SEAFARERS' LIEN FOR WAGES

Dr Damien Cremean* and Ernaldo Paciocco#

Introduction

It is impossible to imagine our present world functioning without shipping. Other modes of transportation are unviable due to the cargoes that are carried, the distances that are covered and fuel costs. As of 3 April 2022, over 314,000 merchant ships are in operation around the world,[1] with over 62,000 of those vessels on international waters en route to their intended destination.[2]

Shipping, however, is only able to be carried on by ships with seafarers on board performing various functions. Unmanned ships are a distinct possibility in the near or distant future – but not for now.[3] The Legal Committee of Comite Maritime International (**CMI**) is currently undertaking a scoping exercise to consider what extent the existing maritime law conventions might need to be modified to accommodate unmanned ships.[4] For the moment, shipping needs seafarers in order to be conducted at all. In a pre-pandemic workforce report on seafarers, it was estimated that there was a total of 1,647,500 seafarers, made up of 774,000, officers and 873,500 of skilled seafarers.[5] The top 5 nationalities of the skilled seafarers, were recorded as being from the Philippines, China, Indonesia, Russian Federation and Ukraine.[6]

It is important then to provide proper incentives to, and protection of, those who are seafarers or who may want to become seafarers. No one will want to be a seafarer, or to continue as one, if seafarers are not properly provided for — in particular, in the way of wages. Seafarers' have a special calling — by its very nature much more hazardous than one on land.

The law has responded to this need by giving seafarers a lien for wages. All countries including Australia and New Zealand contain a provision of like nature or to similar effect in their respective maritime law regimes.

A leading example will be found in the *Senior Courts Act 1981* (UK) section 20(2)(o) which allows for claims to be made in admiralty by ''a master or member of the crew of a ship for wages (including any sum allocated out of wages or adjudged to be due by way of wages)''. The provision for a lien in respect of wages is to be found in section 21(3) of that Act.

The equivalent Australian provision, section 4(3)(t) in the *Admiralty Act 1988* (Cth), is expressed in somewhat different terms but is in fact based on that provision. The actual lien for wages is to be found in section 15(2)(c) of that Act. As for New Zealand, the *Admiralty Act 1973*(NZ) provides the right to make a claim for wages in section 4(1)(o). The maritime lien for wages is specifically mentioned in section 2 of that Act. The New Zealand Act is based more on the *Administration of Justice Act 1956* (UK), although the differences between that Act and the 1981 UK Act (then called the *Supreme Court Act 1981*) are not significant.

'Early wage cases

There are very few records of early wages cases in admiralty. It is likely that they did take place.

There is, however, record of an award of arbitrators in a wages dispute (*Frebarne v Pelyn*) in 1540 where 'arbettrators' state they 'hathe a grede for all manar off wages and debts from the be gynyng off ye worlde to thys day': see Reginald Marsden, *Select Pleas in the Court of Admiralty*, Selden Society ,1894, p 101. Therefore, it is clear that from time-to-time wages disputes did arise.

* Adjunct Professor, University of Queensland.
# BA, LLB, GDLP.

[1] MarineTraffic, *Live Map* (Web Page, 3 April 2022) <https://www.marinetraffic.com/>. Search terms were 'Cargo Ship' and 'Tanker'.
[2] Ibid. The above search was refined to vessels displaying navigational status as 'Underway'.
[3] Unmanned or crewless vessels are referred to as autonomous cargo/container ships, or maritime autonomous surface ships (MASS).
[4] Comite Maritime International, *Maritime Law for MASS* (Web Page, 2018) <https://comitemaritime.org/work/mass/>.
[5] BIMCO and International Chamber of Shipping, 'Seafarer Workforce Report', *New BIMCO/ICS Seafarer Workforce Report Warns of Serious Potential Officer Shortage* (Web Page, 28 July 2021) <https://www.bimco.org/news/priority-news/20210728---bimco-ics-seafarer-workforce-report>.
[6] Ibid.

To encourage men to take on these difficult roles in difficult and dangerous conditions, it was clearly necessary to provide for their protection and to give them adequate reward. Who would want to voluntarily expose themselves to the risk of loss of life or limb without a just and proper wage for their efforts?

