CAN YOU ARREST BUNKERS IN AUSTRALIA?

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Background

'Bunkers' tends to refer to the fuel inside a ship, though it can also refer to the tank those bunkers are stored in, or the process of filling those tanks with fuel. In essence one can bunker their bunkers with bunkers. Inside the ship might be many tanks in which fuel of varying specifications are stored.

Commonly, shipowners will charter their vessels on a time charter. The time charterer will most often buy the fuel already in the tank when they sign their contract with the shipowner, and will thus own the fuel in the tanks and will own additional fuel that they buy and fill the tanks with. At the expiry of their charter, the time charterer will generally sell the remaining bunkers to the shipowner, who will be compelled to buy them at the local market price, under the standard contractual provision/s governing these transactions.

However, a problem arises during the arrest of ships. In Admiralty courts, or courts otherwise vested with Admiralty jurisdiction, a judge can order a ship be arrested, and if need be, sold after a maritime claim has been brought against the ship itself; an action *in rem*.

The problem is that at the time of arrest, the ship will have a lot of items on her, which cannot be sold for the shipowner's dues, as the shipowner does not own them. Cargo is a good example of this and so are bunkers. The difficulty posed by bunkers is that they are said to be practically difficult to separate from the ship (though no case cited in this paper appears to have heard evidence to this effect). Because of this, courts generally sell the bunkers with the ship and remit the proceeds of the bunker sale to the bunker's true owner, generally the charterers.

However, what happens when there is a claim against the bunkers themselves for the evils of the charterers, but not against the ship or its owners? Can you apply the same logic and sell the ship and the bunkers and remit the cost of the ship back to the shipowners? Can you arrest the bunkers and hold them until one's claim is paid, bail is posted or a court releases the ship because the claim did not succeed or was dropped? The answers to these legal questions will form the topic of this paper.

The British Position: What Did You Say, Your Lordship?

Most of the Australian case law in this area is derivative of the judgments of Sheen J.[1] The problem is that there are differing views as to what his Lordship said over the many cases he decided regarding bunkers.

The first relevant case in this regard is *The Saint Anna*.[2] Here the contract was governed by the standard *Shelltime 3* clauses,[3] set out below:

> 14. Charterers shall accept and pay for all bunker oil and boiler water on board the vessel at the time of delivery, and Owners shall, on the expiry of this charter pay for all bunker oil and boiler water then remaining on board . . . Owners shall give charterers the use and benefit of any fuel contracts they may have in force, at home and/or abroad, if so required by Charterers, provided suppliers agree.
> 22. . . . If Owners require the vessel to proceed to any special port for periodical docking purposes no hire shall be payable for time lost in proceeding to whilst at and after leaving such special port . . . all fuel

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[1] Sir Barry Sheen (1918 - 2005) was a British judge who served as Admiralty Judge of the High Court (Queen's Bench Division) from 1978 to 1993.

[2] [1980] 1 Lloyd's Rep 180.

[3] Note the Shelltime 4 clauses (Dec 2003) are slightly, but for the purposes of this paper not materially, different: '15. Charterers shall accept and pay for all bunkers on board at the time of delivery, and Owners shall on redelivery (whether it occurs at the end of the charter or on the earlier termination of this charter) accept and pay for all bunkers remaining on board, at the price actually paid, on a "first-in-first-out" basis… Notwithstanding anything contained in this charter all bunkers on board the vessel shall, throughout the duration of this charter, remain the property of Charterers and can only be purchased on the terms specified in the charter at the end of the charter period or, if earlier, at the termination of the charter'.

> consumed . . . in the course thereof shall be paid for by the Owners, Charterers crediting Owners with any benefit they may gain in purchasing fuel at the special port aforesaid . . .

In this case, the ship was arrested for debts owed by the shipowner. No one contested the right of the Court to sell the ship and the fuel in one sale; the contention was as to who owned the fuel. Sheen J looked to the charterparty agreement to find the answer to these questions. The above quoted provisions could not be more clear about where the fuel's ownership was vested; it was with the charterers. His Lordship therefore said:[4]

> It seems to me that if the charterers purchase fuel, that fuel is their property unless the parties clearly and unequivocally agree that the property shall vest in the owners.

This was made even more obvious by the fact that owners needed to buy back the bunkers on redelivery. Why would they need to buy back their own bunkers? They would not. Therefore the bunkers were clearly the property of the charterers until the owners bought the bunkers back.

The next case decided by Sheen J on this topic was *The Silia*.[5] Importantly in this case *the shipowners owned the bunkers, not the charterers*.

In the case, it was contended by the plaintiff charterers that the Court could not sell bunkers that were owned by the shipowner due to the owner being in arrears. Why did the charterers not want the bunkers to be sold and put into one fund with the ship? Because, if the bunkers were sold with the ship, the proceeds would be shared between all creditors *pari passu*, however if they were separate the charterers hoped that they would have the only claim over that separate fund. His Lordship stated that:[6]

> It has hitherto been the practice of this Court to treat the proceeds of sale of a ship, and her bunkers and lubricants (unless they are the property of charterers) as one fund.

