

CASES: THE AUSTRALIAN YEAR IN REVIEW

G A Thompson SC*

Introduction

This paper discusses four judgments selected from a survey of Australian cases which have come before the Court over the preceding 12 months. There were obviously a number of shipping cases decided over that period, and the selection therefore involved a subjective element. Essentially, the decisions I will be discussing were selected because, in my view, they each involve the consideration of novel points of law which are both interesting and potentially important to practitioners in the field.

The judgments to be discussed are:

- *Birdon Pty Ltd v Houben Marine Pty Ltd*
- *Geraldton Port Authority v The Ship 'Kim Heng 1888' (No 2)*
- *Programmed Total Marine Services Pty Ltd v The Ship 'Hako Fortress'*
- *Transfield ER Futures Limited v The Ship 'Giovanna Iuliano' (No 2)*

As it happens, each case is a decision of the Federal Court.

1 *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCAFC 126

Facts

Birdon Pty Ltd commenced proceedings in the Federal Court of Australia seeking to establish it had no obligations to pay for the hire of a back hoe dredge chartered from Houben.

Houben contended that the charter agreement was a construction contract within the meaning of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (known as the *Security of Payment Act*). Houben had served a claim on the plaintiff under s 13 of the *Security of Payment Act* for payment of the amount of \$2,132,907.86 under the terms of the charter agreement and had made an adjudication application with respect to its Payment Claim under s 17 of the *Security of Payment Act*.

Birdon sought to restrain the Houben from pursuing the application for adjudication. Birdon also alleged that Houben had engaged in misleading and deceptive conduct in contravention of the *Australian Consumer Law*.

Before turning to the issues in the case, some of the relevant statutory provisions need to be briefly referred to:

- Section 25 of the *Security of Payment Act* provides that an adjudication certificate may be filed 'as a judgment' for a debt in any court of competent jurisdiction and is 'enforceable' as if it were a judgment for a debt.
- Section 32 of the *Security of Payment Act* recognises the essentially provisional nature of the adjudication process. The *Security of Payment Act* is not concerned to give effect to the rights of the parties under the construction agreement. As is apparent from the terms of s 32(2), it expressly leaves the determination of those rights to the courts. The process for which the *Security of Payment Act* provides does not involve a determination, even of a provisional kind, of the actual rights of the parties under their construction contract. It does not affect any civil proceedings arising under a construction contract.
- As will be well known to this audience, s 4(3)(f) of the *Admiralty Act* provides:

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- (3) A reference in this Act to a general maritime claim is a reference to:...
- (f) a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charterparty or otherwise;

It was uncontroversial that the hire agreement for the dredge was a contract within s 4(3)(f) of the *Admiralty Act*, and that the dredge was a seagoing ship within the meaning of s 3 of the *Admiralty Act*. Keane CJ observed that it is well settled that s 4(3)(f) is to be given a broad reading, referring to *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Co Inc*¹ and, at least for the purposes of the case, it could be accepted that both the *Security of Payment Act* claim by Houben and Birdon's claim fell within the definition of maritime claim in s 4(3)(f).

Again, as will be familiar to this audience, s 9 of the *Admiralty Act* deals with Admiralty jurisdiction *in personam*. It relevantly states:

- (1) Jurisdiction is conferred on the Federal Court, the Federal Magistrates Court and on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of proceedings commenced as actions *in personam*:
- (a) on a maritime claim;...

The issues

Five questions were stated on a special case for determination to the Full Federal Court. Only the first four of those questions need to be discussed:

- (i) Whether due to the plaintiff having invoked federal jurisdiction under ss 4(3)(f) and 9 of the *Admiralty Act* and the *Australian Consumer Law* in proceedings in the Federal Court, the adjudication procedure under Part 3 of the *Security of Payment Act* may not proceed.
- (ii) Whether Part 3 of the *Security of Payment Act* impermissibly interferes with the institutional integrity of courts upon which the judicial power of the Commonwealth can be conferred and is thereby invalid.
- (iii) Whether ss 25 and 32 of the *Security of Payment Act* purport to withdraw from the Federal Court of Australia the effective authority to quell any controversy, or part thereof, in respect of which federal jurisdiction is conferred by ss 4(3)(f) and 9 of the *Admiralty Act* and are, for that reason, inoperative.
- (iv) Whether ss 25 and 32 of the *Security of Payment Act* are applicable as a source of rights and remedies in federal jurisdiction under s 9 of the *Admiralty Act* because they are picked up and applied as surrogate federal laws by reason of ss 79 and 80 of the *Judiciary Act 1903* (Cth).

