

NAVIGATING AUSTRALIAN ADMIRALTY LAW: THE ABILITY TO CLAIM AGAINST AND ARREST A SHIP IN AUSTRALIAN WATERS

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*In an era where shipping has become integral to the success of many businesses, claims arising in connection with the use or deployment of a ship or the business of its owner or charterer are becoming increasingly commonplace. In this article Corrs Partner, Ian Dallen, examines the ability of an aggrieved party to pursue the unique and powerful admiralty law remedy of recovering their loss and damage via an action *in rem* against a ship.*

Shipping is the cornerstone of world trade with tankers, bulk carriers and container ships carrying billions of tonnes of goods & commodities between countries each year. Australia, as one of the world's most resource-rich countries and an island continent, is heavily dependent upon shipping for the movement of goods & commodities, with a large proportion of its exports comprising dry bulk commodities (such as mineral ores and coal) carried by sea. Indeed, almost all of Australia's export trade and around ¼ of its domestic trade is carried by sea.

Whilst shipping is a vital element of the Australian economy, the vast majority of ships carrying goods & commodities to / from and around

Australia are foreign owned and, in many cases, the ship itself (when in Australian waters) is the only readily accessible asset within Australia which can be used to secure a claim arising in connection with the use or deployment of the ship or the business of the ship's owner or charterer.

PURSUING A CLAIM AGAINST A SHIP IN AUSTRALIA: AN ACTION *IN REM*

The pursuit of a claim against a ship (as opposed to against an individual or company) is a powerful and unique remedy recognised internationally by admiralty law. This is known as an action *in rem* (ie an action against property) and, in Australia, it is only available where

the claim falls within the ambit of the *Admiralty Act 1988* (Cth) (the Act).¹ An action *in rem* involves a party commencing proceedings against a ship and allows that party to have the ship arrested before their claim is heard. Further, once the claim is heard and determined, the ship can be sold by order of the court to satisfy the judgment.²

Section 10 of the Act confers jurisdiction to hear and determine *in rem* proceedings on the Federal Court of Australia and the Supreme Courts of each Australian State and Territory.³ However, in practice, the Federal Court has become the main forum for *in rem* proceedings in Australia.

¹ Section 14 of the Act.

² An action *in rem* can also be brought in Australia against a limited range of "other property" related to a ship (such as cargo). The ship or other property the subject of an action *in rem* is commonly referred to as the 'res'.

³ Both the Act and the *Admiralty Rules 1988* (Cth) (the Rules) (made pursuant to section 41 of the Act) govern all admiralty proceedings irrespective of which Court (Federal or State/Territory) the proceedings are commenced in.

THE TYPES OF CLAIMS THAT CAN BE PURSUED AGAINST A SHIP IN AUSTRALIA

A party can commence an action *in rem* against a ship in Australia in respect of the following claims:

- a 'maritime lien or other charge' in respect of the ship (a maritime lien includes a lien for salvage, damage done by a ship, wages of the master & crew and the master's disbursements);⁴
- a 'proprietary maritime claim' in respect of the ship (being either: a claim relating to the possession, title, ownership or mortgage of a ship or the mortgage of a ship's freight; a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship; or a claim for the satisfaction / enforcement of a judgment given by a court (including a foreign court) against a ship in an action *in rem*);⁵
- a 'general maritime claim' in respect of the ship (being the various claims listed in section 4(3) of the Act including claims for: damage done by a ship; loss of life or personal injury; loss or damage to goods during their loading on to, or unloading from, a ship; loss or damage to goods carried by a ship; goods, materials or services supplied to a ship for its operation or maintenance; master or crew wages) *provided that*:
 - the person who would be liable for the claim if it was

commenced *in personam* (ie commenced against an individual or company):

- was the owner or charterer or was in possession or control of the ship when the cause of action arose; and
- is the owner of the ship when the action *in rem* is commenced,⁶

or

- the person who would be liable for the claim if it was commenced *in personam*:
 - was the owner or charterer or was in possession or control of the ship when the cause of action arose; and
 - is the 'demise charterer' of the ship when the action *in rem* is commenced.⁷

A 'demise charterer' is a person / party who has full possession and complete control of a ship under a hire contract (including the right to employ and direct the master & crew), so that the charterer is in the same position as the owner for the duration of the hire contract.⁸

A 'general maritime claim' against a ship (see above) may also be commenced as an action *in rem* against a different 'surrogate ship' where the owner of the surrogate ship, when the action is commenced, was the owner or charterer or was in possession or control of the first ship when the cause of action arose and they would also be liable for the

claim if it was commenced against them *in personam*.⁹

If a plaintiff's claim the subject of an action *in rem* does not fall within any of the above requirements of the Act (sections 15 – 19), the plaintiff has no right to bring an action *in rem* in Australia and any such action (if brought) can be successfully challenged for lack of jurisdiction. This will result in the action being dismissed and any ship arrested in the action will be immediately released by the Court. Further, where jurisdiction is challenged in Australia (typically by the owners of the ship), the plaintiff has the onus of establishing that their claim falls within the Act.¹⁰

COMMENCING ARREST PROCEEDINGS AND ARRESTING THE SHIP

In Australia, an action *in rem* is commenced by way of writ and the writ must be served on the ship within the geographical jurisdiction of the relevant Court. In the case of the Federal Court, service can take place anywhere within Australian waters (although service is most easily effected when the ship has berthed at, or is anchored in, an Australian port). The writ is served by securely affixing a sealed copy of the writ to the mast or some other conspicuous part of the ship (such as the bridge window). The defendant is the ship itself and not its owner or charterer. Immediately upon filing the writ, the plaintiff can apply to arrest the defendant ship.¹¹ The application to

4 Section 15 of the Act.

5 Sections 14 and 4(2) of the Act.

6 Section 17 of the Act.

7 Section 18 of the Act.

8 *Ships 'Hako Endeavour', 'Hako Excel', 'Hako Esteem' and 'Hako Fortress' v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21 at [54] - [55].