As it happens, the English Admiralty Court in a series of decisions in this area failed to come to the seafarer's aid — and statutory intervention was necessary. Therein lies an example of the law — statute law on this occasion — responding to the needs of a social situation.

Admiralty authorities

In early times, Admiralty courts treated seafarers in an unkindly way. Dr Browne in 1840 (in lectures read in the University of Dublin) says that '[i]n England it has been settled, that if a ship do not return, but perishes by tempest, enemy, fire, etc before she completes her voyage, the mariners shall lose their wages'. The reason given is 'for if the mariners shall have their wages in these cases, they will not use their best endeavours, nor hazard their lives, to preserve the ship'.[7]

A case referred to by Dr Browne was *Abernathy v Langdale* (1780) 2 Doug 539; 99 ER 342, a case in which a ship (the *Winchcombe*) was seized as prize before completing her voyage. Lord Mansfield said (at 542; 343) that as 'a sailor on board a ship on a trading voyage, the plaintiff [suing for his wages] is entitled to nothing'. He explained the reason for this as follows — 'for freight is the mother of wages, and the safety of the ship the mother of freight'. A claim in quantum meruit was also rejected. The case is a notable example of application of the entire contract doctrine but leading to an unjust result.

In contrast, by the laws of the Hanse Towns, a sailor was entitled to one third of his wages when he set sail on the voyage, one third at the port of discharge and the remaining third when the ship returned home.[8]

A further restriction on recovery of wages by seafarers is to be found in the rule that a master of a ship could not sue in Admiralty for wages on a contract, although otherwise due, if the contract was made on shore: see *Clay v Snelgrave* (1700) 1 Ld Raym 577; 91 ER 1285. Lord Chief Justice Holt said (577; 1286), by indulgence of the Courts at Westminster, mariners were allowed to sue in the Court of Admiralty for the recovery of wages but not so the master, except possibly if he died during the course of the voyage and another had to take over there and then. This kind of distinction goes back to statutes of Richard II in 1389 where the Admiral was forbidden to intermeddle except in respect of things 'done upon the sea'. That statute was passed at a time when the early Admiral's Court was or had been asserting a jurisdiction in respect of things done on land leading to bitter disputation with the courts of common law.

Early statutory intervention

Perhaps the first statutory intervention of its kind – but not overly beneficial to seafarers -came with enactment of the *Merchant Shipping Act 1844* (UK), which dealt with the problem of masters suing for their wages. Dr Lushington in *The Repulse* (1845) 2 Wm Rob 398; 9 Jur 738 held that the provisions in question were confined to two cases: first, where the wages were claimed from a party who was owner of the ship at the time of the original contract; and second, where such owner was bankrupt or insolvent at the time when the claim was preferred.

Then came the *Merchant Shipping Act 1854* (UK). No great advances were made by this Act except that by section 9 – dealing with deceased seamen — all monies arising from wages received before 1 January 1852 had to be applied as specified. One odd decision under this Act prevented the master from suing for wages if living more than 20 miles from his port of discharge: see *The Blakeney* (1859) Swa 428; 5 Jur NS 418.

Yet this may be compared with the 'benevolence towards seafarers which has traditionally informed judgments of Courts of Admiralty' as Justice Ryan said in *Marinis Ship Suppliers (Pty) Ltd v Ship Ionian Mariner* [1996] FCA 563.

Indeed, it is generally true that Admiralty Courts traditionally had shown special regard — a few exceptions aside — to the needs of seafarers. In *The Minerva* (1825) 1 Hag 347; 166 ER 123, Lord Stowell (better known as Sir William Scott and older brother of Lord Eldon LC) in the High Court of Admiralty said (355; 127) of seafarers that they were a 'set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument [regarding wages and conditions] that may be proposed to them, even against themselves'.

[7] See Arthur Browne, *A Compendious View of the Civil Law and of the Law of Admiralty* (B&L Merriam, vol 2, 1840) 176.
[8] Ibid 178.

This is hardly to speak of seafarers in glowing terms, but it does indicate that Admiralty was concerned about their welfare and was aware of their difficulties in that regard.

Admiralty statutes

From an early point in the 19th century, the Admiralty Court grew in stature. This was largely due to the pronouncements in prize given by Lord Stowell, but it was also due to the growth in maritime commerce, to the growth in overseas possessions, to the wars of the period and to advances made in shipping and in ships themselves.[9]

Correspondingly, a statutory process began which was to see the Court's jurisdiction – previously largely only to be found in earlier decisions — set out on a firmer legislative basis.