It does not always follow that that one fund (consisting of the proceeds of the vessel and her bunkers *et cetera*) can be drawn from by all creditors *pari passu* unless, of course, the bunkers are owned by the shipowner, in which case that is exactly what happens. This is because where property on board a ship does not belong to the shipowner, it must be set aside and sold for the benefit of only its true owner:[7]

> I have no doubt that in the context of an action *in rem* the word 'ship' includes all property aboard the ship other than that which is owned by someone **other than the owner of the ship.**

Variants of the above paragraph (at least seven by my count) with the caveat 'other than the owner' are repeated throughout the four-and-a-half page judgment, including once in the headnote. The caveat means that where the property aboard the ship in question is owned by the shipowner, even though it is not a necessary part of the ship, then that property forms security from which creditors can claim. This includes the bunkers. To recap, whether something forms part of the 'ship' for the purposes of an action *in rem* depends on the ownership of that, or those, things. Also, whether the oil was sold with the ship was dependant on its manner of storage; at his Lordship says 'unbroached drums of oil are usually sold separately. But the oil in the ship's tanks must, for practical reasons, be sold with the ship'.[8] He then listed reasons, from a technical perspective that made the removal of bunkers in the UK in 1979 difficult, though none of these appear to have been based on evidence. He then offered an additional reason under UK tax law. Whether those presumably guestimated technical issues, if they ever existed, exist 35 or more years later or if such tax issues, if they ever existed in Australia, exist today in Australia has not been the subject of subsequent discussion on the basis of evidence in the Australian case law surveyed for this paper. I note that there is no legal reason his Lordship gave for not disgorging bunkers not owned by the shipowner (and it is doubtful if there is one given the treatment of oil drums quoted above). As this was never an issue of law but only of practicality, it should be revisited (with evidence) as times change.

In 1984 the House of Lords, in *The Span Terza*,[9] approved of Sheen J's earlier *ratio decidendi* in *The Saint Anna*. In the former case the *Span Terza* was arrested and the charterers soon after cancelled their charter with the owners. She was then sold by the Court and the question before the Court was as to whether the bunkers were the property of the charterers or the owner's creditors.

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[4] [1980] 1 Lloyd's Rep 180, 182.
[5] [1981] 2 Lloyd's Rep 534.
[6] Ibid 536.
[7] Ibid 537 (emphasis added).
[8] Ibid 535.
[9] [1984] 1 Lloyd's Rep 119.

Clearly, if the charterers had property in the bunkers then any proceeds from their sale would go to them, in line with Sheen J's earlier judgments (as discussed above). Contradistinctly, if property was with the owners, then on sale of the ship, the bunker's worth would be distributed to the creditor's of the ship. At the time of arrest and cancellation, all fuel had been paid for by the subcharterers. Lord Diplock stated:[10]

> [i]n cl. 2 the words: '*provide* . . . and *pay for*'; in cl. 3 the words; '*take over* and *pay for*' and the references to '*price*', seem to me to be wholly inconsistent with the property in the bunkers being vested in anyone other than the charterers. The words I have italicized would otherwise be meaningless.

In essence, what was created was a case of common law bailment, whereby once property in the bunkers passed to the charterers on the start of the time charter, the shipowner was bailee of the fuel aboard their ship. Lord Diplock stated in relation to this:[11]

> [u]nder the terms of the charter-party the bunkers while aboard *Span Terza* were at all material times the property of the charterers; the shipowners had possession of them as bailees of the charterers. So long as the contract contained in the charter-party continued, the shipowners had the right and duty to use and consume the bunkers of which they were bailees for the purpose of carrying out such instructions to the master about the employment of the vessel as the charter-party granted them authority to give.

Once that bailment was revoked, the shipowners no longer had a right to possess and consume the fuel in their bunkers and were compelled to pay for them by virtue of the contract. Importantly, the right to the bunkers was not merely contractual; it was a property right. If it were only a right in contract then all that could be claimed is damages, which would probably have put the charterers into the position of unsecured creditors.

In 1992, Sheen J was then faced with a novel question. In *The Pan Oak*,[12] the fuel oil was transferred from the ownership of the charterers to the shipowners after arrest. Here the issue was whether a creditor that had secured their mortgage over the 'ship' had in fact secured their claim over the bunkers as well. Sheen J said:[13]

> the property mortgaged to the plaintiff was - … the ship, her boats, guns, ammunition, small arms and appurtenances. Giving those words their ordinary and natural meaning they do not include the bunker oil.

Since none of the words used (including the word 'ship') appeared to secure the bunkers, Sheen J stated that the security over which the mortgage was made did not include the bunkers.[14] Importantly, this also shows the separate nature of the bunkers from being included in the 'ship'.

The next case worthy of discussion is *The Saetta*,[15] where Clarke J was called to decide whether fuel belonged to shipowners, fuel sellers or charterers in circumstances where the charterers had not paid for the fuel which by contract was to be paid by the charterers. Here his Lordship went to the contract of fuel sale to determine each of the parties' relationship with the bunkers. His Lordship found that since a Romalpa (retention of title until payment) Clause was present in the contract, the fuel needed to be paid for by the shipowners.

