

Issues of Arrest & Trans-Tasman Differences in Marshal/Registrar Practice

The Hon Justice Williams
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An Arresting Business: Trans-Tasman Differences in Marshall/Registrar Practice*

Hon. Justice Williams #

Introduction

From the mid-1980s New Zealand, as with a number of other Western democracies including Australia, underwent a period of radical restructuring, a major plank of which was the widespread introduction of “user pays” in the provision of many public services. New Zealand was probably more determined than many others, again including Australia, in its adherence to that creed. But from the mid-1990s, again as with many other countries, one of our principal political themes has been retraction from the “user pays” philosophy. The tide has ebbed— but it has ebbed unevenly.

However, in New Zealand, the arresting of vessels by Registrars and their care and custody thereafter was never a State function which was affected by the “user pays” philosophy. Through that tiny corner of the State’s function was considered for the application of “user pays” it must have been decided that the “public good” aspect of New Zealand maintaining an efficient arrest system as an aspect of its maritime trading regime meant the application of “user pays” was inappropriate.

It is understood, however, that the same position does not obtain in Australia and that as a result it can be significantly more expensive for parties to arrest vessels in Australia than in New Zealand to the point where if a vessel is to travel to New Zealand from Australia, those proposing arrest have been known to refrain from taking arrest action until the vessel arrives in our country.

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Judge of the High Court of New Zealand. Thanks go to Tony Mortimer and Graham Ford, current and former Registrars of the Auckland High Court, and to Jeremy Browne, Judges’ Clerk, for their contributions.

In part, one of the purposes of this paper is to examine what gives New Zealand its market edge in that respect – but not, it is to be hoped, in a way that spurs Australia to reform.

In New Zealand before a warrant of arrest can be issued, an indemnity must be given to the High Court Registrar. The procedure is understood to be similar in Australia where the Admiralty Marshall must receive an undertaking before a warrant of arrest is issued.

This speech discusses issues regarding the indemnity or undertaking, particularly that given before arrest, including when such an indemnity or undertaking must be given; who is able to give it; its duration; what is covered; and finally, the practice of the Registrar or Marshall in relation to security.

Aspects of the law on both sides of the Tasman will be discussed noting differing practices of the Registrar or Marshall, with some comment about possible law reform.

When is an indemnity/undertaking given?

In New Zealand, undertakings may be given at various times,¹ but must be given :

- Before a caveat against arrest can be issued;²
- Before property under arrest is released³
- Before discharging cargo which is under arrest where the ship is not under arrest and vice versa,⁴
- Before a commission for appraisal and sale can be executed.⁵

¹ For example to stop a notice of proceeding, or a warrant of arrest being served - R 772(5) of the High Court Rules.

² R 777(1) The undertaking is to enter an appearance in any action that may be commenced and within three days of receiving notice that such an action had been commenced to give security to the satisfaction of the Registrar in the sum specified in the request or pay that sum into Court.

³ R 778(8). The undertaking is to pay the costs, charges and expenses connected with the care and custody of the arrested property and is only required in default of payment of those costs, charges and expenses.

⁴ R 780(1)(b), (3). The undertaking is to pay on demand the fees and expenses incurred by the Registrar in taking steps to discharge the cargo under arrest.

Before a warrant of arrest is issued, the applicant must give an indemnity (as opposed to an undertaking) in favour of the Registrar. Rule 776 of the High Court Rules reads:

(4) In support of the application for a warrant of arrest, there must be filed –...

...

(b) An indemnity to the Registrar in form 73 and security to the satisfaction of the Registrar for the fees, expenses, and harbour dues (if any) of the Registrar and of the Registrar's appointed officers and agents.

(5) The Registrar may from time to time require additional security to cover fees, expenses, and harbour dues (if any) referred to in subclause (4)(b).

Form 73 is addressed to the Registrar and reads:

The applicant indemnifies you—

- (a) For any fees and expenses (including harbour dues) that may be incurred by you in the execution of the warrant of arrest issued against (*Specify*); and
- (b) Against any liability arising out of or incidental to any act lawfully done by you in executing that warrant.