Birdon argued that the *Security of Payment Act* impermissibly interferes with the institutional integrity of courts upon which the judicial power of the Commonwealth can be conferred and was thereby invalid.

It was argued by Birdon that s 25 of the *Security of Payment Act*, which makes the certificate of the adjudicator enforceable as a judgment of a Court, impermissibly conscripts the courts to do the work of the legislative or executive branches of government of the State of New South Wales, falling foul of the principle in *Kable v Director of Public Prosecutions (NSW)*.²

Broadly, the principle in *Kable* is that Ch III of the *Constitution* limits the power of State Parliaments to confer non-judicial functions on State courts that are incompatible with, or repugnant to, the core requirements of such courts as potential recipients of federal jurisdiction.

¹ (1994) 181 CLR 404, 421.

² (1996) 189 CLR 51.

Keane CJ addressed the second question first. His Honour rejected Birdon's argument because, in his Honour's view, on its face, s 25 does not require any court to undertake a non-judicial function. He observed that there is nothing about the enforcement of the adjudication certificate as if it were a judgment of a court which is at odds with the fundamentals of the judicial process.

His Honour further observed that Birdon's argument rose no higher than the proposition that s 25 attaches consequences, in terms of enforcement, to what is an adjudicator's assessment of a statutory entitlement. That statutory entitlement, his Honour observed, is provisional in that it must yield to the final determination of a court.

Citing from Handley JA in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*,³ his Honour observed that the *Security of Payment Act* confers statutory rights on a builder to receive an interim or progress payment and enables that right to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can then be determined in the normal manner.

In the course of dealing with the second question, the Chief Justice went on to make the following observation at [60] in respect of s 4(3)(f) of the *Admiralty Act*:

No doubt the provisions of the *Admiralty Act* are not to be read down, but in my respectful opinion a claim for progress payments pursuant to the *Security of Payment Act* is not aptly described as 'a claim arising out of an agreement that relates to ... the use or hire of a ship', as per s 4(3)(f) of the *Admiralty Act*. It is not to read down the language of the *Admiralty Act* to treat the words 'arising out of an agreement' as requiring that the right or duty sought to be enforced by the claim owes its existence to a provision of the agreement: *Re McJannet; Ex Parte Australian Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654 at 656-657.

The right to claim progress payments owes its existence not to the provisions of the charter agreement but to the provisions of the *Security of Payment Act*. The charter agreement is no more than the factum on which the provisions of the *Security of Payment Act* operate to confer the right to progress payments ...

Critically, the existence and quantum of the new statutory right depends not on the true state of underlying facts as regulated by the charter agreement, but on the assessment of the adjudicator who is not required or authorised to make any findings about those facts.

This analysis led his Honour to also answer the first and third questions in the negative and to find that it was not necessary to answer the fourth question.

A similar analysis led Buchanan J to the same result. His Honour said that he could see no inconsistency between the provisions of the State Act, or their operation in the present case, and the provisions or operation of either the *Admiralty Act* or the *Australian Consumer Law*.

His Honour observed that the State Act establishes an administrative procedure for claiming, determining and recovering progress payments, and '[i]t does so, in my view, without disclosing any intention, or having any operative effect, of intruding upon the exercise of the jurisdiction of this Court or the exercise of federal judicial power generally...'

Justice Rares

Justice Rares in a powerful dissenting judgment concluded that s 25 and 32(3) of the *Security of Payment Act* are invalid because they impermissibly interfere with the institutional integrity of the courts upon which the judicial power of the Commonwealth can be conferred. It is instructive to spend a little time analyzing his Honour's reasoning, which in my respectful view, makes some compelling points.

³ (2005) 62 NSWLR 385, [22].

It was common ground between the parties that an adjudicator making an adjudication under the *Security of Payment Act* does not exercise judicial power in making an adjudication.