9 Section 19 of the Act.

10 *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404 at 426.

11 Typically, the filing of the writ and the application to arrest is done at the same time (as is service of the writ and arrest warrant).

arrest the ship is made *ex parte* and is relatively straightforward. Whilst the Rules allow for an element of discretion on the part of the Registrar in deciding whether to issue an arrest warrant, provided the matters set out in rule 40(3) of the Rules (ie there is a caveat against the arrest of the ship in force or the proceeding is stayed because payment has been made into court or a bail bond in not less than the amount claimed has been filed with the court) *do not* exist, the application should be granted and, where it is, the arrest warrant will be executed by the Admiralty Marshal upon the ship.

Once the arrest warrant is executed by the Admiralty Marshal, the ship comes within the custody of the Admiralty Marshal (who is an officer of the Court) and the ship will remain under arrest until it is lawfully released from arrest or is sold by order of the Court to satisfy the plaintiff's judgment (if the plaintiff's claim is successful).¹² Further, and importantly, the application for an arrest warrant constitutes an undertaking to the Court to pay on demand the fees and expenses of the Admiralty Marshal in relation to the arrest.¹³ This is necessary because the Admiralty Marshal must (unless the Court otherwise orders) take all appropriate steps to retain safe custody of, and to preserve, the ship throughout the period of the arrest.¹⁴

THE ADVANTAGES OF ARREST PROCEEDINGS

The ability of a plaintiff in an action *in rem* to arrest the ship and keep it detained pending the outcome of the proceedings has substantial benefits. First, it provides the plaintiff with security for their claim at the time they commence proceedings and makes the recovery of any judgment sum (assuming the plaintiff is successful) relatively simple, as the ship can be sold to satisfy the judgment. This removes the difficulties associated with having to enforce a judgment, especially where the defendant is located overseas and has no assets in Australia.

Secondly, the prospect of the ship being detained and unable to operate pending the outcome of the proceedings usually results in the owner of the ship providing alternative security for the plaintiff's claim in exchange for the release of the ship from arrest (such as a bank guarantee or letter of undertaking from a P&I club or insurer issued by a financially secure third party). Indeed, where alternative security is proposed, the plaintiff is entitled to an amount equal to their '*reasonably arguable best case*' or the value of the ship, whichever is the lesser.¹⁵ Alternative security from a financially secure third party has the advantage of removing the risk that another

party may bring an action *in rem* against the same ship which ranks higher in priority to the plaintiff's claim (such as a proprietary maritime claim by a mortgagee of the ship).

Thirdly, where a party appears in the *in rem* proceedings to defend the claim and they are actually the party liable for that claim *in personam*, the proceedings take on the dual status of being proceedings *in rem* and *in personam*. In this situation, where the final judgment is actually higher than the value of the ship (or any alternative security provided in place of the ship), the plaintiff can recover the full judgment from the party who appeared personally (as that party's liability is not limited to the value of the ship (or alternative security)).¹⁶

Fourthly, even if the plaintiff's claim fails and the ship (or alternative security) is released, the owner, or any other party adversely affected by the arrest, can only claim damages from the plaintiff where the plaintiff acted '*unreasonably and without good cause*' in arresting the ship.¹⁷ This will be very difficult to prove in most cases and, whilst there has (to date) been no Australian court decisions on the scope and extent of this requirement, a bona fide plaintiff should not be liable for any damages suffered by the owner arising from the arrest, or another party adversely affected by the arrest, even where their claim is ultimately unsuccessful.

¹² Rules 44, 51, 52, 69 and 70 of the Rules.

¹³ Rule 41 of the Rules.

¹⁴ Rule 47(2) of the Rules.

¹⁵ *Freshpac Machinery Pty Ltd v the ship 'Joana Bonita'* (1994) 125 ALR 683. See also rule 51 of the Rules.

¹⁶ Section 31 of the Act. See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [109].

¹⁷ Section 34 of the Act. Prior to the Act, the former common law position (which still applies in England) was even stricter and only allowed recovery from a plaintiff where they had arrested the ship in bad faith or with malice or gross negligence.

CONCLUSION

In an era where shipping has become integral to the success of many businesses, claims arising in connection with the use or deployment of a ship or the business of its owner or charterer are becoming increasingly commonplace. In Australia, where the claim is a maritime claim within the ambit of the Act, an aggrieved party has the ability to pursue their claim as an action *in rem* against the ship itself to recover their loss and damage.¹⁸ This is a powerful and unique admiralty law remedy which can offer the aggrieved party many advantages. In particular, the aggrieved party can arrest the ship before their claim is determined, the ship will remain under arrest *pending* the outcome of the claim and, if the claim is successful, the

ship will be sold by order of the Court so that the sale proceeds can be used to satisfy the judgment. This gives an aggrieved party a relatively simple and straightforward means of recovering their loss and damage in Australia regardless of where the party liable for the loss and damage *in personam* may be located. Further, even where the aggrieved party's claim is ultimately unsuccessful, the aggrieved party should not be liable in damages to the owner, or any other party adversely affected by the arrest, *provided* the aggrieved party acted reasonably and with good cause in arresting the ship.¹⁹

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¹⁸ As set out in footnote 2, an action *in rem* can also be brought in Australia against certain property related to a ship (such as cargo).

¹⁹ See the comments above in relation to section 34 of the Act.

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