

Relationship between admiralty, employment and common law remedies – enforcing and recovering the debt

Introduction

[1] This paper is an attempt to consider some practical issues relating to the way in which the use of admiralty law procedures interrelates with other jurisdictions such as employment law (master and crew wages) and civil common law remedies. It can only be an overview in the time available.

[2] This crossover between jurisdictions was referred to by the Editorial Committee of the Victoria University of Wellington Law Review in a foreword to a special edition of the Law Review dealing with maritime law.¹ The committee referred to the importance of maritime law cases in certain precedents across the entire common law. The committee stated in that foreword as follows:

Maritime Law has historically been of major importance, both in resolving shipping disputes and in settling rules applicable to the much wider range of situations. A number of leading cases in the law of contract are, for instance, maritime cases. The growth of air traffic has to some extent reduced reliance on shipping and international trade but developments such as containerisation have in fact kept the world seaways very busy. The increase in fishing around New Zealand shores, especially by foreign vessels, has also meant that maritime law has maintained its practical significance.

Similarly, in areas such as tort and private international law, maritime cases provide many precedents. The “*Wagon Mound*” and *Rhesa Shipping (The “Popi M”)*² cases are for instance maritime cases. Both have had a substantial effect in the common law, the latter an example of the House of Lords bringing common sense to the issue of the civil burden of proof.

¹ *Victoria University of Wellington Law Review*, (Vol 16, Number 2, April 1986).

² [1985] 2 All ER 712.

[3] In dealing with this topic it is necessary to retain a perspective on exactly what it is that the combination of the various Admiralty Acts and arrest procedures throughout the world set out to achieve. This paper will briefly consider the effect of the NZ Admiralty Act 1973, in combination with the rules contained in part 25 of the High Court Rules and to a lesser extent in respect of solely *in personam* claims in the District Courts Act and the District Courts Civil Rules. Before doing so I set out some passages which encapsulate in a more lyrical way those ideas the editors of the Victoria University of Wellington Law Review were conveying. This is a passage from Benedict on Admiralty³ which reads as follows:

In the discussion of modern maritime law, in an age which has seen such tremendous technological developments, when man is able to construct leviathans of the deep of sizes and motive power far beyond the imagination of those who built the quinqueremes of Nineveh, in an age when maritime commerce and transportation has assumed dimensions and characteristics hitherto unknown, in an age which is witnessing social changes of a kind when there is a questioning of the very basis of the laws which have come down to us and of the values and norms they were intended to subserve, a reference to the antiquities of the legal lore of the sea is not likely to be of particular utility in the solution of the legal problems that arise.

We are, nevertheless, the inheritors of great tradition. We have inherited the same spirit of inquiry and adventure which first imbued man to face the unknown sea and through the ages learn its ways and unlock its secrets, and which, in our time, has enabled us, by using the springboard of accumulated knowledge of the past, to take a leap into a far higher plane of scientific knowledge and harness it to our needs. And so if we look to the past, it is not so much that we may be fascinated by its quaint laws, but that utilising the experience of the millenniums we may seek to find and establish ourselves principles on which to build a just system of maritime law having relevance to a frame of reference composed of the many complex variables of new conditions, ideals, institutions, values and competing interests existing in our time.

[4] Benedict is of course is an American text. A more succinct statement of the importance of admiralty law is contained in Gilmore and Black, another important American text in this field.⁴ In the second edition of that text the first paragraph of the chapter *Introduction: History and Jurisdiction* reads as follows:

The law of admiralty, or maritime law, may tentatively be defined as a corpus of rules, concepts and legal practices governing certain centrally important

³ Steven F. Friedell, *Benedict on Admiralty*, (7 ed, (Revised), Vol 1, 1988) at p 1-2.