In his Honour's opinion, the entry of an adjudication certificate as an enforceable judgment of a court arrived at by a process that was not judicial, with no judicial scrutiny, or even any opportunity for such scrutiny, is fundamentally inconsistent with the judicial process. It followed that the 'judgment' created by force of s 25(1) is not an exercise of judicial power. The court in which the certificate is filed does nothing itself to make the adjudicator's determination have the effect of an order. No judicial process is engaged at any point prior to the entry of an enforceable judgment.

However, the Act operates so that once an adjudication certificate is issued, s 25(1) entitles the claimant to file it in any court of competent jurisdiction 'as a judgment for a debt' and makes the judgment enforceable according to the ordinary enforcement powers of the court in which the certificate is filed in respect of orders that that court might make in the exercise of its judicial functions.

Thus, his Honour concluded that the *Security of Payment Act* uses the status and powers of a court to clothe the adjudication certificate in a judicial guise, and that it usurped the judicial authority of the court, whose process is conscripted to give the appearance of a judicial determination.

His Honour further observed that a State Parliament cannot limit or withdraw a part of a controversy from the scope of the application of a valid federal law or the exercise of federal jurisdiction, or prevent any court, State or federal, invested with the judicial power of the Commonwealth, from exercising that judicial power in a matter arising under Ch III of the *Constitution* by precluding a party from exercising rights that arise in a 'matter' within the meaning of ss 75 and 76 of the *Constitution*.

His Honour concluded that the *Security of Payment Act* offends these principles because it does not permit the debtor to make any challenge to the merits of an adjudicator's determination by way of defence to its liability to pay the sum outstanding under an adjudication certificate, which becomes a judgment of the Court. Thus, s 25 effectively excludes from consideration, in proceedings to set aside a judgment enforceable by reason of s 25(1), any issue that may arise under a general maritime claim in s 4(3)(f) of the *Admiralty Act* and hence any issue in federal Admiralty jurisdiction.

By expressly prohibiting a debtor bringing any cross claim in proceedings brought under such a judgment, s 25 purports to exclude a court in such proceedings from exercising federal jurisdiction under any law of the Parliament.

Rares J also therefore concluded that:

- (v) in answer to the first question, ss 25 and 32(3) of the *Security of Payment Act* are operationally inconsistent with the exercise of jurisdiction in a matter under a law made by the Parliament, such as ss 4(3)(f) and 9 of the *Admiralty Act* and the *Australian Consumer Law*. The process that culminates in a judgment created by force of s 25(1), involves no exercise of, and is fundamentally inconsistent with the exercise of, judicial power under Ch III of the *Constitution*.
- (vi) in answer to the third question, that ss 25 and 32 of the *Security of Payment Act* did withdraw from the Federal Court authority to quell part of a controversy in federal jurisdiction.

I am informed by Mr A W Street SC that there has been no application for special leave to appeal by Birdon. It seems the matter was settled before any application was filed.

The question, it seems to me, is one ripe for consideration by the High Court. There is, in my respectful view, some compelling logic to the reasoning of Rares J.

2 **Geraldton Port Authority v The Ship 'Kim Heng 1888' (No 2) [2012] FCA 353**

This is a decision of McKerracher J concerning the question of whether the three year limitation defence under s 37 *Admiralty Act 1988* (Cth) operates to limit the bringing of a separate *in personam* proceeding when *in rem* proceeding has already been commenced. The judgment also contains a useful discussion of that vexed question of the relationship between *in rem* and continuance of the proceeding as an *in personam* proceeding after an appearance is entered.

Facts

Geraldton Port Authority commenced a proceeding *in rem* against three ships on 4 October 2010 seeking damages in respect of the collision of each of the three vessels with berths in the Geraldton Port between 30 September and 1 October 2005.

The defendants in the *in rem* proceeding foreshadowed an application to dismiss the proceeding on the basis it had been brought outside the three year limitation period prescribed by s 37(1)(b) of the *Admiralty Act*.

The Authority sought to discontinue the *in rem* proceeding. It brought a separate proceeding *in personam* against the charterers.

The *in personam* proceeding was almost identical to the *in rem* proceeding, the main difference being the identity of the parties defending it (the charterers, not the ships) and the relief sought, being against the charterers.

