Time & Cost Implications from Arrest of Vessels

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THE HONOURABLE JUSTICE D M RYAN

- Judge of the Federal Court of Australia since 1986;
- Additional Judge of the Supreme Court of the ACT since 1989;
- Judge of the now defunct Industrial Relations Court of Australia since it's inception in 1994;
- Before his appointment he practised at the Victorian Bar from 1965 and the NSW Bar from 1972, mainly in commercial, industrial and constitutional law;
- Editor, Federal Law Reports 1974 - 1980;
- Appointed Queens Counsel for Victoria in 1980 and for NSW in 1982;
- Member of and later Consultant to the Australian Law Reform Commission from 1984 to 1995 and was part-time Commissioner attached to, amongst others, the Civil Admiralty Reference;
- Now a member of the Court's Admiralty, Industrial and Taxation panels, as well as sitting on matters arising in the general first instance and appellate jurisdictions;
- Is a member of several Federal Court Committees, including the Admiralty and Practice and Procedure Committees;
- The author of various papers on procedural administrative and industrial law and other matters of legal interest including a paper delivered to an earlier MLAANZ Conference and one to its Victorian Division.

TIME AND COST IMPLICATIONS OF THE ARREST OF VESSELS

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by the Honourable Justice D.M. Ryan,
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It is now more than thirteen years since the *Admiralty Act 1988* (Cth) came into force on 1 January 1989. Among the principal effects of that Act were to codify the matters in respect of which civil Admiralty jurisdiction could be exercised in this country and to confer jurisdiction concurrently on the Federal Court and the Supreme Courts of the States and Territories.[1] Sufficient time has therefore elapsed to permit an examination, cursory as the scheme of this paper demands, of some of the issues of time and costs which have been revealed in the practical administration of a central feature of the Admiralty action *in rem*. I refer, of course, to the arrest of ships.

I propose to examine three cases, two of them related because the vessels had been operated in the same interest, which have been commenced in the Federal Court in the last seven years. In each case there was at least one appeal to a Full Court. In all three cases sales have been ordered by the Court yielding proceeds of several millions of dollars. Wherever money amounts are stated in this paper, unless specifically denominated in a foreign currency they should be taken to be in Australian dollars. It is hoped that by drawing attention to salient points in each case where significant costs were incurred or where the resolution of competing claims was delayed, some remedies may suggest themselves as tending to maximise the distributable funds from future sales and make them available at the earliest practicable time to those entitled to them.

The Ionian Mariner

This vessel was arrested in Melbourne 22 May 1995 after the issue of a writ by the plaintiff, Marinis Ship Suppliers (Pty) Ltd ("Marinis") claiming 46,844.73 South African Rand (approximately $A18,000) for goods, materials or services supplied to the ship. At the time of her arrest, there were nineteen Russian crew members, including the master, on board. The vessel remained under arrest for more than three months before an application was made for her valuation and sale *pendente lite*. During that time, port charges had been incurred to

the extent of some $17,000, and the Marshal had expended about $6,535 in providing food and other necessities for the crew who continued to keep the vessel secure and provide basic maintenance. The crew claimed to be owed unpaid wages amounting to some $US360,000. Apart from the provision made for them by the Marshal, they were dependent on the charity of the Melbourne Russian community and the Maritime Union of Australia. The Court made an interim order authorising the Marshal to spend up to $2,000 on the provision of outings or other entertainment for the crew including refreshments in connection with such outings or other entertainment.

The owners opposed an order for valuation and sale contending that it would prejudice sensitive negotiations with their financiers. However, they lacked the resources to procure the release of the vessel by giving appropriate security which, as Brandon J pointed out in *The Myrto*,[2] is almost invariably done by owners of ships which have been arrested.

After hearings on 17 and 31 August 1995, an order was made on 4 September 1995 in exercise of the power conferred by r 69 of the *Admiralty Rules* for the sale and valuation of the ship. One of the factors identified as warranting that order was the inevitable continuing deterioration of the vessel. As well, it was inferred, in the absence of evidence of a rising market for ships of that type and age, that there would be some depreciation in value even with full and adequate maintenance.[3] Continuing port charges and the cost of maintaining the crew also militated in favour of a sale, as did humanitarian concerns for the crew who had a claim, with high priority, for unpaid wages.[4]