⁴ Gilmore and Black, *Law of Admiralty* (2 ed) p1-2.

concerns of the business of carrying goods and passengers by water. Insofar as the reference is to substantive law, the terms “admiralty” and “maritime law” are virtually synonymous in this country today, though the first derives from the connection of our modern law with the system administered in a single English court, while the second makes a wider and more descriptive reference. The subject comprises the most important part of the private law but deals with the shipping industry although, for historical and to some extent practical reasons, its coverage is by no means co-extensive with the whole reach of that industry’s legal concerns; in some modern cases it has even been held to cover some matters quite unconnected with shipping Its tie with a single industry, and its separate, long-continued and international traditions and history mark it off quite distinctly from the relatively inter-permeating branches of shore going law – with which, nonetheless, it has numerous relations.

[5] These passages from Benedict and Gilmore and Black are from earlier editions of the texts. Many of the modern texts on admiralty law do not deal to the same extent with the history, development and philosophical basis of the jurisdiction. The chapters from which I have quoted these brief passages, however, make fascinating reading for anyone interested in this topic.

The procedural and the personification theories

[6] I mentioned earlier that it is necessary to consider exactly what it is that the combination of the Admiralty Act and the court rules established to enable effect to be given to its provisions, set out to achieve. Ultimately when an admiralty action has concluded and all the creditors have shared in the vessel’s value the purchaser of the vessel, if in fact it is sold, must receive clean and unencumbered title. Almost invariably, but not always, claims arise from some catastrophe or, where there is a situation of insolvency, admiralty law needs to procure an orderly and fair method of dealing with claimants who are not all going to receive payment in full.

[7] So turning to the two theories of the general character of the jurisdiction. Originally these theories dealt with the philosophical basis upon which the traditional maritime liens which attached to a ship were regarded. With the advent of the modern Admiralty Acts and the extension of *in rem* claims and in America maritime lien categories, the theories now

have wider application. The personification theory, which is the predominant theory under United States law, is set out in the following statement from Gilmore and Black⁵

Much wit and learning have been expended in analysing the “true nature” of the maritime lien. Under what is said to be the predominant American theory the ship, personified, is itself - or herself - the defendant in a proceeding *in rem* to enforce a lien. The ship is “the offending thing”; the lien itself is, in an obscure Latin jingle which has been so often repeated that it is no longer polite to enquire what it means, *jus in re* rather than *jus ad rem*. The English theory of liens, on the other hand, is said to be merely procedural: the process *in rem* against the ship is in the nature of foreign attachment to compel the owner’s appearance by subjecting to the Court’s control property within its territorial jurisdiction.

[8] Benedict⁶ stated the same concept in a slightly different way:

In Admiralty, the vessel is treated as having a juridical personality, an almost corporate capacity, possessing not only rights but liabilities (sometimes distinct from those of the owner), which may be enforced by process and decree against the vessel, binding upon all interested in her and conclusive upon the world, for admiralty in appropriate cases administers remedies *in rem* i.e, against the property, as well as properties *in personam*, i.e, against the party personally.

[9] As Gilmore and Black has stated, under English theory the procedural theory finds favour. Thomas⁷ stated the procedural theory succinctly as:

... based on the premise that the maritime liens evolved out of the process of arrest of a vessel in order to compel the appearance of the *res* owner and to obtain a security.

[10] It is not difficult to understand the need in the United States to theorise the claims on the basis of the personification of the vessel. In respect of the maritime liens and purely statutory and expense claims the procedures under the admiralty law entitle recovery from an asset, which in many instances is not owned by the “*in personam*” debtor. However, when one analyses the Admiralty Acts and the Court rules used to procure resolution of claims against a vessel for the time being under the particular jurisdiction’s control my view is that they are really procedural devices. I return to the question of what it is that is being sought to be achieved. The answer to that is a purely commercial purpose ie, once liability is

⁵ P 589, [9-3].

⁶ P 7-16, [106].

⁷ D R Thomas *Maritime Liens* (British Shipping Law, Vol 14, Stevens, London, 1980) 7.

determined or admitted, to have the means to go beyond the particular jurisdiction, to recover the debt.