In respect of the fees and expenses incurred by the Registrar, there is no substantive difference between an indemnity in favour of the Registrar and an undertaking to pay the same in favour of the Registrar. However, it appears that “indemnity” was specifically used to support of the second limb of Form 73 providing for the applicant to indemnify the Registrar against any liability arising out of or incidental to any act lawfully done by him or her in executing the warrant. It seems the wording was intended to cover the situation where the Registrar is liable because, though he or she has acted lawfully in executing the warrant, the liability does not come within the first limb of the indemnity. Apart from the *Cornelis Verolme*⁶ and the other cases to be mentioned, the full extent of the causation problem plainly arising out of the second limb of the indemnity has yet to be confronted in New Zealand.

In Australia, it appears that undertakings must similarly be given:

- Before a caveat against arrest is issued;⁷
- Before a warrant of arrest is issued;⁸
- Before discharging cargo which is not under arrest where the ship is under arrest or vice versa;⁹

⁵ R 784(6). The undertaking is to pay the Registrar's fees and expenses on demand.

⁶ *Turners & Growers v The Ship "Cornelis Verolme"* (1996) 9 PRNZ 409, 414-416.

⁷ R 7, R 8, and Form 3.

⁸ R 41.

⁹ R 49(2)(b) – see also R 49(2)(c) which provides that if the Marshall requires, the applicant must indemnify the Marshall in respect of any claim against the Marshall arising from the discharge. This

- Before valuation and sale.¹⁰

Who gives an indemnity/undertaking?

One of the trans-Tasman differences in this field is that, in relation to the undertaking given to the Court before a warrant of arrest is issued, R 41 of the Admiralty Rules 1988 provides:

41. Liability for Marshall's fees and expenses

An application for an arrest warrant constitutes an undertaking to the court:¹¹

- (a) if the application is made by the applicant personally – by the applicant; or
- (b) if the application is made by a solicitor on behalf of the applicant – by the solicitor; to pay the Marshall, on demand, an amount equal to the amount of the fees and expenses of the Marshall in relation to the arrest.

Rule 78 empowers the Marshall to make one or more demands for interim payments on account of those fees or expenses, as, now, does our R 776(5). Also it is to be noted that R 75 states that any person failing to comply with an undertaking given to the Court is liable for committal.

In New Zealand, the Form 73 indemnity can be signed by the applicant personally, or by the solicitor for the applicant but does not amount to an undertaking to the Court.¹² Solicitors more often than not sign the indemnity as arresting parties are often foreign with no signatories within the jurisdiction.

It is interesting to note that in England, a solicitor must also sign in his or her capacity as an officer of the Court. Undertakings by solicitors acting as agent, or by parties personally are not accepted.¹³ According to *McGuffie*:¹⁴

The practical reason for requiring an undertaking from a solicitor as an officer of the court and not as agent or in any other capacity is that the solicitor is in a better position to assess the financial

wording is broader than the New Zealand arrest indemnity (Form 73 part (b)) as it does not require the actions of the Marshall to be lawful.

¹⁰ R 69(4)

¹¹ The “to the Court” was added in 1996. The original rule expressed the undertaking to be to the Court, but this phrase was lost when the rule was repealed and substituted in 1993. The purpose of the phrase is to make R 75 clearly applicable to the undertaking.

¹² R.777 (1)

¹³ See form ADM4 (“Application and undertaking for arrest and custody”).

¹⁴ K McGuffie et al, *British Shipping Laws Volume 1: Admiralty Practice* (1964) at para 264.

requirement of his client, often not in the jurisdiction, than anyone else. He should satisfy himself on this point before giving the undertaking.

Though solicitors in firms in all jurisdictions are bound by the form of the undertaking, there are significant differences in practice. It may be doubtful if solicitors can better assess their client's financial circumstances in the way confidently predicted in *McGuffie*. Quite commonly, the request to arrest on behalf of a foreign company may be the first time the solicitor has been instructed to act for that client. And ascertaining reliable information about ship-owning companies in some countries is far from easy.

Further, the elevation in Australia of the arrest warrant application into an undertaking to the Court is believed to lead to an understandable reluctance of Australian practitioners to become involved in such applications – and is again a point of advantage in favour of New Zealand arrests.

Duration and extent of an indemnity/undertaking

In New Zealand, the wording of the undertaking might suggest it relates only to execution of the arrest warrant, rather than to continued detention of the vessel. Obviously there is potential for there to be a considerable disparity in quantum between the alternatives. It is not surprising that this issue has been litigated in New Zealand on a number of occasions.