Generally, no person can give, let alone sell, what they do not own.[16] Here there may also have been some influence upon the Bench from the fact that the shipowners clearly knew that the charterers had not paid for the fuel and the shipowners admitted as much. All they did not know of was the Romalpa clause. In essence:[17]

> when the charter-party came to an end on Jan. 11 the property in all the bunkers on board passed from the charterers (in so far as they had property in them) to the owners. I also hold that any right to possession of

[10] Ibid 122 (emphasis in original).
[11] Ibid 122-3.
[12] [1992] 1 Lloyd's Rep 36.
[13] Ibid 38 (emphasis added)
[14] It is important to remember in this situation that Sheen J looked at Bahamian law, which was the law of the contract, and found no indication that bunkers under that law were part of the 'ship', he then went through the *Silia* case and made no attempt to qualify it on the grounds that the ordinary and natural meaning did not apply. In a later case, *The Eurostar* [1993] 1 Lloyds Rep 106, 113, his Lordship explained the logic behind this was that 'in the absence of satisfactory evidence of Bahamian law the Court will apply English law'. Why would his Lordship apply legal definitions of ship in the first place if the contract is to be settled on the ordinary and natural words as (presumably) an insurance broker would understand them? It is clear he would not, and that the mentioned qualifier is a turn of phrase rather than anything truly meaningful. In any event, the discussion of Bahamian law is a distraction insofar as the bunkers are concerned, as no evidence was before Sheen J to say that mortgaged property included bunkers under Bahamian law (see [1993] 1 Lloyd's Rep 106, 109).
[15] [1993] 2 Lloyd's Rep 268.
[16] This rule is commonly referred to as the '*nemo dat* rule', or in full form the '*nemo dat qui non habet* rule'.
[17] [1993] 2 Lloyd's Rep 268, 273.

> the bunkers which was vested in the charterers passed to the owners. At the same time the owners became under an obligation owed to the charterers to pay for the bunkers

This makes sense, in line with previous decisions, because the shipowner's creditors could not have property in the bunkers passed from the shipowner to its creditors if the shipowner had no property in them to begin with. This is exactly the same principle as applied in the aforementioned cases, but applied between fuel sellers and the shipowner.

In the last British case I will refer to, *The Eurostar*,[18] Sheen J looked at whether the right to claim the value of the bunkers at the end of a charterparty was one in property or if it was merely contractual. If it was contractual and the shipowners could not pay, then the right against the shipowners would be in damages, which is of limited help if they have no money. If the right is in property, then the owners are mere bailees and at the end of the bailment the charterers have the right to the property, which they can sell or use in normal cases. However, even though the law in admiralty restricts use and sale for practical reasons, the charterers can still sell it.

In this case, the charterers knew the shipowners were low on cash because they could not pay for repairs when the ship was docked; a pretty good indication. Therefore they wanted to ensure that they got the value of the bunkers. Sheen J stated:[19]

> When the period of hire expired by effluxion of time the shipowners' right to use and consume the bunkers then remaining in *Eurostar* terminated. The shipowners remained bailees of the charterers' property. As there was no sale of the bunkers to the shipowners thereafter the bunkers remained the property of the charterers until they were sold by the Admiralty Marshall.

Of course when they were sold by the Marshal, as was the usual practice, the ship and bunkers were sold together and the charterers had a certain claim in property over an amount equivalent to the local market price of the bunkers.

On 21 March 2012, Justice Buchanan gave a speech at the Federal Court on bunkers. His Honour offered five general principles on the English law (citing: *The Saint Anna, The Silia, The Pan Oak and The Eurostar*) which are summarised as:

1. The terms of the agreement between the shipowners and charterers are determinative (generally) of who owns the bunkers.
2. Similarly for point one, for security, with agreements between banks and bunker owners.
3. For the purpose of a sale of a ship *in rem*, bunkers of a ship are not separate from the ship. But this is not the same as saying legal title of the bunkers and ship are one.
4. If bunkers belong to the charterers then they cannot be distributed to creditors claiming out of the arrest and sale fund.
5. If bunkers are owned by the owner then they can be sold and put in the same fund as the claim *in rem*.

Now that the British cases have been summarised, it is important to ascertain the Australian position.

The Australian Position

In *The Billie Fay,*[20] Sheppard J of the Federal Court issued an arrest warrant for the bunkers of the *Billie Fay ex parte*. The plaintiff was the supplier of the bunkers and the claim was in relation to the same bunkers that were arrested pursuant to this warrant[21]. Security was later put up and the matter did not progress further. These appear to be the first recorded orders where bunkers were arrested pursuant to the *Admiralty Act 1988* (Cth).

[18] [1993] 1 Lloyds Rep 106.
[19] Ibid 110-1.
[20] *Bridgewater Marine Pty Ltd v The Owners of the Bunkers supplied to the Vessel 'Billie Fay' by the Plaintiff on or about 24 April 1992* (Unreported, Federal Court of Australia, Sheppard J, 15 May 1992).
[21] D James, *Arrest of Time Charterer's Bunkers in Australia* (1992) 22 *International Banking Law* 365.