[11] One significant feature, which has arisen in the United States apparently out of the personification theory, is that the list of maritime liens that have a special place in admiralty law is more extensive than the list applying under English law and as that has extended into the Commonwealth jurisdictions. For instance in the United States maritime liens include claims such as necessaries and repairs to a ship, general average and breach of the contract of affreightment. The position with mortgages is also different. Under English law and by extension into New Zealand law the list of maritime liens has been restricted to a small number of claims set out under the definition of “maritime lien” in the Admiralty Act 1973.

[12] The Admiralty Act sets out the extent of the admiralty jurisdiction in the High Court and District Courts. Jurisdiction may be exercised by the High Court both in respect of *in rem* and *in personam claims* whereas the District Court only has a jurisdiction *in personam* within its monetary limit jurisdiction of \$200,000. The Act sets out the extent of the admiralty jurisdiction and lists a series of the maritime liens, statutory claims, statutory rights *in rem*, claims relating to possession or ownership and mortgages. Of those claims listed there are certain limitations provided in the Act as to whether they constitute actions *in rem* and therefore justifying the arrest of the vessel or may simply only be dealt with as *in personam* claims. Certain jurisdictional limits are also specified in respect of some *in personam* claims. There was a consideration of the restrictions contained in ss 4, 5 and 6 of the Act in the decision of Smellie J in *Reef Shipping Co Ltd v The Ship “Fua Kavenga”*⁸.

[13] The High Court Rules provide a procedural scheme for the commencement of actions, arrest of the vessel or vessels the subject of the claim, pleadings and preliminary acts (collision), defence of claims, appraisalment and sale of vessels following proof by trial or admission, determination as to priority of claims and of course the High Court has sole jurisdiction to deal with disputes if they arise as to limitation of claims.

[14] The District Courts have jurisdiction to a limited extent with *in personam* claims. The District Courts Rules provide as well procedures for preliminary acts and stay pending

⁸ [1987] 1 NZLR 550.

resolution of any dispute as to limitation being resolved by the High Court under Part 7 of the Maritime Transport Act 1994.

Public policy and equitable principles

[15] Public policy plays a significant part in the preferred position of maritime liens in admiralty law. For instance the prominent position of master and crew wages arises from the obvious need to man ships and therefore provide a trustworthy security for wages. Without such protection mariners would be vulnerable. Similarly policy issues apply strongly in respect of salvage because of the need to encourage the saving of maritime ventures.

[16] Public policy has also played a part in the United States in the giving of prominence to the ship mortgage in priority of claims whereas this is not true under English law. The prominence of mortgages under the United States law relates back historically to the downgrading of the merchant fleet in the United States at the beginning of and during the First World War. After that war under the United States Shipping Act in 1920 the preferred mortgage was created giving it priority over all claims against a vessel except preferred maritime liens and the costs, fees and expenses associated with arrest and berthing of the vessel until resolution of claims. Similarly public policy attaches to the priority of the damages lien; such policy issues associated with the promotion of safety in navigation.

[17] Equitable principles apply to priority of claims. Of primary importance under this head is the principle of the “preserver of the *res*”. Similarly priorities apply in inverse order between contractual claimants on the basis that later providers of services or suppliers to the vessel protect the position of the earlier claimants. Priority also exists as between contractual and tortious claimants, with the latter having precedence on the basis that the contractual claimants are more closely associated with the owners of the vessel as opposed to those who involuntarily suffer damage by tortious acts such as errors of navigation and so on. The lowly position of the mortgagee under English as opposed to American law is counter-intuitive in a way in view of the fact that under usual commercial considerations the secured creditors would have prominence. A reason for this may be that generally, although not always, the financiers are in a far better position to procure security whereas the prior claimants are vulnerable. For instance, and again it can only be a general observation, the mortgagee is in a position to procure collateral security beyond the hull.