The question was first considered in the *Offi Gloria* litigation, where Holland J stated:¹⁵

At the time of arrest the sum of \$5000 was obtained by the Registrar as the estimated cost of arrest. The Rules do not specifically provide for security to be given to cover the enormous daily costs of paying and maintaining crew, servicing the ship, harbour dues, and subsequent expenses relating to appraisal and sale. The Rules should be amended and some practice guidelines given to Registrars.

Holland J was referring to the provisions in the Admiralty Rules 1975, and as a result of his complaint, R 776(5) was added to the Admiralty Rules when they were

included in the High Court Rules as Part 14 on 1 February 1998. Apart from this addition, for our purposes the present rules are essentially a copy of the 1975 rules.

The issue was also considered in 1996 in *The "Cornelis Verolme"*¹⁶. In an earlier hearing the Court had ordered that the ship be insured for a sum exceeding US\$11m. At issue in the reported decision was liability for the insurance premiums and other costs.

The Court noted that in England the undertaking to the Marshall expressly covers not only the fees and expenses of the Marshall incurred in the arrest but also in the care and custody of the vessel whilst under arrest. The Court then went on to hold that the second limb of Form 73 extends the indemnity not just to liability arising on actual execution of the warrant of arrest but includes all expenses arising out of or incidental to the execution of the warrant, so long as those actions are lawful and connected in some way with the execution of the warrant. The reason was that Registrars are required to continue to act, often for quite lengthy periods, following arrest, and it cannot have been Parliament's intention to leave them exposed to liability for whatever they are required to do after executing a warrant. The Court therefore held the arresting party liable to pay the premium. That interpretation of the indemnity may no longer be necessary in light of the amendment to R 776 empowering the Registrar to acquire further security.¹⁷

The construction of the indemnity in *The "Cornelis Verolme"* was accepted in 1997 in *De Nationale Investeringsbank NV v The ship "Queeny Margreth"*.¹⁸ Giles J noted that relief from the practical consequences of the indemnity is found in the fact that paramount priority is given to both Marshall's expenses and the plaintiff's costs in arresting the vessel.¹⁹ Giles J, however, stated that it was his opinion that "there is

¹⁵ *ABC Shipbrokers & Anor v The Ship "Offi Gloria"* (HC, Christchurch, AD 47/92, 9 June 1992) at pages 2-3.

¹⁶ *Supra* note.

¹⁷ R 776(5).

¹⁸ (1997) 11 PRNZ 454, 457.

¹⁹ For New Zealand maritime priority law see *ABC Shipbrokers Ltd v The Ship "Offi Gloria"* [1993] 3 NZLR 576 adopting the priorities as set out in Perkins M, "The Ranking and Priority of In Rem Claims in New Zealand." (1986) 16 VUWLR 105. For Australian maritime priority law see *Patrick Stevedores No 2 Pty Ltd & Ors v Proceeds of sale of the vessel "MV Skulptor Konekov"* (1997) 144 ALR 394.

jurisdiction to require payments to be made pursuant to the indemnity as and when liabilities are incurred.” His Honour saw no good reason why the Registrar, (via the Consolidated Fund) should bear the costs of the ship’s management, even in the interim.

So far the only decision on this point under the new Admiralty Rules is *Wallace & Cooper Engineering (Lyttelton) Ltd v Orlovka*.²⁰ In that case the plaintiff arrestor alleged that substantial quantities of fuel and oil had been supplied to the ship, in what was described as “stockpiling”. The oil had been ordered by the Registrar following a request from the ship’s agent. The supplier was unaware at the time of supply that the vessel was under arrest. William Young J followed *The “Cornelis Verolme”* and *The “Queenly Margreth”* in holding that the New Zealand indemnity extends to expenses associated with the care and custody of a vessel after arrest. Thus the supply of oil and provisioning for crew fell within the ambit of the Form 73 indemnity. He drew support for his conclusion from the indemnity referring to “harbour dues”, which presupposed that the Registrar is entitled to an indemnity for ongoing costs associated with the care and custody of the vessel.

The more difficult question was whether the indemnity only applied to expenses genuinely associated with care and custody of the vessel, or whether it also related to expenses reasonably believed by the Registrar to be necessary. The Judge noted that the High Court Rules supplied no guidance on the matter. But since the stockpiling problem would disappear if the vessel remained under arrest for any length of time, no orders had to be made. Also, since any decision on the matter would only be a provisional one, His Honour did not hold that there had in fact been excessive bunkering. Therefore the Registrar had to meet the expenses from the Consolidated Fund.