On 14 September 1995 an order was made for the Marshal to engage brokers for the sale of the vessel by sealed bid tender and, on 24 November 1995, the Marshal was authorised to accept the highest tender of $3,791,660. The Marshal was further authorised to distribute in his discretion the sum of $25,000 out of the proceeds of sale for the relief and assistance of the crew. On 21 December 1995 it was ordered that the proceeds of sale of the vessel be paid into an interest bearing bank account to be held by the District Registrar of the Court and that the costs of repatriating the master and crew be defrayed out of that account as part of the Marshal's expenses of arrest. It was further ordered that the sum of $US300,000 be paid out of the same account and be distributed to the master and crew on account of their claims against the vessel in such proportions as should be agreed between them or, in default of such agreement, as the Marshal should determine. However, a dispute arose as to whether the

claim for unpaid remuneration should be quantified by reference to a "Greek Collective Agreement" between Adriatic Tankers Shipping Co SA, the operator of the fleet of which *The Ionian Mariner* had been part and the International Transport Workers Federation ("the ITWF") and the Pan-Hellenic Seamen's Federation ("the PHSF") or a "crew management contract". The master, the second engineer and two other officers refused to leave Melbourne until that issue had been resolved and a conflict of interest between them and the rest of the crew was revealed because of differential claims on the fund according to the instrument under which their remuneration was calculated. That necessitated separate legal representation for the two groups of seafarers. The cost of the separate representation of the master and second engineer was later agreed to be paid out of the fund in Court in the sum of $19,375.

New actions against the vessel by the United States Trust Co of New York ("the US Trust Co") as mortgagee and Wilhelmsen Lines Australia Pty Ltd were consolidated on 2 February 1996 with the pending action by Marinis and directions were given for the preliminary trial of the question whether the claim of the master and crew should be determined by reference to the Greek Collective Agreement or the crew management contract. On the same date, it was ordered that the sum of $US3,850.67 be paid to the Marshal on account of moneys paid by him out of his general account in connection with the arrest and sale. On 16 February 1996, an order was made authorising payment out of the fund in Court of the accommodation expenses of the master and second engineer to be charged primarily against their entitlement (if any) to a further share of the fund but without prejudice to the rights of any party to contend that those expenses should form part of the Marshal's costs and expenses of arrest or be otherwise dealt with.

By March 1996, the Marshal's expenses had amounted to $381,569.09 so the balance of the proceeds of sale was approximately $3,000,000.00.

The issue about the rate of remuneration of the master and crew was resolved at first instance on 30 July 1996 when it was declared that they had a lien over the proceeds of sale for unpaid wages and other remuneration calculated in accordance with the Greek Collective Agreement up to 8 December 1995 and for the costs of repatriation together with accommodation and subsistence expenses incurred from 8 December to 22 December 1995 but not thereafter. It was further ordered that there be an inquiry by a Registrar of the Court

to ascertain the amount due to the master and each member of the crew in accordance with that declaration. However, it was held on appeal that s 4(3)(t)(ii) of the *Admiralty Act* did not support the crew's claims that their outstanding wages should be calculated in accordance with the Greek Collective Agreement. Nevertheless, the Full Court considered that the master and crew should be afforded an opportunity to pursue their claims to remuneration under that Agreement based upon a trust, subject to the joinder of the Greek unions which had negotiated the Agreement and were the presumptive trustees of the promise said to have been created by it.[5]

On 14 August 1996, the costs of the plaintiff, Marinis, up to and including 24 November 1995 were taxed at $18,600.50. On 7 May 1997, an order was made by consent that the legal costs and disbursements of the Marshal be taxed and allowed at $26,100 and that his other fees and expenses be fixed and allowed at $368,156.01. Further provision was made for payment out of the fund of the medical expenses of certain crew members.

The claims of the master and the second engineer were resolved on 3 September 1997 when it was ordered that there be a final payment to them from the fund on account of wages of $US30,478 and $US13,970 respectively together with $2,579 each on account of sustenance together with interest and costs. It was further ordered on the same date in consequence of the reasons of the Full Court[6] that the ITWF and the PHSF be joined as parties to the proceeding.

In the meantime, another writ *in rem* had been issued on 24 October 1996 against the fund representing *The Ionian Mariner* by Loucas G Matsas Salvage & Towage Maritime Company ("Matsas") which claimed to have salved the vessel off the coast of Chile in October 1994 and to be entitled to $US121,956.27 pursuant to an arbitral award made in London by Ms Belinda Bucknall QC on 13 March 1996. That claim was rejected as not having been brought within two years from the date when the salvage services had been rendered. It was further held that any maritime lien to which Matsas might have been entitled had been extinguished by the arbitral award and the provision by the owners of *The Ionian Mariner* of security in connection with that arbitration.[7]

On 25 November 1997 it was ordered that the ITWF and the PHSF provide security in the sum of $32,000 for the costs of the US Trust Co up to and including the first day of the

trial of the remaining issues in the action. Fortunately, those issues were resolved by compromise and a final order was made by consent on 25 May 1999 for payment from the fund remaining in Court of the sum of $20,000 to the substituted plaintiff Wilhelmsen Lines Australia Pty Ltd with the balance to be paid to the US Trust Co.