In the *in personam* proceeding, the Authority's claim in damages was based on s 113 of the *Port Authorities Act 1999* (WA) and on breach of duty of care owed by the defendants to the Authority. It was common ground that in usual circumstances the limitation period for commencing a claim based in tort would be six years after the cause of action accrued.

Issues

The defendants in the *in rem* proceeding contended that dismissing the *in rem* proceeding, by virtue of it being out of time, would also have the effect of dismissing the *in personam* proceeding.

The argument advanced by the defendants turned on s 37 of the *Admiralty Act*, which materially provides:

Limitation periods

- (1) A proceeding may be brought under this Act on a maritime claim, or on a claim on a maritime lien or other charge, at any time before the end of:
 - (a) the limitation period that would have been applicable in relation to the claim if a proceeding on the claim had been brought otherwise than under this Act; or
 - (b) if no proceeding on the claim could have been so brought — a period of 3 years after the cause of action arose.

The defendants in the *in rem* proceeding argued that once a *claim* has been submitted to the jurisdiction of the Court (not a *proceeding*), one consistent limitation period applies, and they emphasized that the only explanation for the discontinuance application was the existence of the limitation defence. They argued that the limitation point could not be overcome 'by the device of recommencing the *in personam* claims separately in different proceedings.'

It was argued that s 37 prescribes the time limit in respect of *claims*, not *proceedings*, and that there is a fundamental distinction between ‘claim’ and ‘proceeding’ in the *Admiralty Act*: a ‘claim’ is the set of circumstances which is being pursued as the basis for liability while a ‘proceeding’ is the procedural mechanism by which the Court is made aware of those claims in that set of circumstances and asked to adjudicate on liability.

His Honour observed that s 37 is not easy to understand.⁴ The drafting of the section is rather unfortunate, and its effect is not entirely clear. Any plaintiff proceeding *in rem* against a ship under the *Admiralty Act* could have proceeded *in personam* against its owner by invoking the ordinary, non-Admiralty jurisdiction of the Court. That would mean that s 37(1)(b) would have no effect at all, because s 37(1)(a) would always apply the limitation period that would apply if the action were brought *in personam*. However, the apparent intention of s 37(1) is that para (a) should apply to *in personam* proceedings in the Admiralty jurisdiction conferred by the Admiralty Act and para (b) should apply to actions *in rem*. That intention can only be effected by reading the section as if it included the words ‘of the same kind’ after the word ‘proceeding’ in each of the lettered paragraphs.

His Honour noted that in the *Admiralty Act* there is no general definition of either ‘claim’ or ‘proceeding’ contained in s 3, but s 4 does define various types of maritime claims. It does so by reference to the circumstances or the facts of the claim.

The defendants further argued that, as the Authority initially chose to pursue the proceeding *in rem*, it has already submitted both the claim *in rem* and the related claim *in personam* to the jurisdiction of the Court: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*⁵ and *Caltex Oil (Australia) Pty Ltd v The Dredge ‘Willemstad’*⁶ (ie after appearance the action *in rem* proceeds as if it were an action *in personam* (without ceasing to be an action *in rem*) against that person).

His Honour rejected this argument, observing:

But at [110], Allsop J stressed that a cause of action *in rem* does not merge in a judgment *in personam*. At [111] his Honour stressed that the procedural theory relies for its effective operation upon the reality of the claim against the ship being separate and distinct from the claim *in personam*.

The parties are entirely in agreement that after an unconditional appearance is filed by a named defendant in an *in rem* proceeding then the proceeding continues both *in rem* but also against that person on an *in personam* basis. This is the Australian position as reinforced by the Full Court in *Comandate*. It does not necessarily follow from this, however, that what would be a six year limitation period for any *in personam* claim in that proceeding is converted to a three year limitation simply because the proceeding was initially issued *in rem* only against the ship. That is another step altogether and one which is neither necessary or desirable to take at this point of the litigation between the parties.

His Honour continued:

I take the observation of the Court (in *Comandate*) on this topic to simply be an acknowledgement that while the claim *in rem* continues, a plaintiff may also be able to pursue an *in personam* claim (on different legal foundations) against the unconditionally appearing ‘relevant persons’. If anything there is one proceeding with two different claims, one *in rem* and one *in personam* but the inter-changeability of terms such as claim, proceeding and action throughout the *Admiralty Act* does not permit one to read into the words of s 37 the argument which the defendants now advance.

