", "true" or "real" owner mean. They obviously encompass the notion well known to English based legal systems of equitable ownership, but they are not restricted to that.

It should not be forgotten that in certain circumstances e.g. if fraud or subterfuge is an explanation for an ownership structure, the court can and will look through the corporate veil to find the owner in truth: *The Maritime Trader* [1981] 2 Lloyd's Rep 153. I will deal with this further below. However, absent considerations such as this, one ship companies and wholly owned subsidiaries are both common and proper. The parent is not the owner, or beneficial owner, or true, or real, owner of its subsidiary's ship merely because of a 100% ownership of the shares in the subsidiary company. What more is required? An examination of the facts in the *Iron Shortland* gives some assistance in coming to an answer.

There was indeed evidence that notwithstanding the subsidiary structure, Capeco Maritime was the real owner of the *"Newcastle Pride"*. First, there was a management agreement in which Capeco Maritime (said to be as owner) appointed a party to be the ship manager for the *"Newcastle Pride"*. The agreement was signed by a director of Capeco Maritime on its behalf.

In connection with the work and its payment the ship manager had made various statements about the "owners" which inferentially referred to Capeco Maritime. There was a "placing memorandum" created in connection with the issue of shares in Capeco Maritime which said that it, Capeco Maritime, intended to engage in the business of acquiring and operating vessels through its wholly owned operating subsidiaries. Various expressions were used in the placing memorandum about Capeco Maritime owning and operating vessels. Further, and importantly, the P&I cover certificate of entry referred to the "Capeco Group of Companies" as the owners and the Newcastle Pride Co as "disponent owners".

Sheppard J found that the evidence established that Capeco Maritime was the "owner" of the "*Newcastle Pride*". His Honour particularly relied upon the ship management agreement and the insurance certificate. Of particular importance, it would appear, was the description in the insurance certificate of the registered owner, Newcastle Pride Co. as merely the "disponent owner" - generally understood to be someone who controls the commercial operation of the ship - Sullivan *The Marine Encyclopaedic Dictionary* (3rd Ed 1992) and cf *O/Y Wassa Steamship Co and NV Stoomschip "Hannah"* v *Newspaper Pulp & Wood Export Limited* (1949) 82 Ll L Rep 936.

The evidence as to the ownership of the *"Iron Shortland"* was less clear. First, a *Jones* v *Dunkel* submission was made against BHPT (which did not call any evidence). This submission was rejected. However, Sheppard J also referred to the fact that no one appeared on behalf of the owner. It did appear that either Capeco Maritime or Everbird owned the vessel and that in all likelihood the proceedings had come to their attention. His Honour made some important comments about the absence of anyone on behalf of the owners. He said at pp.554-55:

> "There is no appearance by Everbird and there is no appearance by Capeco Maritime. Yet, plainly, the vessel which has been arrested is owned by one or other of them. Furthermore, Everbird is controlled by Capeco Maritime which owns 100% of its shares. What was not discussed with counsel during the argument was the question whether I could the more readily draw inferences adverse to Capeco Maritime because no appearance had been entered in the matter by it or by its subsidiary and no evidence had been led by or on its behalf. It seems unlikely, bearing in mind, that the vessel is owned by Capeco Maritime or its subsidiary, that the proceedings in relation to the vessel have not come to the notice of Capeco Maritime. It appears that a deliberate decision has been made not to participate in the proceedings. That is an inference which I draw."

His Honour continued at p.558:

> "If there had been any evidence at all of beneficial ownership by Capeco Maritime I would not have hesitated to find the issue of ownership favourable to the plaintiff. For reasons earlier mentioned, I would have had every confidence in doing so because of the absence from the case of both Capeco Maritime and Everbird. But, regrettably though it may be from the plaintiff's point of view, I do not regard any of the material as establishing or tending to establish beneficial ownership by Capeco Maritime..."[7]

[7] One lesson from this is to attempt to bring to the attention of those who form the class of possible owners the fact of the arrest

I will not set out here all of the matters adduced in evidence before Sheppard J and referred to at pp.555-56 about the ownership of the *"Iron Shortland"*. Most were ambiguous and often embodied commercial language entirely consistent with the real use of subsidiaries, even if "special purpose" subsidiaries. Much of the evidence was said to be consistent with Everbird being the owner rather than Capeco Maritime.

