

SERVICE OF PROCEEDINGS *IN REM* OUTSIDE THE TERRITORIAL SEA: *Sembawang Salvage Pte Ltd v Shell Oil Services Ltd* [1993] 2 NZLR 97

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In September 1992, Hillyer J decided the leading New Zealand case of *Sembawang Salvage Pte Ltd v Shell Oil Services Ltd*,³⁷⁸ which dealt with two questions of law. First, whether a maritime lien against cargo is extinguished once the *res* in question is no longer cargo. Second, whether a writ³⁷⁹ *in rem* may be properly issued and served if the *res* is outside the jurisdiction. It is the second of these questions which I address in this paper. *Sembawang Salvage* is of practical importance as part of the body of New Zealand Admiralty law as it applies to the service of proceedings *in rem*, because it is cited in *The Laws of New Zealand* as authority for the proposition that:³⁸⁰

If the ship or other property is within the territorial sea or in the waters over the Continental Shelf, it will be within the territorial jurisdiction of the New Zealand Court and will be capable of being served with the proceedings.

It is not insignificant that *Sembawang Salvage* was decided two years before the *United Nations Convention on the Law of the Sea* came into force,³⁸¹ and four years before it came into force for New Zealand.³⁸² It follows that Hillyer J was not called upon to consider the interface between UNCLOS and New Zealand Admiralty law in this case. With this in mind, the question that this paper addresses is whether *Sembawang Salvage* still represents good law two decades later, and whether in fact the commentary indicated above correctly reflects that law.

The facts

The proceedings in *Sembawang Salvage* arose from the near loss of a steel space-frame structure or jacket which was to form part of the Maui B oil and gas drilling and wellhead platform. The jacket was loaded as cargo (the second defendant) onto a barge (the first defendant) and towed by the salvage and fire-fighting tug *Salvigour* from Whangarei to Golden Bay, near Nelson. The *Salvigour* was owned and operated by the plaintiff, Sembawang Salvage Pte Ltd.

The *Salvigour* anchored the barge in Golden Bay on 26 February 1992 and then stood by, awaiting another vessel and orders to proceed to the Port of Nelson for clearance. At about 2 am the following morning, the barge dragged its anchor in winds gusting to 40 knots. The *Salvigour* weighed anchor and commenced a long and difficult operation to regain control of the barge and prevent it from grounding on nearby rocks, which was ultimately successful. The plaintiff then claimed salvage, arguing that the barge and cargo would have stranded and in all probability become a total loss, but for its intervention. It is trite law that a claim in the nature of salvage gives rise to the possibility of an action *in rem* against the salvaged vessel and cargo.³⁸³

The jacket was subsequently installed as part of the Maui B platform, approximately 24 nautical miles off the coast of Taranaki.³⁸⁴ The plaintiff then obtained a writ *in rem* against the first defendant barge and the second defendant cargo. In the High Court at Auckland sitting in Admiralty, the fourth defendant owner of the jacket, Shell Todd Oil Services Ltd, moved to have the writ *in rem* against the second defendant set aside on two grounds. This paper focuses on the second ground, namely that the *res* was now situated outside the jurisdiction.

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³⁷⁸ [1993] 2 NZLR 97 ('*Sembawang Salvage*').

³⁷⁹ Now a notice of proceeding under r 25.8 of the *High Court Rules (Judicature Act 1908 (NZ), Sch 2)*.

³⁸⁰ LexisNexis, *The Laws of New Zealand* (at 16 December 2013) Maritime Law: Admiralty, 'Part I General Introduction to Admiralty' [11].

³⁸¹ 1982, 1833 UNTS 3, entered into force 16 November 1994 ('UNCLOS' or 'the Convention').

³⁸² 18 August 1996.

³⁸³ *Admiralty Act 1973 (NZ)*, ss 4(1)(i), 5.

³⁸⁴ *Sembawang Salvage* [1993] 2 NZLR 97, 100.

Judgment of Hillyer J

Hillyer J observed at page 101 of the judgment that:

It is of significance that a writ can be issued, even though the res is not within the territorial jurisdiction. At p 59, para 87 of Thomas, the learned authors say:³⁸⁵

‘Although a *res* may only be arrested when within territorial jurisdiction there exists no similar restriction in respect of the issue of a writ *in rem* and warrant of arrest. Such forms of process may be issued when the *res* is out of the jurisdiction and later served and executed when the *res* comes within jurisdiction.’