In *The Skulptor Vuchetich,*[22] Sheppard J was asked to decide whether movable equipment (importantly) owned by the shipowner and aboard a ship formed part of the 'ship' for the purposes of arrest and sale. He answered in the affirmative, stating:[23]

> In all the circumstances I think that Sheen J's statements should be adopted and applied. The equipment in question was equipment which was used by the vessel in the course of its operations. It may be, as Mr Wood said, that it was not essential for the ship to have the equipment on board although I would have thought that a vessel such as this might well have benefited from the presence of such equipment from the point of view of its safety because of the need perhaps to move cargo in an emergency in order to retrim the vessel or to carry out some other operation when it would not have been possible to engage stevedores.

Though this statement is important regarding bunkers, and Sheppard J draws the link between them, citing the ALRC's interpretation of Sheen J's judicial statements, it is not as solid as it may seem. Sheen J himself said, in *The Eurostar*, 'there is, however, a fundamental difference between the equipment of a ship and her fuel.'[24]

Four years later, the Full Court of Federal Court was asked to decide, in *The Skulptor Konenkov*,[25] whether containers were sufficiently a part of the ship to be saleable when the ship was arrested and sold in an action *in rem*. They answered in the negative, especially if the containers were not loaded on the ship. Black CJ, Cooper and Finkelstein JJ stated:[26]

> [135] There must be some sufficient connection between the property and the ship to justify the former being treated as an integral part of the latter…. [138] A container of itself is not a ship… [143] In any event, even if it were correct to hold that a container is part of a ship when it is placed on board a ship, especially a ship designed for carrying cargo packed in containers, we would not conclude that a container that is stored onshore is a part of a ship, at least when it has not been acquired as equipment for a particular ship. This is important, for here the evidence shows that the services in respect of which the claim was made were rendered when the containers were onshore. Further, there is no evidence that the containers ever had any character as equipment acquired for a particular ship and thus no evidence that they retained any such character at the relevant time. Accordingly, even on this narrow ground, Opal [the *Skulptor Konenkov*] must fail.

The significance of this should not be understated. The idea behind arresting a ship and everything on it that belongs to the shipowners, is that you cannot get security over the rest of the shipowner's belongings. This is why you arrest the ship *in rem*. If the shipowner turned up you could sue her, him or it personally. In this case, there were extra assets of the shipowner accessible i.e. the containers, yet their Honours limited the value of the attainable security to what was directly on the ship and integral to it. They stated 'a container of itself is not a ship';[27] Sheen J said the same of bunker oil in *The Pan Oak*. However, insofar as the container was the property of the shipowner and was aboard the ship, Sheen J would likely have found the container a part of the ship as 'the word 'ship' includes all property aboard'[28] so long as that property is owned by the shipowner.

The remaining cases look at bunkers alone, to ascertain the Australian position on whether you can arrest them, noting of course *The Billy Fay* where bunkers were arrested by the Federal Court.

First is that of *The Genko Leader and Tolmi.*[29] The Full Court of the Federal Court here was asked to decide what 'property' and 'other property' meant under *Admiralty Act 1988* (Cth) s 17:

> Where, in relation to a general maritime claim concerning a ship or other property, a relevant person:
>
> (a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and
>
> (b) is, when the proceeding is commenced, the owner of the ship or property;
>
> a proceeding on the claim may be commenced as an action *in rem* against the ship *or* property

[22] *Morlines Maritime Agency v The Ship "Skulptor Vuchetich"* (1996) 62 FCR 602.
[23] Ibid 605-6.
[24] [1993] 1 Lloyd's Rep 106, 112.
[25] *Opal Maritime Agencies Pty Ltd v The Ship "Skulptor Konenkov"* (2000) 98 FCR 519.
[26] Ibid 556-8.
[27] Ibid 557 [138].
[28] *The Silia* [1981] 2 Lloyd's Rep 534, 537.
[29] *Metall Und Rohstoff Shipping & Holdings BV v Owners of Bunkers on Board ship MV Genco Leader* (2005) 145 FCR 145.

Or, abbreviated to remove the 'or' statements in order to relate it to a claim on charterer's bunkers:

> Where, in relation to a general maritime claim concerning other property, a relevant person: (a) was, when the cause of action arose, the charterer of, or in possession or control of, the property; and (b) is, when the proceeding is commenced, the owner of the property; a proceeding on the claim may be commenced as an action *in rem* against the property.

In this case, the *Tolmi and Genko Leader's* time charterers were involved in a London maritime arbitration. Those seeking an award against the time charterers spotted the *Genko Leader* off the coast of Australia and arrested the bunkers in that ship as security for the London arbitration which related to only the *Tolmi*. It is important to note that the property arrested had no connexion with either the charterparty of *Tolmi* or the bunkers of *Tolmi*. The owners of the *Tolmi* and *Genko Leader* are also different; the dispute was purely with regards to the time charterers.

Therefore the question was whether the property spoken of in *Admiralty Act 1988* (Cth) s 17 could include property that does not have a connexion with *the* general maritime claim. The Court said it could not.