The benefits to arresting parties from the meaning given to the word "owner" may be more apparent that real.

The notion of ownership is of a bundle of innumerable rights of dominion over property, including rights of exclusive enjoyment, of destruction, of alienation, of alteration. It is a bundle of rights inextricably linked, although some ownership rights may be detached: one can give possession or use, one can create security interests or one can carve out a retention of title clause. Further, ownership rights may be split between legal and beneficial ownership. As to ownership see generally Halsbury (4th Ed) Vol. 35 paras 1227, 1228.

Ultimately, the notion of ownership is a question of dominion carrying with it the right to sell or otherwise dispose of the vessel, subject to intervening rights already created dealing with the use and possession of the vessel.

The task of proving ownership of a moveable chattel such as a ship, in respect of which those controlling it can choose the situs of registration and the legal structure in which it is held, will often carry with it the need to consider, and perhaps prove, foreign law. For instance, if a vessel is on a foreign register, but on the facts known, the foreign law of that or another relevant country will hold the ownership in a different entity, it may be necessary to plead and prove foreign law. Careful thought should be given to the need for foreign law and, if it is needed, the proper scope of its framing: *National Mutual Holdings* v *Sentry Corporation* (1989) 87 ALR 539 and *Allstate Life Insurance Co* v *ANZ* (1996) 64 FCR 79.

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and the proceedings to make this approach available.

The conception of ownership was not analysed by Sheppard J beyond saying "beneficial" or "real" or "true". Thean J in *The Ohm Mariana ex Peony* referred to the right to sell, dispose of or alienate the ship. See also to similar effect *The Permina 3001*[1979] 1 Lloyd's Rep 327, 329.

One must be careful of any sense of new freedom given by *The Iron Shortland*. If an ownership structure is not a sham, or cannot be proved to be a sham, and if the subsidiary is a real company and the registration and its name is real, there may only be limited scope for proving that someone else, the controlling parent "really" or "truly" owns the ship. The evidence must exist beyond matters consistent with a parent's interest in, and capacity to control the property owned by, a 100% subsidiary. The evidence must be capable of basing an inference that a party, not the registered owner, not only controls it or possesses it (these facts may be relevant, though insufficient, to prove ownership), but that this other party has the rights of ownership and dominion to sell, dispose of or alienate the vessel, other than by the controlling interest in the shareholding of the subsidiary. Commercial expressions of control are often made in terms dismissive of the niceties of legal structure, but very often those expressions can be understood as denoting parental control, rather than parental ownership. How good, one should ask, is the evidence to arrest based on ownership? One way of testing the matter might be to assume that the evidence collected was the evidence in a dispute between the liquidators of the parent and the subsidiary (each of which has, it is assumed, different creditors) as to who was entitled (that is whose creditors were entitled) to the proceeds of the sale of the vessel. What is being sought to be proved is ownership of the ship, not merely commercial control or direct or indirect parental interest.

Having said that, it is very dangerous for owners to structure their affairs such that people undertake dominion or control over the ship without making clear in what capacity they are acting. The words of Sheppard J as to his approach if someone representing the ownership class does not turn up should ring in an owner's ear if it is unwilling to or does not desire to submit to the jurisdiction to defend the arrest.

