2014 Review of Australian Shipping Cases

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The following is from a series of newsletters, I sent earlier this year, setting out some important Australian shipping cases in 2014. The summaries are written with the aim of informing a lawyer in brief, general terms and are not a substitute for reading the cases.

Collision in a foreign EEZ

It is unusual for a court to stay a proceeding because it is a clearly inappropriate forum. But, in *CMA CGM SA v Ship 'Chou Shan'* [2014] FCA 74, the Court granted the stay and the Full Court of the Federal Court dismissed an appeal (see *CMA CGM SA v Ship 'Chou Shan'* [2014] FCAFC 90).

The "Chou Shan" and another ship collided in China's EEZ. They were registered in different countries; the owners were domiciled in different countries, none of which included Australia or China. The ships then proceeded to different Chinese ports, where authorities required the shipowners to provide security for pollution cleanup costs and for damage to fisheries.

In the Ningbo Maritime Court, limitation funds for both vessels were established, there were claims between the owners and claims against the owners by cargo interests and proceedings as to pollution. Although there was no connection with Australia, a writ *in rem* against the "Chou Shan" was filed in the Federal Court. Under Australian law a larger limitation fund could be established than under Chinese law. The ship was arrested while visiting Port Hedland.

Although the judge was not convinced that Chinese collision law applied automatically to a collision in its EEZ, he granted the stay because:

- the natural and obvious forum for all disputes (pollution, cargo, collision and limitation) was China;
- apart from the proceeding, there was no connection with Australia;
- there were proceedings currently before a Chinese court with jurisdiction over all persons and claims;
- regardless of the Australian proceeding, the Chinese proceedings would continue; and
- there was a risk of inconsistent findings and verdicts, this was particularly acute in relation to any attempts to enforce different judgments in other jurisdictions.

The benefit of the larger Australian limitation fund did not displace the Court's decision that the Australian court was an inappropriate forum.

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The Full Court approved the primary judge's analysis and application of the principles governing the stay. It accepted the possibility of a proceeding being commenced in Australia to take advantage of the larger limitation fund, despite the fact that a limitation fund had been established in another jurisdiction. Further, because the collisions occurred in China's EEZ (and not in its territorial waters), the Full Court accepted the primary Judge's reservations about the application of Chinese law. Australian law of collision applies to collisions in Australian territorial waters, and is capable of applying to the high seas, the Australian EEZ and, possibly, the EEZs of foreign nations.

The Full Court accepted the possibility that a collision in a foreign EEZ could be subject to a proceeding in an Australian court, taking advantage of the Australian limitation provisions.

Tribunals and admiralty jurisdiction

Jenner v Birtles [2014] NSWCATCD 63 reinforces the position that State tribunals (in this case NCAT) are not invested with jurisdiction under the *Admiralty Act.* This follows Rein J's decision in *China Shipping (Australia) Agency Co Pty Ltd v DV Kelly Pty Ltd* [2010] NSWSC 1556.

Repairing a ship under arrest

In *Latitude Fisheries Pty Ltd v Ship 'South Passage'* [2014] FCA an owner was in default of a mortgage over its fishing vessel. The mortgagee/applicant had the vessel arrested. The mortgagee sought the Court's permission to carry out repairs to the vessel and to sell it in time for the next fishing season. The Court held that such rights would be inconsistent with the Court's preservation, management and control powers (under rule 50 of the *Admiralty Rules*) and the Court's power to order valuation and sale (rule 69).

Surrogate Arrest: Control or Ownership?

Shagang Shipping Co Ltd v Ship 'Bulk Peace' as surrogate for the Ship 'Dong-A Astrea' [2014] FCAFC 48 is a nice reminder that the ownership requirement for the arrest of a surrogate vessel will not be satisfied, if all one can show is that the relevant person exercises a high degree of control over the surrogate.

The plaintiff, as owner, chartered the vessel for some years. The charterer's obligations under the charterparty were guaranteed by another company. After the charterer defaulted in payment, the owner called upon the guarantor to perform the charterer's obligations. The guarantor did nothing. The owner arrested another vessel as surrogate.

The registered owner of the surrogate sought its release. It argued successfully that the guarantor was not the owner of the surrogate. While the guarantor exercised some control over the vessel, the Court was not prepared to conclude it was the owner.

This case highlights the limitations of the *Admiralty Act* and raises, as a matter of policy, whether Australia should follow the South African approach, i.e. the

"associated ship" test.

Seizure of a Fishing Vessel: Who is the Owner?

The Tasmanian *Fisheries Act* provided that, when a fishing vessel was seized because of illegal fishing, the State could sell the vessel, unless the owner disputed the seizure. If the owner did dispute, then the State would have to commence a proceeding seeking an order to allow it to sell the vessel.

In *Leiah Pty Ltd v State of Tasmania* [2014] TASFC 4, some two days before the vessel was seized, the original owner sold the vessel to a bank, which then leased it back to the original owner. When it was seized, the original owner was the lessee but still registered as the owner of the vessel.

The original owner contended that "owner" in the *Fisheries Act* should be read widely so as to include "a bailee or any person with a lesser title than the true owner". In its submissions, it also said it was a charterer by demise and therefore an owner, it referred to the *Admiralty Act* to support this position. It is unclear from the reasons how this argument was advanced.

The Full Court held that "owner" had its literal meaning in the *Fisheries Act* and that, consequently, the original owner was not an "owner" under the Act.

Seaworthiness and Photocopied Sea Charts

In Mogilyuk v Australian Maritime Safety Authority [2014] AATA 409, AMSA conducted a survey of a vessel at MacKay, Queensland, which had travelled from Kawasaki, Japan. It made an order for the vessel's detention on the grounds that it was unseaworthy and substandard, under the *Navigation Act 2012*. AMSA's decision was based on the fact that the vessel had not been supplied with appropriate official navigation charts. It had been supplied with scanned/photocopied charts. The AAT agreed that scanned/photocopied charts do not meet the international standards for marine navigation. It was satisfied that the vessel was unseaworthy and substandard.

Amending a Writ

The last case I will look at for the review of Australian shipping cases from 2014 is *Programmed Total Marine Services Pty Ltd v Ship 'Hako Endeavour'* [2014] FCAFC 134.

Although this case raises a number of interesting questions, the one I want to focus on is: whether a person who has had a ship arrested is entitled to recover in its proceeding the costs of manning services provided during the arrest. The tension here is between what is originally claimed in the writ and what is subsequently claimed at trial.

Here, the appellant was in the business of providing crew and other services to ships. The appellant entered into an agreement with a demise charterer of three vessels to provide these services. The demise charterer fell into arrears in payments owed to the appellant. The appellant then had all three ships arrested. The parties

entered into a deed, under which the vessels were released. While the vessels were under arrest, the appellant continued to provide services to the demise charterer.

The appellant sought the primary judge's leave to amend its writ and statement of claim so as to recover the cost of the services. It relied upon implied contract and quantum meruit. The primary judge refused leave.

The Full Court held that s 18 of the *Admiralty Act* did not constrain the power to grant the appellant's amendments, since the additional claims were the same general maritime claims that had already been brought in the proceeding. The Full Court concluded that the demise charterer should, in all the circumstances, be viewed as requesting the continued services during the ships' arrest.

Concluding Remarks

All of these decisions are available in full and free of charge on http://austlii.edu.au. If you would like to subscribe to my shipping and international trade law newsletter, *Compass Points*, please send me an email.