Allsop J (as his Honour then was), who wrote the leading judgment, stated that the words 'or property' and 'or other property' are absent definite articles, which are required to be read into the legislation. His Honour states, therefore that s 17(a) should read 'the owner or [the] charter of, or in possession or control of, the ship or [the] property''. His Honour stated that no matter how you read it, the interpolation of words is necessary. His Honour stated the other reading of s17(a) is 'the owner or charter of, or in possession or control of, the ship or [any] property''. Allsop J stated that this was due to the drafter valuing an economy of words more than anything else.

Importantly Allsop J (with whom Lee and Tamberlin JJ agreed) left open the question of whether bunkers can be arrested. His Honour stated:[30]

> [20] It is unnecessary to decide whether 'property' includes bunkers. For my part, I see no reason to limit the word "property" to particular types of property that would exclude bunkers. The relevant limitation is, as I have said, found in the words 'general maritime claim concerning' in the first part of s 17. (See generally ALRC Report [107]-[110].)

One year later, a differently constituted Full Court of the Federal Court (comprising Ryan, Tamberlin and Kiefel JJ), was called to specifically decide whether bunkers always form part of the ship in *The Taruman.*[31] The Full Court answered in the affirmative. However, their answer was more than affirmative; they said that the bunkers were inseparable from the 'ship'. However, their answer was *obiter dicta.*[32]

On the 12 September 2005, in Hobart, the Australian Fisheries Management Authority served a notice of seizure on the ship, the *Taruman.*[33] Three days later the plaintiff began *in rem* proceedings against the bunkers, which contained 220 000L of fuel. In answering who had a right to the bunkers, all three judges agreed that (1) bunkers were a part of the ship under both the fisheries legislation and the *Admiralty Act 1988* (Cth), (2) therefore when the ship was seized, title passed to the Commonwealth, and (3) fuel bunkers cannot be property separate to the ship, therefore an action could not be brought in relation to the bunkers.

Kiefel J went through much of the above case law. Her Honour concluded that Sheen J came to the conclusion that the 'ship' always necessarily includes its 'bunkers' and therefore 'bunkers' cannot be 'other property' under the above quoted *Admiralty Act 1988* (Cth) s 17. Her Honour stated:[34]

> [81] If regard is had to s 17 it seems to me that there is no answer to the proposition that the bunkers cannot be regarded as *'property'* if they are to be taken as part of the property which is the *'ship'*. The *'property'* referred to in the section is that which is not the *'ship'*, whatever else it may mean. The plaintiff offered no basis for the submission that the bunkers could be both part of the ship or property, given the reference to *'or'* in a ship or other *'property'* and the *'ship or property'*. The reference to *'other property'* in the opening part of s 17 in particular conveys that what is part of a ship cannot also be property.

[30] Ibid 148.
[31] (2006) 151 FCR 126.
[32] Justice James Allsop, 'Admiralty Jurisdiction - Some Basic Considerations and Some Recent Australian Cases' [2007] *Federal Judicial Scholarship* 5.
[33] There are a number of relevant facts that are difficult to ascertain from the judgment regarding property ownership and the contractual relationships between parties, though the claim that was brought against the bunkers appeared to involve a contract dispute and a damages dispute ([29]).
[34] (2006) 151 FCR 126, 147 [81], 150 [99].

> [99] I conclude that the plaintiff does not have a right to proceed against the bunkers. There is authority which holds that the term 'ship' in the *Admiralty Act* includes the bunkers…[A]s a matter of the construction of s 17 of that Act, that whatever is included as the property which is the 'ship' is not 'other property'.

At first blush these are attractive propositions. However, reflecting on the authorities summarised above it can be noted that not one decided (or at a minimum implied) that the ship and her bunkers were inseparable legal property.

Her Honour concludes that 'bunkers' come under the word 'ship'. Before her Honour's statement, the strongest statement of inseparability was that it was impractical to separate the bunkers and the ship physically at the time of sale, thus although a ship would be sold together with her bunkers, the proceeds of the sale of the bunkers owned by the charterers would go to the charterers, in circumstances where the charterers owned the bunkers; see the *Silia*.

I set out below some points that support a different conclusion to that reached by her Honour.

First, the relevant British case law has concluded that the shipowner is bailee of the charterer's bunkers where the charterer owns the bunkers (see especially, *The Span Terza* and *The Eurostar*). If the bunkers are inseparable from the ship, then the owners are both shipowner and bailee of the 'ship', and the charterers are both owners and bailee of that same 'ship'. This would mean that shipowners could not sell a ship without permission of their co-owner. This would also mean that charterers would need to register as part owners of the ship, in many jurisdictions. It would also raise a question as to why a separate fund would need to be made for owners and charterers from the sale of the ship (as was (and is) the long time practice in Britain which was referenced in many of the cases her Honour cited), if both own and are thus responsible for the 'ship' and general maritime claims against the ship under *Admiralty Act 1988* (Cth) s 17.[35]

Second, if title is merged, which it must be for the bunkers to not be considered as *'other* property' and thus may only be considered as the *'same* property', then why would it only be as a matter of practicality that bunkers are not sold with the ship? It would be a legal certainty – putting aside any national tax regimes or general fuel sale regulations – that the bunkers would be sold with the ship in an arrest and sale if they were the same piece of property. No practical considerations, which Sheen J was at pains to explain, would be necessary or logically useful.