The *Admiralty Court Act 1861* (UK) (**the 1861 Act**) was the principal measure but there was an earlier *Admiralty Court Act 1840* (UK). By section 10 of the 1861 Act, the High Court of Admiralty was given jurisdiction 'over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship'. Importantly, by section 35 of that 1861 Act, the jurisdiction so conferred was able to be exercised by proceedings brought *in rem* or *in personam*. Previously, *in rem* proceedings could only be brought if a maritime lien was being asserted. This was a significant advance.

A maritime lien enabled a ship to be arrested in an *in rem* proceeding until the cause giving rise to the lien was resolved or if not could result in the ship being sold.. Maritime liens appear to have arisen out of cases of bottomry where a ship's keel was pledged thereby giving rise to an interest in the *res* enabling an action *in rem.* Now, however, seafarers too, if suing for wages, could do so in an *in rem* proceeding, in which the ship could be arrested and remain under arrest until the wages issue was settled. This equated the seafarers claim for wages to having a maritime lien — a lien for wages.

In contrast to early rulings of the Admiralty Court, seafarers now had proper security for wages.

Further developments

With growth in the importance of shipping and the resultant growth of shipping itself in the UK and in her Majesty's overseas dominions, the *Merchant Shipping Act 1894* (UK) (**the 1894 UK Act**) was passed. Immediately prior, the jurisdiction of the Admiralty Court (later the Probate Divorce and Admiralty Division of the High Court following the 1875 consolidation) passed to courts abroad in all her Majesty's possessions under section 2 of the *Colonial Courts of Admiralty Act 1890* (UK). The courts inheriting that jurisdiction included courts in Australia: see *McIlwraith Mc Eacharn Ltd v Shell Oil Co of Australia* (1945) 70 CLR 175, 204.

Seafarers now had wages protection and could sue on a lien for wages by proceedings *in rem* begun anywhere in those possessions and, importantly, those possessions included Australia and New Zealand: see *The Queen Eleanor* (1899) 18 NZLR 78, where Stout CJ confirmed that the Supreme Court of New Zealand in its admiralty jurisdiction had inherited the jurisdiction of the English High Court given by section 2(2) of the 1890 Act.

In the 1894 UK Act, section 155 provided that the seafarers' right to wages 'shall be taken to begin either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens'. By section 156(1) of that Act, it was provided that a seafarer 'shall not be any agreement forfeit his lien on the ship or be deprived of any remedy for the recovery of his wages, to which in the absence of the agreement he would be entitled'.

Importantly, recalling the unfortunate Admiralty Court decision of Lord Mansfield above in *Abernathy v Langdale*, wherein he said 'freight is the mother of wages and the safety of the ship the mother of freight', section 157(1) of the 1894 UK Act very expressly stated that '[t]he right to wages shall not depend on the earning of freight' and continued that 'every seaman and apprentice who would be entitled to demand and recover any wages, if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to demand and recover the same, notwithstanding that freight has not been earned'.

In Australia, a provision similar in effect to section 155 of that Act was enacted in section 83 of the *Navigation Act 1912* (Cth) and by section 84 it was declared that a lien for wages was given to seafarers, that is their right to

[9] See generally F L Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press, 1st ed, 1970) 40-74.

wages 'shall not depend on the earning of freight'. New Zealand was ahead of Australia in this regard: see *Shipping and Seamen Act 1903* (NZ) sections 77 and 78.

In Australia, these matters are now dealt with by or under the *Navigation Act 2012* (Cth) and, in New Zealand, by or under the *Maritime Transport Act 1994* (NZ).

Conclusion

We have come a long way from the earliest times of English law and seen the development of the seafarers' lien for wages. In the end, despite the traditional benevolence of the Admiralty Court shown towards seafarers, it was by statute alone that an adequate remedy came to be provided. Parliament responded to a situation that required addressing for the needs of maritime commerce and for it to remain viable. The operation of maritime commerce would not have been possible if masters and crews had to undertake dangerous callings without adequate protection for their wages.

The law responded to the situation in the United Kingdom and this response has been largely mirrored in the Admiralty Acts of both Australia and New Zealand.