If it can be shown (and it is important to do so) that the owner or those forming the class of possible owners has or have been given notice of the hearing and if it or they chooses or choose not to attend, the court will be astute to draw inferences against the relevant person. So, there is some hope and encouragement to claimants if the owner does not show up; but, care should be exercised to avoid the risk of s.34 damages by marshalling as much evidence as possible about ownership. The evidence collected should be critically analysed to ascertain whether any of it goes so far as to prove the kinds of rights referred to by Thean J in *The Ohm Mariana*: the right to sell, dispose of and alienate, not just the right to control its use and the right of possession.

The existence of a "creature" subsidiary and its participation in a non sham transaction or ownership will not necessarily be fatal to ownership resting in a parent. Loan and trust arrangements can live side by side in the one body of facts: *Quistclose Investments* v *Rolls Razor* [1970] AC 567. Equally, A may own the shares in B, and B may be the registered owner of the ship, but it may be that B*'s* rights are limited to mere nominee ownership. This could occur in a number of many ways, e.g. a resulting trust of the purchase moneys if proper loan accounting has not been put in place, or evidence of such control or possession together with sufficient admissions about ownership to raise an inference that the ship has been in effect sold.

Also, unless *The Ship Zoya* is reversed or qualified, a plaintiff in Australia will have to prove matters of ownership on a final basis, if ownership is put in issue in a challenge to the arrest.

What cases such as *The Iron Shortland* do is open up for exploration and debate the general law on what has been often called "lifting the corporate veil" and its relationship wit the less restricted meaning of the word "owner".

First, one cannot say that a company is a sham if it has been set up. While a company is a legal fiction: *Sutton's Hospital Case* (1612) 10 Co Rep 1(a) 32 per Coke J and *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 171 per Brennan J, it is a fiction which has been recognised by legislatures and courts: *Salomon's Case*. Once acts are taken to register and set up a

company, which are real acts involving public authorities, the company itself cannot be labelled a "sham": *Peate v FCT* (1964) 111 CLR 443, 480.

Secondly, a transaction may be a "sham" – that is, something that is intended to be mistaken for something else or that is not really what it purports to be: *Sharrment Pty Ltd v Official Trustee* (1988) 18 FCR 449, 453-8; *Re State Public Services Federation* (1993) 178 CLR 249. A sham will often be part of some fraud to disguise the reality of what is occurring from those whom it is hoped will not perceive the reality.

Thirdly, sometimes, a corporate form will be used to avoid an existing legal liability or duty. In these circumstances, courts have said that they will look behind the corporate entity: *Gilford Motor Co. v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832. In *Gilford* a corporate form was used in an attempt to circumvent a restraint of trade clause. However, there is no legal principle that the incorporation and use of a company to avoid a liability will, of itself, entitle the court to disregard the company set up: *ICT Pty Ltd v Seacontainers* (1995) 39 NSWLR 640, 654-57 (NSW Court of Appeal). See also *Pioneer Concrete v Yelnah Pty Limited* (1986) 5 NSWLR 254 (Young J).

The finding of a principled basis for ignoring or putting to one side the separate corporate form or its consequences still lacks a clear foundation in our jurisprudence: Ford *Principles of Corporations Law*, 9th edition, p.129. This was illustrated by the discussion by the Court of Appeal in New South Wales in *ICT v Seacontainers* at 654-57. While themselves eschewing the use of epithets such as "sham" or "device" their Honours said that nothing they said should be taken as a sanction against "colourable evasion" of contractual liabilities.

The cases and circumstances referred to above reflect a willingness in the courts to intervene in circumstances where there is perceived to be conduct which is worthy of criticism, generally because it displays a party seeking to avoid an obligation which is presently existing in some fashion which can be given a label such as "colourable" or "unconscionable" or "sharp" or "fraudulent". If evidence of this sort of behaviour is available, as was said in *The Maritime Trader,* even in England where

"owner", in the first limb, means registered owner, the courts will look behind conduct placing a party in the position of a registered owner if that conduct is part of a fraud.