However, William Young J took the opportunity to say at page 220:

Purely as a matter of impression, I would have thought that the Registrar and/or Wallace & Cooper would have a claim against the vessel in respect of “excessive” bunkering provided, that is beyond what was beyond what was truly necessary for its proper care and custody.

²⁰ (1999) 14 PRNZ 213, 218.

A number of interesting questions are raised by the possible claim for “excessive bunkering”. The first is whether the claim is *in rem* or *in personam*. In the above quote, the Judge refers to a claim “against the vessel”, which of course means an action *in rem*. Such claims could come within the Admiralty Act 1973 s 4(1)(l) which reads “Any claim in respect of goods, materials, or services ... supplied or to be supplied to a ship in its operation or maintenance” though the plaintiff would have to satisfy the s 5(2)(b) “*in personam* link” to have a claim against the vessel. However, the problem with the claim as an action *in rem* is that in the usual scheme of priorities the mortgagee takes everything and the plaintiff receives nothing out of the *res*. Of course the normal order of priorities is not set in concrete and can be altered by the Court in its discretion and it may be that in such a case it would be appropriate to upset the normal order of priorities²¹ though the Court concluded that “there is no principle of admiralty law in New Zealand entitling the third intervener to priority over all other creditors of the ship. Nor is there any equity requiring such an order.”²²

The other option is that the claim might be founded on a maritime lien. Almost all maritime liens were of course developed as an exercise of inherent jurisdiction²³ so it is theoretically possible that a lien for inducing expenses to be conferred on a vessel under arrest could be added to the existing classes of liens. However, the possibility is much more likely to be theoretical than practical since the New Zealand Courts, like their English and Australian counterparts, have shown no inclination to add new classes of maritime liens.²⁴

It is also interesting that William Young J spoke of the “Registrar and/or Wallace & Cooper” having a claim against the vessel. Further, the report indicates the plaintiff was resisting liability for payment for the oil as not being within the indemnity. The Judge did not make it clear whether Wallace & Cooper’s possible claim against the vessel would only arise if they paid the account or would rest on some broader basis. A further difficult question may have been any liability of the

²¹ Neeson: *Admiralty Jurisdiction and Practice* 2nd ed 2000 p6-836 p 201.

²² Ibid 585.

²³ The liens for damage, salvage, seamen’s wages, bottomry and respondentia were created by the High Court of Admiralty. The liens for master’s wages and master’s disbursements were created by the Merchant Seamen Act 1844 (Imp) and the Merchant Shipping Act 1889 (Imp) respectively.

²⁴ See *Fournier v The Ship “Margaret Z”* [1999] 3 NZLR 111, 124 and *The Offi Gloria*, supra note 19 at, 580-581.

Registrar, however innocently incurred, through over-ordering on request and whether that liability fell within the indemnity and Form 73.

Returning to the issue whether the indemnity covers only the actual arrest, or covers the costs of the continued detention of the vessel, the further issue that has not been considered in any of the decided cases is the inter-relationship between Rule 776(4)(b) and Rule 778(8)²⁵. The latter provides:

Before property under arrest is released in compliance with a release issued under this rule, the party at whose instance it was issued must, in accordance with the directions of the Registrar, either pay the costs, charges, and expenses due in connection with the care and custody of the property while under arrest or give a written undertaking to pay those costs, charges, and expenses.

One could argue from the strict wording of R 778 that R 776 only refers to costs proximately associated with the actual arrest while R 778 only refers to final recoupment of ongoing costs. However, such an interpretation would leave an unfortunate gap and is one that does not appear in practice. The Registrar is entitled to an indemnity for fees, expenses and harbour dues at the time of arrest. The Registrar can direct payment of, or obtain an undertaking for, costs, charges and expenses connected with care and custody of the vessel prior to release. On that strict interpretation the Registrar would have no means of obtaining payment for those costs in between. Resort to R 776(5), however, provides the practical answer.

In some jurisdictions the possible difficulty is overcome by the undertakings in the application for the warrant of arrest and in the application for release being identically worded.²⁶

The preferable interpretation is to regard R 776 and R 778 as overlapping though ideally the wording of the rules should be amended so as to make this clear.. The Registrar then has two avenues for recouping money incurred during the arrest.

It is noteworthy that the New Zealand Rules say virtually nothing about a Registrar's powers in relation to vessels under arrest by comparison with the detailed provisions in Australia (RR 47-50). In Singapore there is a practice whereby the sheriff applies

²⁵ This repeats the former R 17(8).