Third, the view that a ship is inseparable from her bunkers does not appear to accord with commercial practice. Mariners, in standard agreements such as *Shelltimes*, treat bunkers as separate property, capable of bailment, sale and resale. There is no conception that they are selling an equity stake in a larger whole of property or subdividing a greater property or anything elsewhich would indicate a commercial understanding of inseperability.

Fourth, all judicial references are to 'property in the bunkers' not to 'property in the ship equivalent to the market worth of the bunkers'. For example, in *Daebo v Go Star*, at first instance[36] 'property in the bunkers' was mentioned 19 times, and on appeal[37] 5 times, according to a simple text search. The manner of reference, in no instance I have seen in the present context, connotes that 'ship' and 'bunkers' are one and the same in circumstances where the bunkers are owned by the charterers.

Fifith, Sheen J said that both the natural and ordinary meaning of 'ship' did not include 'bunkers', nor did English law (see *The Pan Oak and The Eurostar*). Her Honour's implication that the words 'bunkers' in *The Silia* was used in an unnatural or extraordinary manner is an alternative view to that expressed by Sheen J. Ultimately, a distinction must be drawn between where bunkers are part of a ship for the purposes of sale or are part of the ship for the purposes of differentiating the ship and other property. Whether bunkers are considered part of the *res* for the purposes of a sale fund or not is dependant entirely on whether they are owned by the shipowners or another party, under the English law cited above.

Sixth, how could the Romalpa Clause in *The Saetta* work if title merged with the ship the second the ship took on the fuel?

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[35] Note that part ownership of a ship is not recognised under *Admiralty Act 1988* (Cth) s 19 in Australia as a result of the *The Ship "Gem of Safaga" v Euroceanica (UK) Ltd* (2010) 182 FCR 27, 42-6 [73]-[87].
[36] (2010) 182 FCR 27.
[37] (2012) 207 FCR 220.

Seventh, Allsop J, with whom Lee and Tamberlin JJ agreed, said in a prior Full Court of the Federal Court decision that his Honour could see no reason at all why bunkers should not be a type of 'other' property under s 17. Furthermore, bunkers have been arrested pursuant to the *Admiralty Act 1988* (Cth) in the past in *The Billie Fay*.

Eighth, her Honour's conclusion that '[h]is Lordship concluded that the proceeds of the sale of the oil are part of the *res* and, as such, are available to judgment creditors *in rem*'[38] does not accord with the *ratio decidendi* in *The Silia*, which was that 'the ship includes all property aboard the ship *other than that which is owned by someone other than the owner of the ship*'.[39] The emphasised words are the vitally important qualification. It is not that his Lordship was saying that the shipowner's possessions somehow became a ship or part thereof; he was merely making the observation that it would all be sold by the Marshal into a single fund. However, in circumstances where any of that other property is not owned by the shipowner, it would be sold by the Marshal, if it could not be easily separated from the ship, but if that sale occurred then the proceeds would be given back to the other property's true owner. This is the reason that time-after-time Sheen J put the sale proceeds of bunkers into a separate fund from the ship.

Ninth, on one view, the *Admiralty Act 1988* (Cth) would need to be expressed in no uncertain terms to be read in such a way as would deprive an innocent property owner (i.e. not the shipowner) of having his property taken from him by (in this case) the Government, or (in another case) any other party, without adequate compensation. There may even be a Constitutional issue in circumstances where the Australian Government takes without adequate compensation to the charterers.[40]

Tenth, reading *Admiralty Act 1988* (Cth) ss 4(3) and 17 very narrowly appears to be contrary to the reasoning of the High Court in the *Shin Kobe Maru*.[41] On one view, her Honour's reading of s 17 may be so narrow as to denude the words 'other property' of any real meaning. It is true that s 4(3) does not create a new maritime lien or charge or other cause of action, but, for example, s 4(3)(d)(i) states '[a] reference in this Act to a general maritime claim is a reference to a claim (including a claim for loss of life or personal injury) arising out of an act or omission of the ... charterer of a ship' and s 17 states (in the form summarised above) a right to proceed *in rem* '[where], in relation to a general maritime claim concerning other property, a relevant person: (a) was, when the cause of action arose, the charterer of, or in possession or control of, the property; and (b) is, when the proceeding is commenced, the owner of the property; a proceeding on the claim may be commenced as an action *in rem* against the property.' It is clear, at least from the words of the sections quoted above, that the drafters of the legislation intended that general maritime claims could be brought against charterers and against property other than the ship.

Ryan J, who wrote the other substantial judgment in *The Taruman*, said:[42]

> It is significant, however, that his Lordship [Sheen J, in the *Saint Anna*,] did not regard the bunkers as something separate from the ship so as to be immune from the sale in consequence of an arrest instigated by the plaintiff mortgagee *in rem*.

In addition to his Honour's inseparability argument, Ryan J added a practical reason why the bunkers should not be capable of being arrested themselves:[43]

> To admit of the possibility of its separate arrest as 'property' would compel its disgorgement from the ship, upon or before arrest, or the provision by the owners of security in respect of an item of property in which *ex hypothesi* they have no interest.