The Ionian Mariner demonstrates the need for a prompt sale to minimise high port charges and deterioration of the vessel. Where necessary a court, of its own motion, can invoke r 69(5) of the *Admiralty Rules* which provides;

> *"If the ship or property is deteriorating in value, the court may, at any stage of the proceeding, either with or without application, order it to be sold."*

However, a balance has to be struck between this imperative and the understandable concern of owners or other parties to procure finance or reach an understanding which will avert a sale at an undervalue or at a price close to the bottom of the market.

The litigation concerning *The Ionian Mariner*, and to a lesser extent *The Rangitata* and *The Turakina* discussed below, teaches an important lessen in relation to costs where there is a claim by the crew for unpaid wages accruing before or after the arrest. That is that the ITWF, either directly or through an appropriate local maritime union affiliate, should obtain suitably experienced legal advice to resolve, or at least minimise, conflicts of interest between different sections of the crew and to ensure, as far as possible, that the costs of legal representation are not duplicated unnecessarily. The timely involvement of a union in that way should also avoid the need for late joinder highlighted by the Full Court in *US Trust Co of New York v Master and Crew of Ship "Ionian Mariner"*.[8] Moreover, if representation of the interests of the master and crew is arranged as early and appropriately as possible, the exposure of their representatives to an order for security of costs like that made in *The Ionian Mariner* should be reduced, if not eliminated. Courts can contribute to the achievement of these objectives by identifying for early and separate determination issues affecting the claim of seafarers against the ship and making it clear that recourse to the proceeds of sale to pay their costs of representation on unrelated issues will be limited or excluded altogether.

The Rangitata

This vessel was arrested in Melbourne on 19 February 1998. She was laden with cargo and evidence was adduced to the effect that the continuous presence of an engineer on

board was required to ensure the safety of the vessel and to keep the refrigerated containers functioning. The chief engineer and second engineer, who had been on board since the arrest, gave notice that they were leaving the vessel for New Zealand on 14 March 1998. Tamberlin J took the view that the continued presence on board of two engineers was essential to the safe-keeping of the vessel and the preservation of the cargo. He also expressed concern about the welfare of other members of the crew remaining on board.[9]

There was evidence that the cost, including management fees, of providing the necessary engineers through a ship management firm would be of the order of $1,200 per day. An issue arose as to whether the Marshal should be put in funds to meet that expense by recourse to the undertaking which had been given by the plaintiff's solicitors. His Honour ordered that the Marshall engage the ship management firm;

> *"(a) to advise the Marshal, and*
>
> *(b) to engage such engineers, masters, officers, and other crew whom the Marshal, in his discretion, requires to maintain the safe custody of the vessel under arrest and any cargo on board."*

It was further ordered that the plaintiff's solicitors put the Marshal in funds in the sum of $20,000 to cover the engagement of engineers. In relation to the enforcement of the undertaking, his Honour observed;

> *"It is important to bear in mind in the present case that the undertaking is cast in broad terms in order to protect the Marshal, who is required to assume custody and preserve the vessel and the property. No doubt parties giving such a broad undertaking to pay on demand must be taken to be aware of its importance particularly in the case of an undertaking by a solicitor. The Marshal is given direct and immediate recourse by the undertaking to the obligations assumed by the solicitor in order to meet the costs incurred or likely to be incurred in maintaining the arrest procured at the behest of the plaintiffs."*

An application by the plaintiff for leave to appeal from the orders of 13 March 1998 was refused by Lindgren J on 22 April 1998.[10]

On 25 March 1998 it was ordered that judgment be entered for the plaintiff in the sum of $NZ1,017,521.29 plus accrued interest and interest accruing at the rate of $278.77 a day. In late March and early April 1998 several consignees of cargo obtained orders for the release

to them of their respective shipments subject to each consignee and the plaintiff undertaking to pay the fees and expenses of the Marshal incurred in complying with the order.

Apart from the two departing engineers to whom reference has already been made, the master and crew of *The Rangitata* chose to remain on board until their claims for unpaid wages and repatriation expenses had been satisfied. On 5 May 1998, Tamberlin J held, on an application by the master and crew, that, in the absence of a discrete contract between the Marshal on the one hand and the master and crew, or some of them, on the other, the wages claimed for the period since the arrest were not an expense of the Marshal in relation to the arrest. His Honour said;