²⁶ England for example: See forms ADM4 and ADM12.

for a standard omnibus order giving authority to take appropriate measures to preserve the ship, its machinery and equipment, movement within port limits and supply of food, fuel and water. New Zealand Registrars would be well advised routinely to seek similar assistance from the Court.

It is also important to note the distinction between security and indemnity. In *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh"* [2001] 2 NZLR 801 security was fixed in the amount sufficient to cover the claimant on a reasonably arguable best case whilst a dispute with the owners went to arbitration and our Court of Appeal has recently reaffirmed (*Det Norske Vertas AS v The ship "Clarabelle"* 10 June 2002 CA.66/02) that re-arrest to obtain increased security is not reserved for exceptional cases. Despite the rule against re-arrest, the Court held that an exception to the rule arises where security was fixed at an inadequate amount initially or where the actions of the owner have rendered inadequate security which was adequate initially. Where re-arrest is permitted in accordance with that exception, the amount of security is determined on the usual reasonably arguable best case basis. It does not involve a broad judicial discretion influenced by factors such as the nationality of the crew.

In Australia the wording of the undertaking is different from the New Zealand equivalent in that it is "in relation to the arrest" rather than "in the execution of the arrest". This wording implies that it is wider and includes costs incurred whilst the vessel is under arrest. The decisions are clear that this is the case.

In *Patrick Stevedores No 2 Pty Ltd v The Ship "Turakina"; Waitemata Stevedoring Services Ltd v the Ship MV "Rangitata" & Anor*,²⁷ it was noted that the Court has broad discretionary powers under R 50 to make orders relating to the preservation, management or control of a ship or other property that is under arrest in the proceeding. In that case the Court ordered that the Marshall engage a ship management company and for funds to be paid by the plaintiff to cover this expense for an interim period of two weeks.

²⁷ Unreported, Tamberlin J, [1998] 244 FCA, 13 March 1998. An application for leave to appeal was not granted – *Waitemata Stevedoring Services Pty Ltd v The Ship "Rangitata" & Anor* (Unreported, Lindgren J, [1998] 441 FCA, 22 April 1998).

An application to release a vessel from arrest must be accompanied by Form 19 in which the applicant undertakes “to pay the fees and expenses of the Marshall in connection with the custody of the ship/property while under arrest.” The inter-relationship between this undertaking and the R 41 arrest undertaking was examined in *Patrick Stevedores No 2 Pty Ltd v The Ship “Turakina”*.²⁸ The solicitors for the shipowners gave the appropriate undertaking and applied to release the ship from arrest. The ship was not released. The solicitors sought to be released from their undertaking. The estimated costs of arrest incurred during the period between the date of the owner's application for release and the judgment refusing the application, were estimated to be over \$A120,000. The main argument by the shipowner was that the undertaking was only intended to operate if the vessel was in fact released from arrest. Also, there were other undertakings (for example in R 41) which applied, and afforded the Marshall ample protection.

Tamberlin J, in holding the solicitors to their undertaking said that:

Is neither necessary nor appropriate, in my view, to approach the undertakings provided for in the Rules on the basis that they are mutually exclusive, or that they must be read down so as not to cover fees or expenses which may be encompassed by other undertakings and which might be given by different parties in respect of the same fees or expenses. It is not appropriate, for example, to read down the words “in relation to the arrest” in R 41 to necessarily exclude fees and expenses of the Marshall in connection with the custody of the ship, simply because the two undertakings are required in respect of different applications made at different stages of the arrest process.

The Rules do not attempt to establish a series of water-tight compartments with respect to undertakings. Merely because the Marshall may have the protection of two overlapping undertakings in respect of the same expenses from different parties does not mean that the language of those undertakings should be necessarily restricted. Obviously the Marshall may not claim double reimbursement in respect of the same fees or expenses. However, there is no reason why the language of the undertakings should not be given an ordinary or natural meaning. The working out of the relevant entitlements and obligations of the various parties providing the undertakings, as between themselves, is a matter for negotiation and resolution between those parties.

Thus it is clear that the R 41 is broad in scope, and covers not only actual arrest, but also the fees and expenses during arrest.