Much greater problems arise for the party who wishes to "lift the corporate veil" of a structure set up in advance of obligations being undertaken and not by way of any fraudulent or deceptive conduct. One avenue, which formed the basis for the preferred interpretation of *Gilford Motor Co.* by the New South Wales Court of Appeal in *ICT v Seacontainers* at p.157, is to say that the subsidiary is the agent of the parent/principal. It is plain that a parent's control over its subsidiary does not, of itself, justify treating acts of the subsidiary as acts of the parent. This was the whole argument in *Salomon's Case*. See also *Gramophone and Typewriter v Stanley* [1908] 2 KB 89; and see *Dennis Willcox v FCT* (1988) 79 ALR 267 at 272-74. However, in some circumstances it will be open to say that, while the subsidiary is not a sham, it was intended to act as a nominee or agent for the parent, with the result that its property is owned as nominee or trustee for the parent and its business is really that of the parent. The making good of these conclusions in any given circumstance will rest on developing an argument out of cases such as *Re FG (Films) Ltd* [1953] 1 WLR 483; *Firestone Tyre and Rubber Co. Ltd v Lewellin* [1957] 1 WLR 464; *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116 and *DHN Food Distributors v Tower Hamlets LBC* [1976] 1 WLR 852.

These cases throw up the following sorts of factual questions to be analysed to see whether the conclusion can be drawn that the parent is really the principal and the subsidiary is really the agent: Does the subsidiary ever bring profits to account for itself? What are the decision making procedures? Does anyone ever decide anything within, as opposed to, for, the subsidiary? Does the subsidiary have any funds? Is the parent in constant control of the subsidiary's day to day affairs?

Whatever conclusion is sought to be drawn about questions such as these, there is a real debate about the true scope of these cases. *Smith, Stone & Knight* has been followed in Australia: *Hotel Terrigal v Latec Investments [1969]* 1 NSWR 676 and *Spreag v. Paeson* (1990) 94 ALR 679, though its limits have been questioned: *Dennis Willcox v FCT* (1988) 79 ALR 267. Also, the extent of the *DHN Case*

has also been questioned: *Pioneer Concrete Services v Yelnah* (1986) 5 NSWLR 254; *State Bank of Victoria v Parry* (1990) 2 ACSR 15, 32; *Woolfson v Strathclyde Regional Council* [1978] SC 90 (HL); *Briggs v James Hardie* (1989) 16 NSWLR 549; and see generally Ford op cit pp. 122ff; and 1997 Cambridge Law Journal 284.

Rogers AJA in *Briggs* accepted the propositions, first, that the potential to control the subsidiary and the exercise in fact of control of the subsidiary is each insufficient to conclude that the subsidiary's acts are acts of the parent and, secondly, that the statement that the corporate veil may be lifted where one company exercises complete dominion and control over another is too simplistic. See also *State Bank of Victoria v Parry* (1990) 2 ACSR 15, 32.

Thus, these general law principles which might lead to the conclusion that the ownership of A is "really" or "truly" the ownership of B are replete with difficulty and have been, in recent times, construed narrowly by the courts, at least in Australia.

One can say, perhaps, that in searching for the "real" or "true" owner as opposed to the registered owner one needs to look for at least the following kinds of factors, which may or may not be sufficient to lead to the conclusion that a party other than the registered owner really has the right to dispose of, alienate, that is "own" the property:

1. There may be admissions; though one must recognise the inherent ambiguity of many commercial expressions in this area. People often say: "I am running a business", when in fact that person runs it through a subsidiary.
2. What is the accounting of the various companies? Does the subsidiary ever produce accounts of its own or, is the business accounted for as part of the business of the parent?
3. Has the subsidiary any infrastructure, employees, assets?
4. Does the subsidiary's board ever meet, other than for statutory purposes?
5. Who makes operational decisions? In what capacity?
6. What level of formality is there in the legal relationship between the parent and subsidiary?