> *"The appointment of the Master as the ship's keeper does not amount to an authorisation for the Master as agent of the Marshal to engage crew on behalf of the Marshal. The position of the Master and crew in this application is to be contrasted with the position of the new contract engineers, who were specifically engaged by the Marshal pursuant to a Court direction to replace those engineers, who left the vessels. This direction was given in the light of evidence that it was appropriate, in the circumstances, for the Marshal to engage the two substitute engineers on each vessel in order to preserve and maintain the ship and keep it in safe custody pending release or sale. The evidence presented to the Court, before the new contract engineers were engaged, indicated that there were important and necessary maintenance and supervisory functions to be carried out by these engineers until such time as each of the vessels was layed up or de-manned as a "dead ship".*
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> *The payment of the wages and other employment entitlements of the crew after arrest and up to sale or repatriation is, generally speaking, not the responsibility of the Marshal unless the Marshal considers it appropriate or necessary to enter into an agreement to engage such crew. The number and nature of the crew to be engaged by the Marshal will vary from time to time depending on the status of particular vessels, such as, for example, whether they are layed-up. In many cases the vessels will be carrying cargo. Where this is so the number of crew necessary to man the ship will reflect the need to preserve and exercise custody over the cargo. The appropriate crew number may also depend on whether it was necessary to move the vessel in order to effect discharge of cargo or to berth at a suitable location which may vary from time to time as a result of exigencies at the port of arrest. What is necessary or appropriate in any particular case will depend to a large extent on the nature and quantity of the cargo.*
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> *Whilst it is true that work has been done on the vessel by the Master and crew, such work cannot in a realistic sense be said to have been carried out for the benefit of the Marshal, who is the Executive officer of the Court charged with the custody of the vessel pending determination of the proceedings or sale. In the absence of any engagement between the Marshal, the Master and crew, it cannot be said that the wages of the crew members are fees or expenses of the Marshal in relation to the arrest."*[11]

However, it was concluded in respect of the repatriation expenses that;

> *"The position, in my view, is that if the Marshal reasonably considers it is appropriate to repatriate the crew and the crew are willing to return to their home port then such an expense can properly be described in the present circumstances as "an expense of the Marshal in relation to the arrest" and can therefore either be the subject of a demand under r 78 in anticipation of the expense being incurred, or can be recovered from the proceeds of sale, after the moneys have been paid."*[12]

This rationale was given for that conclusion;

> *"In practice there may be many circumstances where it may be appropriate for a Marshal to arrange for repatriation of the crew prior to any application being made for sale. For example, in order to minimise daily running costs of the vessel, which would otherwise be unnecessarily incurred by permitting a full complement of seamen to remain on board when it was neither appropriate nor necessary. In such a case, if the crew members were discharged or were willing to leave the vessel, and wished to be repatriated, then it may well be appropriate for the Marshal to incur the costs of repatriation and seek, in advance if necessary, from the plaintiff the funds to achieve the repatriation. There is no universal formula because each set of circumstances may be different.*
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> *The need for repatriation of the crew arises as a consequence of the arrest of a vessel with a foreign crew on board, on the application of a plaintiff. There is an evident and real connection between the arrest and the need to pay repatriation expenses. Something must be done with respect to the crew. They should not be permitted or required to remain indefinitely on the vessel regardless of the necessity or appropriateness of their remaining. Repatriation expenses, in my view, in the present circumstances, are an appropriate expense of the Marshal in relation to the arrest because it is in the interest of all parties concerned to minimise the payment of daily expenses pending a determination of the dispute and where appropriate the sale of the vessels. In order to minimise costs it is clearly desirable that vessels, the subject of this proceeding, should be de-manned and layed up as soon as practicable. These considerations do not generally apply in relation to the payment of wages because, as a result of the arrest, the Marshal is not liable to pay wages of the crew in the absence of any employment relationship.*
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> *Where the crew are willing to return to their home port and accept repatriation, it is within the discretion and power of the Marshal to arrange for repatriation and make demand on the undertaking given on arrest by the applicant's solicitor to pay the expenses of the Marshal in advance if necessary.*
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> *In the present case, I consider that there is a rational and substantial link between the costs of repatriation and the performance by the Marshal of his functions, such as to justify the treatment of repatriation as an expense of the Marshal in relation to the arrest."*[13]

On 17 August 1998, to give effect to those reasons for judgment, orders were made which included these paragraphs;

> *"3. The Marshal's costs, with respect to the application of the Master and crew, the subject of the reasons for judgment of 5 May 1998, should be the fees and expenses of the Marshal in relation to the arrest on a solicitor-client basis.*
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> *4. 75% of the Plaintiff's legal costs of the application of the Master and crew, the subject of the reasons for judgment of 5 May 1998, be part of the Plaintiff's costs and expenses of arrest and be payable from the fund representing the proceeds of the sale of the "Turakina" and the "Rangitata".*
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> *5. All of the Master and crews' legal costs of the application, the subject of the reasons for judgment of 5 May 1998, be payable from the fund representing the proceeds of the sale of the "Turakina" and the "Rangitata"."*

An appeal was brought, effectively against the last of those orders, by two mortgagee banks ("the Banks") which had been added as plaintiffs after the arrest of the vessels in both the action against *The Rangitata* and that against *The Turakina* which is discussed below. The original plaintiff in the action in which *The Rangitata* was arrested had been Waitemata Stevedoring Services Ltd.