The New Zealand indemnity is expressed to cover “the fees, expenses, and harbour dues (if any)” whilst the Australian equivalent refers to “fees and expenses” in

²⁸ (Unreported, Tamberlin J, [1998] 886 FCA, 15 July 1998)

relation to the arrest. What exactly is covered? Those costs generally accepted by Registrars to be within the scope of the indemnity/undertaking include ²⁹ harbour dues/berthage costs; bunkering and lube oil; securing and moving the vessel; ³⁰ engaging a ship keeper; engaging professionals to protect the vessel; and public indemnity insurance (in Australia). ³¹

In New Zealand the Registrar has power to seek the Court's assistance in the performance or exercise of any function, duty, right or power conferred on him or her and the Court has wide discretion as to the orders it may make. ³² Some of the items recovered under that power include: water and food for crew, expert advice on degassing, fumigation, dental, medical, physio and pre-natal costs ³³, wages, repatriation costs ³⁴, Marshall's/Registrar's legal costs, insurance premiums (in New Zealand) ³⁵, security and maintenance costs.

²⁹ Usually where a solvent agent of the owner or demise charterer exists, most of these items are met without the Registrar/Marshall being involved.

³⁰ Locks are usually changed where a pleasure craft is under arrest. Where a large commercial vessel is under arrest a security firm may need to be hired if necessary, although most wharfs have their own security and surveillance cameras.

³¹ *Practice Note No 12 of 1996* (1996) 137 ALR 744 states that the Marshall will obtain indemnity insurance for the period the vessel is under arrest. The premium is considered to be an expense of the Marshall and is payable by the arresting party. The Note also provides that the Marshall will not obtain commercial insurance for the benefit of any person who has an interest in the arrested property including cargo. Persons with an interest in the vessel should consider insuring the amount of their interest against consequential risks, including risks occasioned by any movement of the vessel. The Practice Note should stop situations like that in *Den Norske Bank (Luxembourg) SA v The Ship Martha II* (Unreported, Tamberlin J [2000] FCA 241, 9 March 2000), where double insurance on the ship existed, from re-occurring.

³² R 795 (1).

³³ These costs were expended in *The Abruka* where there were about 70 crew on the vessel, many in need of various types of medical treatment

³⁴ In *Patrick Stevedores No 2 Pty Ltd v MV Turakina* (1998) 154 ALR 514, Tamberlin J had to consider whether the wages of crewmembers whilst their ship was under arrest and repatriation costs, constituted fees and expenses of the Marshall. While His Honour held that the repatriation costs came within the fees and expenses of the Marshall, he held that the wages did not. This is because there is a real and evident connection between the arrest and the need to pay repatriation costs. Wages in general will not fall within the "fees and expenses" of the Marshall as there is no employment relationship between the Marshall and the seafarers. Also, the Courts have in general taken a broad view of the wages lien. For example union dues and repatriation costs have been included within the ambit of the lien, and so recovered against the *res*. (See *The Westport (No 4)* [1968] 2 Lloyd's Rep 559 and *United States Trust Co of New York v Master and Crew of the Ship "Ionian Mariner"* (1997) 149 ALR 200). However, in certain situations the Marshall may need to employ seafarers to maintain and preserve the ship until sale, and in this case the Court hired four engineers to maintain the two ships in good order.

³⁵ In New Zealand the Registrar does not ordinarily insure the vessel. Rather the plaintiffs should insure their own interest in the *res*. If the vessel is to be moved, the Registrar may insure the vessel for this movement. It is to be remembered that ports already have huge insurance cover and that the insurance on the vessel may still be in place. In Australia, the Marshalls can take out indemnity insurance, which is considered to be a Marshall's arrest.

When a commercial ship is arrested often a vast amount of time needs to be spent making sure all the arrangements are in place. Even with a pleasure craft the time involved can be considerable. In New Zealand time spent on the file, telephone calls, photocopying, maintaining accounts (cl 784(7)) often in foreign currencies, other office expenses and dealing with the many solicitors involved, are not recoverable under the indemnity. This is another aspect where it is considerably cheaper for ships to be arrested in New Zealand by comparison with Australia because these expenses are by no means minimal, and if the Registrar charged even a modest hourly rate would amount to a considerable amount of money. For example in the *Offi Gloria* litigation the Registrar was involved in virtually full time management over a six-month period. We have had a spate of Russian trawler arrests which have continued for months, involving some unusual Registrar's costs such as the dental and pre-natal expenses earlier mentioned. Even though a fee is paid to the Court when a warrant of arrest is sought (\$920), or a commission for appraisalment and sale is applied for (\$900), these fees in most cases come nowhere near compensating the Registrar for the large amount of time spent on the file. However, against the ebb-tide mentioned earlier, in New Zealand, civil Court fees have recently been considerably increased so as to more accurately reflect a "user pays" recovery of the cost of the resource. That may indicate an increase in Admiralty fees is justifiable but since there is an offset for public law matters, the "public good" aspect of New Zealand maintaining an efficient arrest system as an aspect of international maritime trading may militate against fee increases.