7. Who is held out to the world as owner e.g. as in *The Iron Shortland*, who is the insured under any relevant policy?
8. Who entered contracts in relation to any business?
9. When was the ownership structure set up in relation to the incurring of the liability in question?
10. Is, at any relevant time, or, was the group in financial difficulty?
11. Is there any evidence that the group is otherwise seeking to evade its liabilities?

From these kinds of matters (there may be more) a fabric may be able to be woven based on one or more of the strands of principle in the cases referred to above, such that it can be said that behind the registered owner lies the "true" or "real" owner.

In conclusion, it is perhaps worth reminding oneself of the facts and results of some of the "lifting the veil" cases in the admiralty context . The following is not intended to be exhaustive, but it gives some illustration of the similarity between the search for the "real" or "true" or "beneficial" owner and the task involved when parties seek to "lift the corporate veil".

In *The Aventicum* [1976] 1 Lloyd's Rep 184 Slynn J said that in a case where there was a suggestion of trusteeship or nominee holding there was no doubt that the Court could investigate the notion of ownership: p.187. However, while a complex arrangement of subsidiary companies had been employed and while there had been a sale of the vessel after the damage was caused to the cargo and before the proceedings were commenced, there was no evidence that it could be said that the ultimate owners of the ship after the sale were the same persons as those who owned the vessel before. It was a case in which there was no positive evidence produced to draw any conclusions contrary to the legal effect of corporate control through subsidiaries.

In *The Enfield* [1982] 2 MLJ 106 (Singapore Court of Appeal) the sale of the vessel was described as a "device and a sham designed to defraud claimants such as the respondents". The evidence showed that the purchaser of the vessel did not "carry the true face of a corporate bona fide purchaser". It was found that one man owned all three relevant companies and manipulated them. His mother and

wife were company officers. There was evidence that he told the captain of the vessel in question that the company which then owned the ship was a paper company and he intended to transfer it to another company. The only apparently independent (in the sense of not being related by blood or marriage) officer of the group was held to have a nominal role. It was found that the man in question controlled all three companies and that the vessel was beneficially owned by him. Further, there had been no delivery of the vessel after the sale; the vendor's name remained on mate's receipts issued after the sale; the bill of sale which was "allegedly" executed at a certain date was not notarialised in the place one would expect it to be; and, finally, and rather surprisingly, a second bill of sale was executed after the proceedings were on foot and after the vessel (presumably after its release from arrest upon security being proferred) had sunk after a collision.

In *The Maritime Trader* [1981] 2 Lloyd's Rep 153 Sheen J found on the evidence that there was no device or sham designed to defraud people such as the claimants and that the evidence did not raise a prima face case that the vessel had been sold in order that it would not be available as security. In these circumstances, he was not prepared to go behind the subsidiary structure.

In *The Saudi Prince* [1982] 2 Lloyd's Rep 255 Sheen J found that the person who owned the vessel at the time of the damage was the beneficial owner of it at the time of the institution of proceedings, notwithstanding the fact that he had sold the vessel to a company of which he said he owned 80% of the shares while the remaining 20% he said were held equally by his son and daughter. Saudi Arabian law was relevant in that there was no more than an unincorporated association of members until the articles of association of the purchaser company had been published in an official gazette. The articles of association were not so published until after the issue of the writ. Sheen J was also not convinced of the evidence that the children had paid cash for their shares, and, on the balance of probabilities he found that the shares were held by them as nominees merely for the father and that this had all been done in order to divest himself of shares in his name. On these factual conclusions, beneficial ownership of the vessel remained with the man in question.