On 19 March 1999 a Full Court of the Federal Court (Beaumont, Moore and Merkel JJ) dismissed the appeal[14] observing that the master and crew had neither failed entirely nor succeeded entirely in their application. The benevolence which Tamberlin J had considered should be extended to seamen, even in respect of costs of applications like that pursued in relation to *The Rangitata* and *The Turakina,* was held to reflect an approach described as follows in *Meeson's Admiralty Jurisdiction and Practice* 1993 at 42;

> *"The court has always adopted a benevolent and protective attitude towards seamen to avoid overreaching by shipowners. In* The "Minerva" *Lord Stowell described the disparity of bargaining power in the negotiation of special contracts in following memorable words:*
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> > *"On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side, is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves."*

> *The particularly high regard which the Admiralty Court has for the intellect of seamen is also illustrated by the words of Lord Stowell in another case,* The "Juliana", *where he said: "... the common mariner is easy and careless, illiterate and unthinking; he has no resources, in his own intelligence and experience in habits of business ..."*

Their Honours entered this caveat[15] about the application of that approach to today's seafarers or contemporary economic and industrial conditions;

> *"Whilst we would not accept the above description as necessarily having accuracy today the underlying premise of disparity of bargaining power as a basis for the benevolent approach remains valid."*

After rejecting an argument that the reasonableness of the master and crew in pursuing their application was irrelevant to the exercise of the discretion as to costs, the Full Court drew on analogies with other areas of the law where a facility has existed for ordering the payment of the whole or part of a party's costs out of a fund.

On 14 September 1998 it was ordered that $US31,500.00 be paid to a firm of brokers for services provided to the Marshal in the sale of *The Rangitata*. Shortly afterwards, on 22 September 1998, orders were made for payment out of the proceeds of sale of the vessel to the various plaintiffs which had incurred them of fees and expenses, including legal costs, of the arrest and sale of *The Rangitata* together with interest thereon. By an order of 9 October 1998, the amount payable as poundage on *The Rangitata* was quantified as $102,069.18.

By a further order of 25 August 1999, a direction was given for the payment to the Banks out of the proceeds of sale of *The Rangitata* of $US1,565,285.17 and the Marshal was directed to retain the balance of the proceeds, being a sum in excess of $US1,342,800.16 in an interest bearing account to satisfy an order for a distribution in favour of the master and crew, the Marshal, the first or second plaintiffs or Mobil Oil New Zealand Ltd. A common issue arising in both *The Rangitata* and *The Turakina* in relation to the distinction between legal costs and other expenses of the Marshal is described below.[16]

On 4 and 11 November and 23 December 1999, further distributions to the Banks from the proceeds of sale of *The Rangitata* were ordered totalling $US772,793.30. An order

was made by consent on 13 July 2001 for payment out of the same proceeds of sale of $95,000 "in satisfaction of the agreed settlement of the master and crew's clams for costs in proceedings numbered NG 444 of 1998." The master and crew had obtained judgment in those proceedings on 1 November 1999 and that was declared by order of 18 February 2000 to have the priority of a maritime lien over all other claims against the proceeds of sale of the ship with the exception of;

> *"(a) the Admiralty Marshal's fees and expenses in relation to the arrest, custody, valuation and sale of the ship "Rangitata" and the proper costs incurred in the administration of the proceeds of sale;"*

By the same order, the Banks' judgment entered on 5 May 1999 was declared to have the priority of a first registered mortgage ranking ahead of all other claims except the Admiralty Marshal's fees and expenses described above and the judgment in favour of the master and crew of 1 November 1999.

An order was made by consent on 21 August 2001 for payment out of *The Rangitata* account of further amounts in satisfaction of the Marshal's claims for costs, fees and expenses including the sum of $86,875 for solicitor's and counsels' fees up to 1 August 2001 and for payment to the Banks of the balance of the account subject to the retention of a further $11,718.88 for the Marshal's costs. Final orders were made on 28 March 2002 for a payment to the first and second plaintiffs, the retention of further amounts for the Marshal's fees and expenses and for the remaining balance to be paid to the Banks.

The litigation over *The Rangitata* illustrates the need for prompt identification by the Marshal of adequate, but not extravagant, manning to preserve the ship until the sale is completed. Wages of surplus crew members will not be recoverable as an expense of the Marshal in relation to the arrest. Nor, depending on the language of their undertaking, may the plaintiff or its solicitors be liable to indemnify the Marshal against those wages. Arrangements for the repatriation of crew members not required for ship-keeping should be made promptly. The Marshal, and, if necessary, the court should make it clear to recalcitrant members of the crew that their claims for accruing wages or sustenance will not enure beyond the rejection of an appropriate offer of repatriation. The early and effective involvement of the ITWF or a relevant maritime union suggested above in relation to *The Ionian Mariner* should provide some assurance to repatriated seafarers that their claims on the proceeds of sale will be properly pursued and safeguarded.

There is also a pertinent reminder in the observations of the Full Court in the *Bremer Landesbank* appeal[17] that the reasonableness of the master and crew, as well as that of other parties, will usually weigh with the court in the exercise of its discretion as to costs.