The learned Judge then considered the implications of section 7(1) of the *Continental Shelf Act 1964* (NZ), which provides that:

Subject to the provisions of this Act, for the purposes of this Act and of every other enactment (whether passed before or after the passing of this Act) and of every rule of law for the time being in force in New Zealand,—

- (a) Every act or omission which takes place on or under or above or about any installation or device (whether permanent or temporary) constructed, erected, placed, or used in, on, or above the continental shelf in connection with the exploration of the continental shelf or the exploitation of its natural resources shall be deemed to take place in New Zealand; and
- (b) Every such installation or device shall be deemed to be situated in New Zealand, and for the purposes of jurisdiction shall be deemed to be situated in that part of New Zealand above high-water mark at ordinary spring tides which is nearest to that installation or device; and
- (c) Every court in New Zealand which would have jurisdiction (whether civil or criminal) in respect of that act or omission if it had taken place in New Zealand shall have jurisdiction accordingly; and
- (d) Every power of arrest or of entry or search or seizure or other power that could be exercised under any enactment (whether passed before or after the passing of this Act) or under any rule of law in respect of any such act or omission or suspected act or omission if it had taken place or was suspected to have taken place in New Zealand may be exercised on or in respect of any such installation or device as if the installation or device were in New Zealand.

Hillyer J held that the service of a writ *in rem* on an oil and gas platform situated on the continental shelf would qualify as an ‘act’ for the purposes of section 7(1)(a) of the *Continental Shelf Act* and that, accordingly, the service of such a writ or, in due course, a warrant of arrest would be within the jurisdiction.

United Nations Convention on the Law of the Sea

In considering the proper interpretation of jurisdiction under the law of Admiralty in New Zealand, UNCLOS is now a key touchstone. As the Court of Appeal put it in *Sellers v Maritime Safety Inspector*:³⁸⁶

New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea and, if possible, consistently with that law.

Neither the *Admiralty Act 1973* (NZ) nor the *Judicature Act 1908* (NZ) explicitly state the geographical extent of the High Court’s jurisdiction in Admiralty under the former Act.

As is the case throughout the Convention, the question of jurisdiction under UNCLOS represents a balance between the interests of coastal States and flag States. A coastal State enjoys sovereignty and therefore largely unfettered enforcement jurisdiction in its territorial sea.³⁸⁷ However, beyond 12 nautical miles from the coastal

³⁸⁵ D.R. Thomas, *British Shipping Laws* (Stevens & Sons, 1980) vol 14.

³⁸⁶ [1999] 2 NZLR 44, 57.

³⁸⁷ UNCLOS, art 2.

State's baselines,³⁸⁸ the State does not enjoy sovereignty – rather it possesses sovereign rights in various zones in respect of particular matters enumerated in the Convention. For example, a coastal State is entitled to prescribe an Exclusive Economic Zone (EEZ) extending 200 nautical miles from its baselines.³⁸⁹ In its EEZ, the coastal State may:³⁹⁰

...in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

Subject to that limited enforcement jurisdiction conferred on the coastal State, foreign-flagged ships in the EEZ enjoy high seas freedoms and are subject to the exclusive jurisdiction of their flag State.³⁹¹ Oil and gas platforms in the EEZ are, however, subject to the exclusive jurisdiction of the coastal State.³⁹² Essentially the same position applies to foreign-flagged ships operating in the waters above a coastal State's continental shelf, and platforms established by or with the consent of the coastal State on that shelf.³⁹³

Jurisdiction *ratione loci* under New Zealand Admiralty law

Section 4 of the *Admiralty Act* extends the Admiralty jurisdiction *ratione loci* to 'all claims, wheresoever arising'. However, 'wheresoever' is misleading as a geographical limit in respect of proceedings *in rem*, for three reasons. First, r 25.8(4) of the *High Court Rules* states that a 'notice of proceeding *in rem* may not be served out of the jurisdiction.' Second, there is a presumption of statutory interpretation that Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication.³⁹⁴ Third, there is the principle of interpretation referred to above in *Sellers*, which applies to Admiralty law specifically.

As the designation suggests, the seaward boundary of the territorial sea marks the limit of New Zealand's territorial jurisdiction.³⁹⁵ It follows that any exercise of jurisdiction in the EEZ or over the continental shelf is extraterritorial. The question, then, is what is meant by 'out of the jurisdiction' in r 25.8(4). Does 'jurisdiction' in this context mean 'territorial jurisdiction', or is it capable of bearing a broader meaning consistent with UNCLOS?

There is a contextual indication in the *High Court Rules* that 'out of the jurisdiction' is indeed a simile for 'outside New Zealand's territorial limits'. Rule 25.7(3) prescribes that the notice of proceeding for an action *in personam* may be served 'out of the jurisdiction' in accordance with rr 6.27 to 6.35. Those rules constitute the bulk of Part 6 Subpart 4 of the *High Court Rules*, under the heading 'Service out of New Zealand'. They are focused, as might be expected, on service outside the territorial limits of New Zealand. This territorial limit on the service of proceedings *in rem* is consistent with both UNCLOS and long-standing English Admiralty law.³⁹⁶

It follows that, absent section 7(1) of the *Continental Shelf Act*, service of a notice of proceeding *in rem* on cargo discharged onto an oil and gas platform in the EEZ, ie outside New Zealand, would not be permitted under the *High Court Rules*. As Hillyer J held in *Sembawang Salvage*, the effect of section 7(1)(a) is that service on such a platform is deemed to have occurred in New Zealand and is therefore permitted.³⁹⁷ The effect of section 7(1) extends to 'any installation or device... constructed, erected, placed, or used in, on, or above the continental shelf in connection with the exploration of the continental shelf or the exploitation of its natural

³⁸⁸ These are to be drawn in accordance with Part II Section 2 of UNCLOS, and must generally follow 'the low-water line along the coast as marked on large-scale chart officially recognised by the coastal State': UNCLOS, art 5.