Again, I set out below some points that support a different conclusion to that reached by his Honour.

First, with regards to the second argument, one must ask why, when the ship is under arrest for the evils of the shipowners, the charterers (or cargo owners etcetera) must post security or have the cargo they are bound to carry, their fuel and other property detained in respect of a claim and a piece of property that they have no

[38] *The Taruman* (2006) 151 FCR 126, 145 [69] (emphasis added).
[39] [1981] 2 Lloyd's Rep 534, 537.
[40] Note that, as a general rule of statutory interpretation, where there is a construction of a statute that is open that allows the statute to be read consistently with the Constitution, it will be read in that consistent manner: *Acts Interpretation Act 1901* (Cth) s 15A.
[41] (1994) 181 CLR 404, 422.
[42] (2006) 151 FCR 126, 129 [7].
[43] Ibid 133 [20].

interest in. Why is it that only charterers must suffer and shipowners are the only party that must repay their marine debts under threat of arrest and sale?[44] It seems particularly odd in situations where the fuel in a ship is worth more than the ship itself, which can occur with poor quality ships in market downturns. If the issue were the relative value of the ship, cargo and bunkers, there would be nothing to stop a judicial assessment weighing the proportional worth of the property, the ability to obtain security for costs and whether there is an undertaking for damages and the extent of that undertaking.

Second, the shipowners are liable for the charterer's actions every day. For example, under clause 16 of *Shelltimes 4*, charterers may employ and pay for stevedores and pilots, but this in no way lessens the liability of the owners for:

> all issues, claims, responsibilities and liabilities arising in any way whatsoever from [the charterer's] employment of pilots, tugboats or stevedores, who although employed by the charterers shall be deemed to be the servants of and in the service of owners.

Accordingly, if the charterer's pilot collides the shipowner's ship with another ship, a claim will often be brought against the *res* (being the property of the shipowner). There is little to support, in the reports, why this liability should have an artificial line drawn at bunker arrest, which could cost shipowners in having their ship detained, but not any more than if a charterer's pilot crashes the shipowner's ship into another ship and a claim is brought against the *res*, *in rem*, or the owner, *in personam*.

Third, the solution used when there are claims (of any size) against the shipowners and the *res* is arrested, and the owners do not show to defend their ship, is the ship is sold by the Marshal under the orders of the Court. If the same were applied to claims against the charterer, then the charterer's bunkers would be arrested and the vessel along with her bunkers sold with the shipowner obtaining the market value of their ship. This being in place, would almost certainly result in new insurance being offered by the market to protect shipowners from this eventuality (assuming the owner was not indifferent between his ship and the market value of his ship). Lloyds is particularly famous for offering insurance for unusual or nascent risks.

Fourth, and related to the third point, shipowners are perfectly capable of protecting themselves. In *The Pacific Chukotka*, a US appellate court stated :[45]

> It should be noted that Green Pacific [owner of the *Pacific Chukotka*] could have taken any number of steps, including requiring the charterer to post a bond, demanding a letter of credit or even possibly procuring some sort of insurance, in order to protect its interest in the Vessel from the effects of a maritime lien, but no such actions were apparently taken in this case..

Fifth, with countries like South Africa allowing bunker arrest in some circumstances (beyond the scope of this paper), it makes Australia a less attractive arrest jurisdiction. It also makes Australia uncompetitive with countries with regimes that are similar in effect to bunker arrest. In America, ship arrest is permitted in circumstances where the charterers purchase necessaries (for example, bunkers) and the fuel suppliers are unpaid.[46]

Sixth, disgorgement costs, though widely cited by Sheen J in the cases set-out above and raised in Australian authority, appear to be based entirely on judicial notice; there does not appear to be any evidence cited in support of these unstated costs. Such a highly technical topic as disgorgement of bunkers from ships does not seem an apt topic to take as a matter of judicial notice. Nor should it be assumed that in Australia in 2015 the practical hurdles referred to by Sheen J in the late 1970s and 1980s in the UK are relevant. Moreover, there are enormous costs holding a ship under arrest for any period of time and evidence may show it is cheaper to disgorge the fuel (though the fuel will generally lose value on disgorgement, the plaintiff takes that risk by seeking that order).

Seventh, it makes charterers a law unto themselves, if they do not need to satisfy their debts, unlike owners. Essentially, unless charterers are a large, easily findable company in a jurisdiction with a reliable judiciary, there are few ways to enforce debts against them.

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[44] Note, however, charterers often work out their differences with the owners later in an arbitration (usually in London under English law), as per their charterparty agreement.
[45] 575 F 3d 409 (4th Cir, 2009) fn 4.
[46] See, eg. *The Pacific Chukotka* 575 F 3d 409 (4th Cir, 2009); *The Trogir* 602 Fed Appx 673 (9th Cir, 2015).