The possessory lien holder

[18] Amongst all of this is the position of the ship repairer who maintains a possessory lien. This recently came to the fore in *Babcock Fitzroy Ltd v M/V Southern Pacifika*.⁹ I do not intend to retrace the decision at length and indeed there has been a lengthy analysis of the case in a very good article by James McGeorge.¹⁰

[19] The position of the possessory lien holder in the order of priority in admiralty law has always been a difficult concept. The importance of the lien is connected to the fact that under English law, as opposed to American law, ship builders or ship repairers do not possess a maritime lien and therefore would have a low ranking in the order of priorities. Prior to the New Zealand Admiralty Act in 1973, such claims were not regarded as possessing any right of arrest of the vessel and accordingly the retention of possession was of vital importance. The 1973 Admiralty Act created such claims as statutory claims *in rem* but even so with priority below other claims such as the maritime liens and mortgages.

[20] The point in issue in *Babcock* was whether the possessory lien holder in that case applying to the Court to arrest the vessel on the basis of an action *in rem* effectively relinquished possession to the Registrar and thereby arguably lost possession of the vessel. Normally to accommodate the possessory lien prior to *Babcock* a practice evolved whereby when other claimants had sought to arrest the vessel to advance *in rem* claims, the possessory lien holder by convention would surrender the vessel to the Registrar to enable the vessel to be sold under the best possible conditions. The possessory lien holder would then participate in the rankings of claim and rank behind the prior maritime liens and the statutory claims and expenses but ahead of subsequent maritime liens, all mortgages and other lower ranking claims. So this was the issue which arose in *Babcock* as between the repairer and the mortgagee.

[21] Mr McGeorge's article is a well written attempt to rationalise the basis upon which the New Zealand High Court sided with mainly Singaporean authority to give the lien holder priority over the mortgagee even though the lien holder had taken steps to enforce a statutory *in rem* claim under the Admiralty Act.

⁹ [2012] NZHC 1007.

¹⁰ James McGeorge, 'Grappling the Nettle': Common Law Possessory Liens in Admiralty Law (2012) 26 A & NZ Mar LJ.

[22] Previous commentators have expressed the view that the absence of a maritime lien for repairs in English Law is illogical. As a result of *Babcock* the position is now effectively resolved in New Zealand although in a way the purists may not like. If one has regard to the procedural theory of admiralty law, while purists such as Mr McGeorge might disagree, there is a certain logic in allowing the possessory lien holder to take steps to enforce the claim and bring it to a head rather than having to simply maintain possession with all its inconvenience until the position is precipitated by other claimants. As Mr McGeorge has stated in his article the possessory lien holder wishing to bring the claim to a head does have other remedies such as the right to sale under the Wages Protection and Contractors' Liens Repeal Act 1987. The possessory lien holder also has the right to pursue through ordinary civil remedies the underlying cause of action against an "*in personam*" defendant. That of course, though also applies to any of the admiralty claimants. While the processes under the Admiralty Act and the rules provide a powerful remedy to procure submission to the jurisdiction and security for the claim, if the claim is in fact disputed by the party making an appearance in the action, then the claim would have to go to proof at trial before being able to participate in sharing the fund.

Other procedures

[23] As indicated, the purpose of the Admiralty Act and High Court Rules procedures is primarily to bind to the jurisdiction where the cause of action is pursued, the substantial asset of the vessel. This is in order to try and force a solvent owner or others interested in the vessel to participate in the claims.

[24] While the Admiralty Act provides a powerful remedy to claimants against the vessel other remedies to prevent the removal of the asset from the jurisdiction are the *Mareva* injunction and what is referred to as to the combination of the *Mareva* injunction and the *Anton Piller* (*Mareva/Piller*).¹¹ The procedure covering *Mareva* (freezing order) and *Anton Piller* (search order) are provided under rules 32 and 33 of the High Court Rules. With the extended jurisdiction in the District Court, those Courts have jurisdiction to deal with *Mareva* injunctions (but not *Anton Piller*) within the monetary limitation applying in those courts. The disadvantage of this type of proceeding as opposed to admiralty proceedings against the

¹¹ *Mareva Compania Naviera SA v International Bulkcarriers SA* ("*the Mareva*") [1980] 1 All ER 213 and *Anton Piller KG v Manufacturing (Mfg) Processors Ltd* [1976] CH55.

ship is that only the owner of or some person with a proprietary interest in the vessel may be enjoined.