Both *The Rangitata* and *The Turakina*, as well as *The Ionian Mariner,* testify how significant a component legal costs can be of the Marshal's expenses. That is especially so in complex litigation which arguments about the arrest and sale of a vessel and competing claims to priority in the distribution of the proceeds can generate. As was pointed out by Tamberlin J in *Patricks Stevedores (No 2) Pty Ltd v The Ship "Turakina"*[18] the ancient authorities to which he there referred;

> *"... draw attention both to the responsibility which attaches to the performance of the Marshal's duties as executive officer of the Court and the need for adequate funds to carry out those functions. In modern times there is provision in the legislation for the Master to obtain or recover funds from applicants or their solicitors in order to met his expenses in relation to the arrest and sale of ships.*
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> *Under the* Admiralty Act 1988 *(Cth) ("the Act") and the* Admiralty Rules *("the Rules"), in exercising his functions and performing his duties, the Marshal has a broad discretion as to the way in which they will be performed."*

However, it is suggested with respect that it is the Marshal's very status as an officer of the court which makes it incumbent on him or her, and where necessary the court itself, to ensure that separate legal representation of the Marshal is confined to those issues where it is indispensable and is no more expensive than is absolutely necessary. It is true that issues can arise where Counsel for the Marshal performs the functions of an *amicus curae*, but equally there are other occasions where all sides of an argument can be fully canvassed by Counsel for the parties with a commercial interest in the *res* and the Marshal need do no more than abide the order of the court.

The Turakina

This vessel had been arrested in Sydney on 19 February 1998 at the instigation of Patrick Stevedores No 2 Pty Ltd ("Patricks"). Tamberlin J, on 2 March 1998, directed the Marshal to arrange for her air-conditioning system to be repaired forthwith and, on 12 March 1998, authorised the Marshal to permit the immediate discharge of containers from the vessel.

Like those on *The Rangitata*, the two engineers on *The Turakina* had given notice of their imminent departure from the vessel and, on 13 March 1998, in reasons for judgment in both actions, Tamberlin J made orders in respect of the *Turakina* in identical terms to those which he made for *The Rangitata.*[19]

On the day of the arrest, the presumptive demise charterer of *The Turakina* ("SPS") had purported to terminate with immediate effect the contracts of employment of the master and crew. However, the master remained on board as "ship's keeper" appointed by the Marshal and the crew continued to carry out daily work on board until at least the end of March. The same questions therefore had to be decided about the wages accrued since 19 February 1998 and the cost of repatriating the master and crew to New Zealand as had been thrown up by *The Rangitata*. There was evidence that the crew numbers, while appropriate for a sea-going voyage, were excessive while *The Turakina* was laid up in port. However all members of the crew, other than the engineers, elected to remain on board until their claims for wages and repatriation had been satisfied. The master and crew of *The Turakina* joined with their counterparts on *The Rangitata* in seeking the relief considered by Tamberlin J in *Patrick Stevedoring No 2 Pty Ltd v Ship MV "Turakina" (No 1).*[20] As already noted, both orders were upheld on appeal.[21] Meanwhile, on 15 July 1998 Tamberlin J had dismissed an application by the solicitor for the owners of *The Turakina* to be released from an undertaking[22] given in support of an application for her release to pay the fees and expenses of the Marshal in connection with the ship while under arrest. The application for release of the vessel had been dismissed for procedural reasons by Lindgren J on 7 April 1998.[23] The Marshal had estimated at $123,550 his costs and expenses of the arrest from 19 February 1998 to the date of the order refusing the owners' application for release of the vessel. Tamberlin J applied, in part, the reasoning of Cooper J in *Bayside Airconditioning Pty Ltd v Owners of the Ship "Cape Don"*[24] in deciding that the refusal of the application for release of the vessel did not entail that the Marshal should be denied recourse to the solicitor's undertaking which had been given in aid of that application.[25]

SPS had gone into voluntary liquidation a few hours before the arrest of *The Turakina* and *The Rangitata* and the liquidators claimed after the sale, which had been ordered by the Court on 24 June 1998, certain items of personal property on board at the time of the arrest as well as each vessel's bunkers and lubricants. Both claims were dismissed, that for the

bunkers essentially for lack of evidence establishing that property in them had passed to SPS.[26]

On 28 August 1998 a further order was made directing the Marshal to keep the proceeds from the sale of *The Turakina* in an interest bearing bank account and authorising the payment out of that account of the Marshal's fees and expenses in relation to the arrest and sale and in connection with the custody of the ship while under arrest which had not already been funded by Patricks or the Banks. As well, an order was made for payment of poundage at the rate of 2% of the gross proceeds of sale including the amount received for bunkers and lubricants. That poundage was later quantified in an order of 2 October 1998 at $105,404.43.[27]

Subsequently, on 22 September 1998, his Honour made orders for the payment to Patricks, as a cost of arrest, of interest on the costs and expenses of arrest and sale which Patricks had paid. It was further ordered that the Marshal pay to Patricks and the Banks the legal costs of arrest and sale. A later order of 2 October 1998 indicated that those plaintiffs' costs amounted in all to $553,923.17.