³⁸⁹ UNCLOS, art 57.

³⁹⁰ Ibid art 73.

³⁹¹ Ibid arts 58, 87 and 92.

³⁹² Ibid art 60.

³⁹³ Ibid arts 78 and 80. Unlike the other maritime zones prescribed in the Convention, the continental shelf is a geomorphological feature which may be claimed out to a maximum of 350 nautical miles from a coastal State's baselines: UNCLOS, art 76. New Zealand has a vast continental shelf which was accepted for the purposes of UNCLOS by the UN Commission on the Limits of the Continental Shelf on 22 August 2008: see UN Commission on the Limits of the Continental Shelf, *Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission made by New Zealand 19 April 2006* (22 August 2008). <http://www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf>.

³⁹⁴ *Poynter v Commerce Commission* [2010] 3 NZLR 300, 318 (Supreme Court of New Zealand).

³⁹⁵ *Interpretation Act 1999* (NZ), s 29.

³⁹⁶ See *The Freccia del Nord* [1989] 1 Lloyd's Rep 388, 392 (Sheen J).

³⁹⁷ This provision essentially mirrors United Kingdom law in respect of oil and gas platforms in the North and Irish Seas: *Petroleum Act 1998* (UK) s 11 and *Civil Jurisdiction (Offshore Activities) Order 1987* (UK) art 3. It is less clear whether Australian law is to the same effect, due to the drafting of s 428 of the *Offshore Minerals Act 1994* (Cth) and s 22(1) of the *Admiralty Act 1988* (Cth).

resources.’ In addition to oil and gas platforms, this could include a structure erected to conduct offshore mineral resource exploration or recovery. However, it does not include a ship; even a New Zealand-flagged ship in the EEZ over which New Zealand enjoys exclusive jurisdiction under UNCLOS Article 92.

The implication of this is that it is not possible to commence *in rem* proceedings against a ship or its cargo while it remains outside the territorial sea, unless the cargo has been discharged onto, or become part of, an offshore platform or structure on the continental shelf. In Australia, this limitation is explicitly recognised in section 22(1) of the *Admiralty Act 1988* (Cth):³⁹⁸

Subject to subsection (4):

- (a) initiating process in a proceeding commenced as an action *in rem* in the Federal Court may be served on a ship or other property; and
- (b) a ship or other property may be arrested in such a proceeding;

at any place within Australia, including a place within the limits of the territorial sea of Australia.

Subsection (4) provides yet a further limit on service inside the territorial sea:

Where the arrest of a foreign ship, or of cargo on board a foreign ship, would be inconsistent with a right of innocent passage that is being exercised by the ship, this Act does not authorise the service of process on the ship or the arrest of the ship or cargo.

Section 22(4) of the *Admiralty Act 1988* implements Australia’s international obligation under UNCLOS Article 24 not to ‘impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage.’ In ordinary circumstances, it would almost certainly be impractical to attempt to serve a foreign-flagged ship exercising the right of innocent passage through Australia’s territorial sea. However, while innocent passage ordinarily requires continuous and expeditious passage, it may also include stopping and anchoring in certain limited circumstances.³⁹⁹ In such circumstances, while the service of a warrant of arrest might be possible, it would not be lawful. While the provisions on arrest in Part 25 Subpart 6 of the *High Court Rules* do not give explicit recognition to this limitation, the application of the *Sellers* principle is likely to produce the same result.⁴⁰⁰

Conclusion

It follows from the foregoing analysis that, while *Sembawang Salvage* is still good law in New Zealand, the cited portion of *The Laws of New Zealand* does not reflect that decision as closely as might be desirable.

A better exposition of the law governing the service of proceedings *in rem* might be as follows:

If the ship or other property is within the territorial sea, it will be within the territorial jurisdiction of the New Zealand Court and will be capable of being served with the proceedings, provided that, in the case of a foreign-flagged ship, such service can be effected consistently with the ship’s right of innocent passage. Service of proceedings *in rem* is also within the jurisdiction and therefore permitted if the property to be served is cargo which has been discharged onto, or forms part of, an installation or device used for resource exploration or exploitation in, on or above the continental shelf, such as an oil and gas platform.

³⁹⁸ The portion of this provision which applies to State and Territory courts, which is materially the same as that applying to the Federal Court, is omitted here. As is indicated in the preceding footnote, there is in fact some doubt as to whether *in rem* proceedings under the *Admiralty Act 1988* (Cth) can be served on a cargo discharged onto a platform in Australia’s EEZ.

³⁹⁹ UNCLOS, art 18.

⁴⁰⁰ Damien J Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press, 3rd ed, 2008) 208-209.