[25] Clearly in the case of *Babcock* those remedies would not have been appropriate in its position as a possessory lien holder as there could be no evidence of an imminent intention to remove the asset from the jurisdiction. However, with the limitations and restrictions upon actions contained in the Admiralty Act there may be cases where it is more appropriate if security *pendente lite* is sought, to look at other options. It is necessary to consider all the facts pertaining and make a reasoned decision on the appropriate procedure, which may not necessarily be an admiralty action.

Employment Court remedies – wages

[26] Section 4(1) of the Admiralty Act 1973 states that the court shall have jurisdiction in respect of any claim by a master or member of the crew of a ship for wages. In addition any claim by or in respect of the master or member of the crew of the ship for any money or property which, under any of the provisions of the Maritime Transport Act 1994, is recoverable as wages or in the Court and in the manner in which wages may be recovered, comes within the jurisdiction. Section 5 specifies those causes within s 4 which may be invoked by an action *in rem* and therefore obtaining a right of arrest.

[27] Section 4(1)(o) is in direct conflict with ss 161(1) and 187(1) of the Employment Relations Act 2000, both of which give the Employment Relations Authority and the Employment Court respectively exclusive jurisdiction to hear personal grievances and actions for the recovery of wages. The Employment Court acquires such jurisdiction by way of challenges to determinations of the Employment Relations Authority, which are then heard in the Court as *de novo* hearings. In addition ss 161(3) and 187(3) specifically provide that no other court has jurisdiction in relation to any matter within the exclusive jurisdiction of the Authority or Court. It should be further noted that while s 4 of the Admiralty Act prescribes the extent of the admiralty jurisdiction vested in the High Court and District Courts s 3 makes the exercise of such jurisdiction discretionary.

[28] The matter is further complicated by the fact that amongst the remedies, which can be granted by the Authority or the Court in respect of personal grievances, the Authority and the

Court have power to order reimbursement of wages or other money lost by the employee as a result of the personal grievance. This may include future wages or income.

[29] The problem of course arises in a situation where the ship's crew or master may wish to avail themselves of the right under the Admiralty Act and High Court Rules to have the vessel or vessels arrested. The right to procure security for any such claim in this way is a valuable remedy.

[30] In *Arthur Udovenko & Ors v Karelrybflot*¹² Young J stated in respect of s 4(1)(o):

It is not disputed that this provision (which took its present form by reason of an amendment in 1994), preserves a jurisdiction to this Court which can be exercised notwithstanding the general provisions of the Employment Contracts Act. These provisions would otherwise preserve exclusive jurisdiction to the institutions established under that Act in respect of the present proceedings because they are connected with contracts of employment.

The amendment in 1994 merely refers to the fact that the reference to the Shipping and Seamen Act 1952 in the section was replaced by reference to the Maritime Transport Act 1994 which repealed it. Young J¹³ did state that his views on these legal issues should be treated as provisional only as they were not argued in front of him.

[31] It is suggested that *Udovenko* may not have been good law on this point at the time. However, since then the Employment Contracts Act has been repealed and replaced with the Employment Relations Act 2000. Under the Employment Contracts Act 1991 (which Young J was interpreting) the jurisdiction provisions in relation to the Employment Tribunal and Employment Court merely stated that those entities "shall have jurisdiction". Under the Employment Relations Act 2000 the wording is that the Authority and the Court have "exclusive jurisdiction". The alteration in the wording cannot have been accidental. Nor could the addition of ss 161(3) and 187(3), which substantially modified similar provisions in the earlier statute.