⁴ As noted by Davies, M and Dickey, A, *Shipping Law* (3rd ed, 2004, Lawbook Co) 446.

⁵ (2006) 157 FCR 45 per Allsop J (as he then was).

⁶ (1976) 136 CLR 529, 538-539.

3 **Programmed Total Marine Services Pty Ltd v The Ship 'Hako Fortress' [2012] FCA 805 (1 August 2012)**

This is also a recent decision by McKerracher J. It contains a helpful discussion of a number of interesting issues.

The application was to set aside writs and arrest warrants. The facts of the case were briefly that the plaintiff (PTMS) had supplied manning services and crew under a deed to which Hako Offshore was a party. PTMS arrested 4 'Hako' vessels relying upon a general maritime claim under s 4(3)(m) of the Admiralty Act and under a statutory maritime lien of the type described in s 15(2)(c) for wages for crew.

First, his Honour addressed what constitutes a 'demise charterer', and the submission that it is a requirement for s18(b) of the Admiralty Act that a demise charterer is employer of the crew.

The owners of the arrested ships contended that Hako Offshore was not in possession and control of the vessels so as to be demise charterer (s18(b) *Admiralty Act*). This was because it was contended that Hako Offshore was not the employer of the master and crew.

His Honour ultimately rejected this argument adopting a broad interpretation of the expression 'demise charterer', but the judgment nonetheless contains a useful discussion of the principles and collects the relevant authorities.

Secondly, the case raised an issue as to whether the claims arise out of a specialty contract (a deed) rather than being claims for services supplied to the vessels: the distinction being between supply of services to a ship on the one hand and supply to the shipowner and not therefore claims within s 4(3)(m) of the Act on the other.

The shipowners sought to draw on the distinction made by Foster J in *Port of Geelong Authority v The 'Bass Reefer'* in which his Honour said:⁷ 'Such a facility must be supplied to a ship in a reasonably direct sense and not merely supplied to the owner or demise-charterer for the ship'.

If the argument was made out it would also follow that the proceedings were not 'on a maritime lien' within s 15: see *Elbe Shipping SA v The Ship 'Global Peace'*⁸ — a case for which I have considerable fondness.

Again, however, after reviewing authorities bearing on the question, his Honour rejected the shipowners' argument. In the course of his reasons, the judge distinguished the judgment of Hill J in *The Petone*,⁹ holding that his Honour was not persuaded that it was still binding authority.

In *The Petone* Hill J had said that if a volunteer pays off debts constituting a maritime lien the party making the payment was not subrogated to and did not thereby acquire a maritime lien.

His Honour observed that 'there is, at least arguably and at least now, a principle in English law that subrogation to the rights of a secured creditor is to be regarded as a remedy to prevent unjust enrichment, and does not necessarily depend upon questions of the intention of the parties',¹⁰ and that the High Court of Australia has accepted that there is a category of case where subrogation of a third party is allowed to securities paid off by that party.

⁷ (1992) 37 FCR 374, 387.

⁸ (2006) 154 FCR 439 [133] per Allsop J (as his Honour then was).

⁹ [1917] P 198.

¹⁰ *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 224.

4 *Transfield ER Futures Limited v The Ship 'Giovanna Iuliano' (No 2) [2012] FCA 967 (5 September 2012)*

This is a very recent decision of Gordon J relating to costs, which raised an interesting point about indemnity costs for wrongful arrest.

The defendant's submission, based on the fact that the ship was arrested and that such an arrest constituted a fundamental interference with a person's right to their property and, because s 34(1)(a)(ii) of the *Admiralty Act* provides for an award of damages arising out of an arrest of a ship where that person acts unreasonably and without good cause, was that the Court's discretion as to costs should be exercised to ensure the owner is fully indemnified for its costs: *Nautilus Australia Ltd v The Ship 'Rossel Current'*.¹¹

The litigation had concerned freight forwarding swap agreements. Gordon J rejected the application for indemnity costs on the basis that the issue concerning FFAs was contentious and not the subject of any binding or persuasive authority. Her Honour observed that, unlike the position in *Nautilus*, there were no other facts or matters which supported costs being ordered to be paid on an indemnity basis.

¹¹ Unreported, QSC, Ambrose J, 26 March 1999, [9].