Eighth, Ryan J cited the ALRC's relevant musings as to what actions *in rem* may be against. The Commission concluded that 'there could also be difficulties with property owned by a person who is not the shipowner, but who may be liable in respect of the claim. On balance it is undesirable to spell out what would be a complex definition… Accordingly it should be sufficient to refer to a right to proceed *in rem* against the ship or other property'.[47] His Honour concludes that that discussion coupled with the decision in *The Silia* 'precludes, I consider, an argument that bunkers are 'property' so as to be the subject, separate from the ship, of an action *in rem*'.[48] In saying this, his Honour appears to interpret the decision in *The Silia* and the view of the ALRC as standing for the proposition that bunkers cannot be property separate to the ship, and accordingly cannot be a type of 'other property' within the s 17 definition. However, respectfully, in my view the decision in *The Silia* found that the bunkers and the ship were separate property, though found, as a matter of practicality, when the ship was arrested and judicially sold, the bunkers should be sold together with the ship, with the market value of the bunkers being put into a separate fund if, and only if, those bunkers were owned by someone other than the shipowner. The fact that property not owned by the shipowner could be the subject of a general maritime claim seems to be precisely what the ALRC was providing for in its deliberate choice of words. Ryan J's interpretation contrarily would leave the words 'other property' with little, if any, work to do and would render the ALRC's conclusion (that his Honour quoted) nugatory. The entire purpose of the maritime regime is that the coffers of shipowners and charterers are often not obtainable, so creditors of these seafarers take as security the ship or other property which they know they can arrest and have sold to satisfy their debt, at least in part. A broader reading, would, in my view better fulfil the public policy underlying maritime arrest as it would provide creditors of charterers (at least in some circumstances) reliable security.

Ninth, in South Africa, which does allow the arrest of bunkers, bunkers are almost never disgorged as commercial realities generally result in security being put up (as occurs in similar circumstances in America, for example, in *The Trogir*). Disgorgement costs, if seen as a practical impediment to arrest, should be understood in light of that practical reality i.e. they are practically almost never actually disgorged as the threat of disgorgement is generally sufficient.

Therefore it is not clear if these arguments, raised by the Full Court of the Federal Court, necessitate that bunkers cannot be arrested.

Generally, if the bunkers do merge with the ship so as to become 'part of the ship' this would mean that the owners of the bunkers take an ownership stake in the ship. This being so, one must query whether one can have a ship arrested for maritime claims against the charterers given their partial-stake in the ship. Indeed, in *Daebo v Go Star,*[49] the Full Court of the Federal Court appear to confirm that where the contract provides for it, there remains a transfer in the ownership of the bunkers on delivery, though they simultaneously confirm that the bunkers are an inseparable 'part of the ship'. In that case Keane CJ, Rares and Besanko JJ said '[t]aking over the bunkers is an inevitable consequence of delivery of the ship for the bunkers are regarded as part of the ship'. However, a claim of such partial ownership may be inconsistent with the decision in *The Ship "Gem of Safaga" v Euroceanica (UK) Ltd*.[50]

Conclusion and Further Questions

It is unclear in Australia if bunkers can be arrested. If bunkers cannot be arrested, there are still a number of questions. For example, what, if any, effect will the *Personal Property Securities Act 2009* (Cth) have on bunkers? Second, what, if any, effect will *Admiralty Act 1988* (Cth) s 15, which allows arrests with regards to maritime liens have, especially where the liens were created in another jurisdiction?[51] Third, will Australia's judiciary change its mind about allowing Mareva injunctions over bunkers? All of these questions easily deserve their own paper and are beyond this paper's scope of investigating *Admiralty Act 1988* (Cth) s 17 and the powers to arrest bunkers under that.

Also important to confront will be the so-called 'practical issues', however as it has been possible to arrest bunkers in, for example, South Africa for such a long time there is a good body of law which Australian judges would no doubt be able to adapt and apply in our jurisdiction. For example, where bunkers are mixed Nicholson

[47] Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, Report No 33 (1986) [110].
[48] (2006) 151 FCR 126, 133 [19].
[49] (2012) 207 FCR 220, 235 [61], citing *The Taruman* (2006) 151 FCR 126.
[50] (2010) 182 FCR 27, 29 [1] (Ryan J), 46 [87] (Besanko J), 51 [115] (Jagot J).
[51] See, for example the issues raised in *Reiter Petroleum Inc v The Ship "Sam Hawk"* [2015] FCA 1005 (11 September 2015) (at the time of publication this case was on appeal to a five-judge bench).

J said in *The Wisdom (No 2)*[52] that the security claimed on the arrest should only be for as much as the tortfeasor charterer's bunkers were worth, not the entire value of the bunkers on the ship.

In sum, it is possible that the current law in Australia is that bunkers cannot be arrested. However, the Full Court of the Federal Court's support of bunker arrest *in The Genko Leader and Tolmi* and the Full Court of the Federal Court's reasoning against bunker arrest in *The Taruman* were both *obiter dicta*. Sheppard J's orders in *The Billy Fay* suggest that at least in the past bunker arrest was possible. Bunkers were also arrested in *The Genko Leader and Tolmi* though the warrants there were set aside for reasons other than the legality of s 17 bunker arrest. There do not appear to be any cases where a superior court in Australia has decided that bunkers cannot ever be arrested in *ratio decidendi*. Accordingly, whether bunkers can be arrested in Australia is still a live issue.

[52] (2003) SCOSA B 201 (D).