In *The Asean Promoter* [1982] 2 MLJ 108 the court applied *Smith, Stone & Knight* v *Birmingham*

Corporation. There were three relevant companies. A $2 company which was the registered owner of the vessel and which was managed by a management company with assets of over $3 million dollars. The third company was the parent of both. After an analysis of the balance sheets of the registered owner and management company and an appreciation of the fact that all three companies had common directorships, the court concluded that the business of the running of the ship was in fact conducted by the manager. It was held that the registered owner was so undercapitalised that it could not carry on an independent existence. This made the management company the relevant person in respect of the claim. (It should be noted that there is no real reason why a $2 company cannot carry on a business, if it is funded by someone, for instance, the parent. However, it will be important to understand how such funding is accounted for, and indeed, that it is accounted for in some fashion. If the $2 company does not produce accounts or does not produce accounts which indicate the borrowing of moneys as liabilities and the bringing to account of vessels as assets, it may be illustrative of the fact that it is a mere nominee company and that the funds used from the parent to run the operation are not loan funds but the parent's own funds running the parent's own business.) Although the conclusion was drawn in *The Asean Promoter* that the management company could be equated with the registered owner in respect of being the relevant person, there was insufficient evidence to draw a conclusion that the holding company was in fact the beneficial owner of the vessel by reference merely to the subsidiary relationship.

In *The Loon Chong* [1982] 1 MLJ 212 the Full Court of the Malaysian Full Court refused on the evidence to find that the structure of a bareboat financing arrangement should be ignored. Hong Kong law was put in evidence that the bareboat lease financing arrangement was an equivalent to hire purchase in which the ownership in the vessel was with the financier, the owner, the demise charterer being the party financial – in a meaningful sense the "real" commercial owner or perhaps owner for accounting purposes, but (like the domestic or commercial hirer under a hire purchase agreement) not in law the owner. Accordingly, the court held that the demise charterer was not the owner.

Each matter will turn on its facts. Reliable guidance from principle is rare. The task is a daunting one without evidence of fraud or sharp practice.

Appendix 1

Administration of Justice Act, 1956, s.3(4)

"In the case of any such claim as is mentioned in paragraphs (d) to (r) of section 1(1) of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court....may... be invoked by an action in rem against –

(a) that ship, if at the time when the action is brought, it is beneficially owned as respects all the shares therein by that person;

(b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."

Supreme Court Act, 1981, s.21(4)

"(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where –

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against -

(i) that ship, if at the time when the action is brought, the relevant person is either the beneficial owner of that ship as respect all the shares in it or the charterer of it under a charter by demise.

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respect all the shares in it."

Admiralty Act, 1973 (NZ), s.5(2))

"In addition to the rights conferred by sub-section (1) of this section, the admiralty jurisdiction of the [High Court] may be invoked by an action in rem in respect of all questions and claims specified in sub-section (1) of section 4 of this Act (except claims specified in paragraph (n) of that sub-section):

Provided that –

(a) in questions and claims specified in paragraphs (a), (b), (c) and (s) of sub-section (1) of section 4 of this Act the admiralty jurisdiction in rem may be invoked against only the particular ship or property in respect of which the questions or claims arose;

(b) in questions and claims specified in paragraphs (d) to (r) (except paragraph (n)) of sub-section (1) of section 4 of this Act arising in connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship, the jurisdiction of the [High Court] may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against:

(i) that ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

(ii) any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as a aforesaid."

Admiralty Act, 1988 (Cth), ss.17, 18 and 19

Right to proceed *in rem* on owner's liabilities

17. Where, in relation to a general maritime claim concerning a ship or other property, a relevant person:

(a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and

(b) is, when the proceeding is commenced, the owner of the ship or property;

a proceeding on the claim may be commenced as an action *in rem* against the ship or property.

Right to proceed *in rem* on demise charterer's liabilities

18. Where, in relation to a maritime claim concerning a ship, a relevant person:

(a) was, when the cause of action arose, the owner or charterer, or in possession or control, of the ship; and

(b) is, when the proceedings is commenced, a demise charterer of the ship;

a proceeding on the claim may be commenced as an action *in rem* against the ship.

Right to proceed *in rem* against surrogate ship

19. A proceeding on a general maritime claim concerning a ship may be commenced as an ation *in rem* against some other ship if:

(a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and

(b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.