On 5 May 1999 judgment was entered for the plaintiff Banks in the sum of DM4,606,041.12. Later, on 25 August 1999, the Marshal was directed to pay to the Banks the sum of $US1,537,516.24 and to retain the balance of the proceeds of sale, being a sum in excess of $US1,288,318.20 "in an interest bearing account to satisfy any order for a distribution from the proceeds of sale in favour of the Master and Crew lately employed upon the Ship "Turakina", the Admiralty Marshal, the first Plaintiff [Patricks] or Mobil Oil New Zealand Limited."

On 28 October 1999, Tamberlin J published reasons for judgment on an application for the further release to the Banks of funds under the control of the Marshal arising from the sale of *The Turakina* and *The Rangitata*.[28] His Honour rejected a claim on behalf of the Marshal for retention of 8% of all his fees and expenses against the contingency that the parties might fail to agree on the proper quantification of those costs. He drew a distinction between the Marshal's liability for legal fees, which he considered could properly be the subject of a bill of costs within the meaning of Item 12 of the Schedule to the Federal Court of

Australia Regulations,[29] and the fees and expenses of the Marshal which fell to be taxed under r 72 of the *Admiralty Rules*.[30]

On 4 November 1999, an order was made directing payment out of the proceeds of sale of *The Turakina* of the amount of $18,992.13, being the legal costs of the first plaintiff ("Patricks") of the arrest of that vessel. The sum of $US590,144.94 was directed on the same day to be paid to the Banks which had recovered judgment on 5 May 1999. On 11 November 1999, in accordance with the reasons for judgment published on 28 October, the Marshal was directed to make a further payment to the Banks out of the proceeds of sale of $US34,945.48.

On 27 August 1999 Patricks had filed a notice of motion seeking to establish that the whole of its costs of the proceeding up to the order for sale of *The Turakina* formed part of its costs of arrest. The question was important because its resolution in favour of Patricks would have given that plaintiff priority for those costs over the claims of the Banks as mortgagees.[31] Tamberlin J on 19 November 1999 held that costs incurred in defending a claim by the owners for the release of the ship were a cost of the arrest because the effect of that defence was "to ensure that the security remains available to all qualifying claimants.[32] However, his Honour did not similarly characterise Patricks' costs of an application (later overtaken by that of the Banks) for sale of the ship or for "monitoring" the process of sale. The latter costs were held to be attributable to Patricks' pursuit of its own interests.[33] A similar explanation was advanced for rejecting as costs of the arrest, costs incurred in opposing an application by the owners' solicitor for a release from an undertaking given in conjunction with the application for release of the ship. In the exercise of his discretion, his Honour held that those of Patricks' costs which were properly costs of the arrest should be taxed on a solicitor/client or indemnity basis rather than as between party and party. A motion for leave to appeal against the orders made in consequence of the reasons for judgment of 19 November 1999 was dismissed by consent on 10 May 2000 when the Full Court ordered, also by consent, that the Marshal pay to Patricks from the proceeds of sale of *The Turakina* the sum of $90,000 being the whole of the balance of its legal costs of arrest and its costs of the notice of motion of 27 August 1999.

On 13 July 2001 an order was made by consent for the payment out of the proceeds of the sale of *The Turakina* of $95,000 in satisfaction of the claims of the master and crew for costs in proceedings numbered NG 438 of 1998. On 21 August 2001 an order was made

authorising payment out of the proceeds from the sale of *The Turakina* of $25,089.99 for costs, fees and expenses incurred by the Marshal up to 16 August 2001 and $76,000.10 for the fees to 1 August 2001 of the solicitor and counsel who had advised and represented the Marshal in proceedings related to the arrest. The balance of the proceeds of sale was ordered to be paid to the Banks on account of their judgment of 5 May 1999 provided that the sum of $11,718.88 be retained for the Marshal's costs and paid to the Federal Court. An amendment was made on 28 March 2002 to the last part of that order to take account of goods and services tax exigible on the amount to be retained by the Marshal.

This case like *The Rangitata* highlights the reach and potential duration of undertakings to meet the costs and expenses of the Marshal which may be required of plaintiffs or their solicitors. Less usually, as in *The Turakina,* such undertakings can also be extracted from an owner or other party with an interest in the vessel.

The sale price of both *The Rangitata* and *The Turakina* was sufficiently large for poundage at 2% to have a significant impact on the net distributable proceeds of sale. At present, poundage is paid into Consolidated Revenue and is not available to defray the costs and expenses of the Marshal either in relation to the particular sale or generally. While it continues to be levied in its present form, it must give prospective plaintiffs some cause to hesitate before effecting an arrest in Australian waters.

