



Précis Paper

Admiralty Law

Something we should all know – how to arrest a ship!

Discussion Includes

- Arresting a ship under the admiralty jurisdiction
- Requirements for arrest of a ship including a surrogate ship
- What quality of ownership is required by sections 17 and 19 of the *Admiralty Act 1988* (Cth)?
- What is the relevance of legal and beneficial ownership of a ship?
- Does the word "belonging" in section 8 of the *Admiralty Act* have a broader meaning than the word "ownership" in sections 17 and 19?

Précis Paper

Admiralty Law

1. In this edition of BenchTV, Angus Stewart SC (Barrister) and Catherine Gleeson (Barrister) discuss maritime/admiralty law and the arrest of a surrogate ship with particular reference to the Federal Court of Australia's (Rares J) decision in *Virtu Fast Ferries Ltd v The Ship "Cape Leveque"* [2015] FCA 324 and the Full Court of the Federal Court of Australia's (Allsop CJ, Mansfield and McKerracher JJ) decision in *Virtu Fast Ferries Ltd v The Ship "Cape Leveque"* [2015] FCAFC 58. Mr Stewart SC acted for Austal Ships Pty Ltd in both instances and Ms Gleeson before the Full Court of the Federal Court of Australia.

Requirements of a Surrogate Ship Arrest

2. The presenters note that it is a defining feature of the admiralty jurisdiction, that one can arrest an asset essentially for the purposes of providing security for a claim. In order for there to be an arrest, there must first be a maritime claim under s 4 of the *Admiralty Act 1988 (Cth)* ("the Act") (extracted below). The arrest provisions may be found in ss 17, 18, 19 as noted below:

SECTION 17:

Right to proceed in rem on owner's liabilities

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

SECTION 18:

Right to proceed in rem on demise charterer's liabilities

Where, in relation to a maritime claim concerning a ship, a relevant person:

- (a) was, when the cause of action arose, the owner or charterer, or in possession or control, of the ship; and*
- (b) is, when the proceeding is commenced, a demise charterer of the ship;*

a proceeding on the claim may be commenced as an action in rem against the ship.

SECTION 19:

Right to proceed in rem against surrogate ship

A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if:

- (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and*
- (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.*

Quality of Ownership Referred to in ss 17 and 19

3. The dispute in *Virtu* was focused on the meaning of "ownership" under the Act and the presenters discussed the relevant quality of ownership necessary under the legislation with reference to the following cases: *Malaysia Shipyard & Anor v "Iron Shortland" as the surrogate for the ship "Newcastle Pride"* [1995] FCA 768; *Kent v SS "Maria Luisa"* [2002] FCA 1207; *Tisand Pty Ltd v The Owners of the Ship MV "Cape Moreton" (Ex "Freya")* [2004] FCA 1191; *Euroceanica (UK) Ltd v The Ship "Gem of Safaga"* [2009] FCA 1467; *Shagang Shipping Co Ltd v Ship 'BULK PEACE' as surrogate for the Ship 'DONG-A ASTREA'* [2014] FCAFC 4.
4. Mr Stewart SC acknowledged that "ownership" in the legislation referred to true ownership, that being the "right of dominion over the vessel such that, that the owner has the right of sale of the vessel and the right to keep the proceeds of the sale." Importantly, this includes beneficial ownership. Mr Stewart SC notes that if a party would have a right to specific performance in relation to the transfer of title in that vessel, then they would be described as the beneficial owner of the vessel: *Maria Luisa*. He further notes that if there is a separation of legal and beneficial ownership, both parties would have to be the relevant person (debtor in personam) for s 19(b) to be satisfied.
5. Additionally, the debtor in personam must be *the* owner, not one amongst several owners of the vessel. In the *Gem of Safaga*, the 90% interest in the vessel held by the principal debtor was not sufficient to establish the requirement of ownership in s 19(b).

Background and First Instance Decision in *Virtu Fast Ferries Ltd v The Ship "Cape Leveque"* [2015] FCA 324

6. Virtu filed a writ in rem on 18 February 2015 to obtain security for an alleged claim against Austal in relation to faults with the Jean de la Valette (the vessel in respect of which the claim arose). It was alleged that Cape Leveque (the vessel that was the target of the arrest) was a surrogate ship for the Jean de la Valette.

7. The case turned on s 19 of the Act, which allows the arrest of a surrogate ship provided that the ship in respect of which the claim arose was owned by the debtor, and at the time that the proceedings are commenced, the second mentioned ship (target of the arrest) is owned by the debtor.
8. Importantly, Austal had concluded a contract with the Commonwealth of Australia (Australian Customs and Border Protection Service) to construct patrol boats, of which the Jean de la Valette was one. However, under s 8 of the *Admiralty Act 1988* (Cth), a ship *belonging* to the government may not be the subject of a writ in rem or an arrest in rem. Mr Stewart SC considered whether the legislature had intended a different meaning through the use of different words (belong v ownership), and postulates that belonging under s 8 has a broader meaning than ownership under s 19.