Even though there is no schedule of Marshall's fees in the Admiralty Act 1988 (Cth) or Admiralty Rules, it is understood that has been the practice since 1996 to charge for the time actually spent by the Marshall on the arrest plus a 20% loading for staffing overheads³⁶ plus commission of 2% on sales.

Practice of the Registrar/Marshall in relation to security

In New Zealand, the Registrar routinely demands security before issuing the warrant of arrest. As with other jurisdictions, it is usually not known how long the vessel will

³⁶ For example, recreation leave, long service leave, workers compensation, etc.

be under arrest, so estimating probable costs can amount to crystal ball-gazing. Also many expenses are dependent on information the Registrar may not have when the vessel is arrested (e.g. berthage fees, crew size, whether or not pilots and tugs are needed). Associated costs can only be ascertained by enquiry. Making such enquiries is time-consuming and with often only a short time in which the vessel is in the jurisdiction, delay may forestall arrest. Delay is not an option open to the Registrar. Hence, standard practice in New Zealand is initially to rely on the indemnity, and to inform the solicitor at the time of filing that security will be needed in the near future. Usually security to cover the first week's expenses is requested on the day of the arrest. Within the first week the Registrar will have an idea how long the arrest will last. If it is clear the arrest will be ongoing for some time the Registrar ascertains more precisely likely costs, and demands security at regular intervals pursuant to R 776(5) (often 3 or 4 week blocks) to meet anticipated expenditure. Sometimes a much greater amount of security will be requested, particularly if there have been prior difficulties in obtaining security. Larger security has been requested where the vessel is in poor condition and of little value as Registrars are careful not to be exposed to liability where payment may be problematical.

In Australia under R 78(b) the Marshall has the power to make one or more demands for interim payments for the "fees and expenses" that the arrestor undertook to pay. The Marshall also has the power to accept a deposit of money towards discharging the undertaking (R 78(a)).

In Australia Practice Note 12 ((1996) 137 ALR 744) requires Marshalls to obtain indemnity insurance for the period the vessel is in their possession, the cost being an expense payable by the arresting party. But the Marshall does not hold the insurance for the benefit of any person with an interest in the arrested property. They must arrange their own insurance. The Practice Note avoids the difficulties demonstrated by *Den Norske Bank (Luxembourg) SA v The ship "Martha II"* (2000) FCA 241 where, unknown to each other, both the Marshall and the mortgagee had arranged cover for hull and machinery P & I and collision insurance. The premium was added by the Marshall to the claim for expenses and was upheld. The mortgagee's objection to paying was overruled by Tamberlin J saying the purchase of the insurance was

within the Marshall's powers to "take all appropriate steps ... to preserve the ship" as provided in R 47.

So the situation on both sides of the Tasman, is that both Registrars and Marshalls have no funds from which to pay expenses and are therefore reliant on security from the arresting party.

Conclusion

That analysis of the Admiralty Rules on both sides of the Tasman together with consideration of the practices demonstrates the practical differences between the operation of the undertaking given to the Admiralty Marshall in Australia, and the indemnity given to the High Court Registrar in New Zealand when applying for a warrant of arrest.

Though the legal situation is broadly similar – unsurprising since the admiralty jurisdiction in both countries stems from the same source – the practical applications can produce markedly different results.

The Australian Marshall charges the arresting party for the time they spend on the file. Also, Marshalls insure to protect both the Commonwealth and themselves. These two expenses can potentially amount to large amounts, certainly larger than in New Zealand. In addition the form of the Australian undertaking exposes arrestor's solicitors to personal liability.

None of that is currently the position in New Zealand. Arrests in New Zealand are cheaper for arrestors than in Australia. They involve less personal risk for the lawyers for arrestors. They are as efficiently managed by Registrars in New Zealand as by their Australian counterparts. As a result New Zealand, we contend, has become a more desirable jurisdiction in which to arrest.

3 October 2002