The Turakina is also important for its elucidation of the distinction between a plaintiff's legal costs which form part of the costs of arrest and those in relation to the sale which do not. In the event, the fund arising from the sale of each of *The Ionian Mariner, The Rangitata* and *The Turakina* proved insufficient for any distribution in excess of its costs of the arrest to be made to the original plaintiff. Accordingly, it is important for a plaintiff to ensure that Tamberlin J's distinction is drawn early and clearly so that it can appreciate those costs for which it will rank in priority after other claimants.

Conclusion

As already noted, cases in which the arrest of a vessel leads to its sale are comparatively rare.[34] However, it is prudent to assume from the outset that each arrested vessel will be the subject of an order for sale and attendant litigation like that which enmeshed *The Ionian Mariner, The Rangitata* and *The Turakina*. The court, the Marshal and the parties

should therefore draw on the experience afforded by cases like those discussed in this paper. By so doing they may go some way to minimising delay and expense and ensuring that, where a sale does eventuate, as much of the proceeds as reasonably can be is promptly distributed to those entitled to them.

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[1] *Admiralty Act (1988)* s 10.

[2] [1977] 2 Lloyds' Law Rep 243, at 260.

[33] R 69(5) of the *Admiralty Rules* gives the Court power, of its own motion, at any stage of the proceeding to order a sale "if the ship or property is deteriorating in value."

[4] *Marinis v "Ionian Mariner"* (1995) 59 FCR 245.

[5] *United States Trust Company of New York v Master and Crew of Ship "Ionian Mariner"* (1997) 77 FCR 563.

[6] See n 5 above.

[7] *Loucas G Matsas Salvage & Towage Maritime Co v Fund on Sale of "Ionian Mariner"* (1997) 79 FCR 351.

[8] See n 5 above.

[9] *Patrick Stevedoring No 2 Pty Ltd v The Ship "Turakina"* and *Waitemata Stevedoring Services Ltd v The Ship MV "Rangitata"* (unreported, 13 March 1998); Federal Court of Australia (Tamberlin J).

[10] *Waitemata Stevedoring Services Ltd v The Ship MV "Rangitata"* (unreported, 22 April 1998).

[11] *Patrick Stevedoring No 2 Pty Ltd v Ship MV "Turakina" (No 1)* (1998) 84 FCR 493, at 502.

[12] ibid, at 503.

[13] ibid, at 504.

[14] *Bremer Landesbank Kreditanstalt Oldenburg v The Ships "Turakina" and Rangitata"* (1999) 161 ALR 587.

[15] ibid, at 594.

[16] See p 14 - 15 (infra).

[17] See n 14 above.

[18] (1998) 84 FCR 493, at 498.

[19] See p 6 above.

[20] Supra n 7.

[21] See pp 9 - 10 above.

[22] See Form 19 of the *Admiralty Rules 1998.*

[23] *Waitemata Stevedoring Services Ltd v Ship MV "Rangitata"* (1999) 82 FCR 462.

[24] (unreported, Federal Court of Australia, 15 May 1997).

[25] *Patrick Stevedores No 2 Pty Ltd v Ship MV "Turakina" (No 2)* (1998) 84 FCR 506.

[26] *Patrick Stevedores No 2 Pty Ltd v The Ship "Turakina" and Waitemata Stevedoring Services Ltd v The Ship "Rangitata"* (unreported, Federal Court of Australia, 17 August 1998, per Tamberlin J).

[27] Item 7 of the Schedule referred to in Reg 2 of the Federal Court of Australia Regulations prescribes a fee of $2.00 "For the seizure and sale of goods by an officer of the Court in the execution of the process of the Court - poundage for each $100.00 value of goods."

[28] *Patrick Stevedores No 2 Pty Ltd v The Ship "Turakina"* (1999) 167 ALR 143.

[29] Items 12 and 12A of the Schedule referred to in Reg 2 of the Regulations prescribe fees payable "on an appointment being given to tax a bill of costs in which the amount claimed" is respectively $10,000 or less, or more than $10,000.

[30] Rule 72 of the *Admiralty Rules* provides: "(1) The Registrar shall tax the fees and expenses of the Marshal in connection with the valuation and sale of a ship or other property ordered to be sold. (2) A person who is an interested person in relation to the proceeds of the sale may appear before the Registrar on the taxation."

[31] *The World Star [1987] 1 Lloyds* Rep 452, at 454.

[32] *Patrick Stevedores No 2 Pty Ltd v Ship MV "Turakina" (No 3)* (1999) 95 FCR 52, at 55.

[33] Cf *The Leoborg (No 2)* [1964] 1 Lloyds Rep 380, at 384.

[34] See eg *"The Myrto"* cited n 2 above.