SECTION 8:

Act to bind Crown

- (1) *This Act binds the Crown in all its capacities.*
 - (2) *This Act does not authorise:*
 - (a) *a proceeding to be commenced as an action in rem against a government ship or government property; or*
 - (b) *the arrest, detention or sale of a government ship or government property.*
 - (3) *Where a proceeding has been commenced as an action in rem against a government ship or government property, the court may, if it is satisfied that the proceeding was so commenced in the reasonable belief that the ship was not a government ship, or the property was not government property:*
 - (a) *order that the proceeding be treated as though it were a proceeding commenced as an action in personam on the claim against a person specified as defendant in the order; and*
 - (b) *make such consequential orders as are necessary.*
9. Although the ship was not totally complete it was to be delivered in the very near future. Hence, Austal argued that they were not the owner of the vessel, rather the Commonwealth was the legal owner or, failing that, was the beneficial owner of the vessel. The strategic purpose of raising s 8 was to cover the possibility that Austal was the owner, but that the ship could nevertheless be said to belong to the Commonwealth.
 10. Rares J found that the remedy of specific performance would have been available to the Commonwealth to receive transfer of the title to the Cape Leveque and therefore it was the beneficial owner. The writ was dismissed.

11. Virtu Fast Ferries appealed this decision to the Full Federal Court and the matter was heard, within around a week of the Jean de la Valette being due for delivery.

Appeal in *Virtu Fast Ferries Ltd v The Ship "Cape Leveque"* [2015] FCAFC 58

12. The issue on appeal was again whether the causes of action on which Virtu relied on in arbitration proceedings arose at a time when the Jean de la Vallette was still owned by Austal.
13. Virtu had argued that s 4(3)(n) of the Act armed them with a maritime claim as it included a claim in respect of the construction of the ship (including such a claim relating to a vessel before it was launched).

SECTION 4:

Maritime claims

...

(4) *A reference in this Act to a general maritime claim is a reference to:*

...

(n) *a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched)*

...

14. The Full Federal Court rejected Virtu's argument as well but for different reasons.
15. The Court found that a ship under construction, prior to launching, is not a "ship" for the purposes of s 19(a). The definitional provisions applied and the jurisdictional provision of a maritime claim under s 4 could not be used to expand the requirements for an arrest.
16. It should be said that the Full Federal Court did not make any findings regarding ownership.

Implications

17. The importance of the *Virtu* litigation is that it reaffirms that parties should carefully consider who the "owner" of a ship is in making an arrest. Furthermore, it provided some guidance on the application of the government ship immunity provisions under the Act. Finally, it determined that a ship under construction that has yet to be launched is not likely to be the subject of a valid in rem proceeding against a surrogate ship.

BIOGRAPHY

Angus Stewart SC

Barrister, New Chambers, Sydney

Angus is a Rhodes Scholar who was admitted to the legal profession in South Africa in 1996 and in New South Wales in 2011. He was appointed Senior Counsel in South Africa in 2006 and in New South Wales in 2014. He has extensive experience in maritime law in both jurisdictions. He is also a maritime arbitrator.

Catherine Gleeson

Barrister, New Chambers, Sydney

Catherine was admitted to the legal profession in 2003 and was called to the Bar in 2009. She was a Bar Councillor from 2013 to 2014, a Member of the New South Wales Bar Association Professional Conduct Committee from 2014 to the present, a member of the New South Wales Bar Association Bar News Committee from 2010 to the present, and a Member of the New South Wales Bar Association's New Barristers Committee from 2011 to 2013.

BIBLIOGRAPHY

Focus Case

Virtu Fast Ferries Ltd v The Ship "Cape Leveque" [2015] FCAFC 58

Benchmark Link

https://benchmarkinc.com.au/benchmark/html/benchmark_05-05-2015_construction.html

Judgment Link

<http://www.austlii.edu.au/au/cases/cth/FCAFC/2015/58.html>

Cases

Euroceanica (UK) Ltd v The Ship "Gem of Safaga" [2009] FCA 1467

Kent v SS "Maria Luisa" [2002] FCA 1207

Malaysia Shipyard & Anor v "Iron Shortland" as the surrogate for the ship "Newcastle Pride" [1995] FCA 768

Shagang Shipping Co Ltd v Ship 'BULK PEACE' as surrogate for the Ship 'DONG-A ASTREA' [2014] FCAFC 4

Tisand Pty Ltd v The Owners of the Ship MV "Cape Moreton" (Ex "Freya") [2004] FCA 1191

Legislation

Admiralty Act 1988 (Cth)