[32] It seems clear, however, that both procedures can be accommodated. In a situation where the master or crew wished to secure the claim by having the vessel arrested (or security provided in its stead) the admiralty procedures would be adopted by the filing of an *in rem*

¹² HC Christchurch, AD90/98, 27 April 1999 at p 12.

¹³ At p13.

claim in the High Court accompanied by the application for warrant of arrest. Once the claim was secured the admiralty proceedings would be stayed pending resolution of any disputed claim in the Employment Relations Authority or the outcome of appeal by way of challenge to the Employment Court. Once liability was finally determined (and all of this presumes of course that the claims in the first instance are not admitted) the crew and master then being the holder of proved maritime liens, would be able to participate in the fund and would of course have claims of high priority. That process would not be inconsistent with the procedural theory as to admiralty claims.

[33] Before turning from employment law considerations, I mention one further matter which has some connection with the recent “*Rena*” litigation. At the Fall Meeting of the Maritime Law Associations of the United States, Canada, Australia, and New Zealand in Hawaii in December 2011, which I attended, a paper was presented, which seemed to mention the possibility that indemnity from employers of reparation orders against crew may lead to avoidance of limitation. I was reminded by this of a New Zealand case *The Attorney-General for New Zealand v Jones*.¹⁴ This was a decision of Quilliam J dealing with a prosecution of the master of the inter-island ferry “Aranui” as a result of leaving the stern door down during the voyage across Cook Strait. The prosecution was successfully defended and the master then sought and was granted indemnity from his employer, the Railways Department, for the legal fees incurred in defending the claim. There was some irony in this in that the employer may have procured initiation of the prosecution in the first place. Such indemnity at common law, however, depends upon the employee establishing that they have committed no criminal act or act of “moral turpitude”. Clearly, therefore, the law in New Zealand on such indemnity would be of no assistance to those claiming against the “*Rena*”.

Garnishee proceedings/charging orders

[34] These are powerful collection remedies available in both the District Court and the High Court and provide possible alternatives to admiralty arrest proceedings after judgment has been procured whether by admission or proof. The garnishee summons can only be issued out of the District Court, but its equivalent in the High Court is the charging order issued without leave in the Court after judgment. Charging orders are also available in the District Court. In respect of both courts, charging orders may be issued prior to judgment

¹⁴ HC Wellington M No 73/79, 16 June 1981.

upon proof of circumstances similar to those pertaining in respect of *Mareva* injunctions. It requires the applicant to prove that the liable party is removing, concealing or disposing of their property with the intent to defeat creditors or is absent from or is about to leave New Zealand.

[35] Garnishee proceedings in the District Court are particularly effective and speedy when, following judgment, it is ascertained that a third party owes money to the judgment debtor. The sub-debtor can include a bank holding funds on deposit. The sub-debt may include money owing under bills of exchange or other negotiable documents.

[36] A difficulty can arise in the District Court with a Garnishee summons where the sub-debtor disputes a debt exceeding the jurisdiction or monetary limit in the District Court of \$200,000. In this case the proper course to adopt would be for the judgment creditor to apply to move the judgment into the High Court and adopt the charging order procedure under the High Court Rules.

[37] The Garnishee summons procedure in the District Court entitles a sub-debtor, who does not dispute the judgment debt, to pay the funds into Court. Obviously, considerable information as to the sub-debt such as bank account numbers and the like would be required but such information may have already been acquired if search orders have been used during the litigation. Employees would generally have knowledge of their employer's bank account details simply through wage records.

Conclusions

[38] Even though a claim is categorised under s 4 of the Admiralty Act 1973, if such a claim is disputed then it is necessary, before the enforcement procedures under the Act and Rules are adopted, for the claim to be crystallised by way of proof. Each of the maritime liens, the statutory claims and the statutory claims *in rem* specified in that section involve an underlying cause of action. This similarly applies with a possessory lien. What the Act and Rules provide, however, is an effective means whereby, if the claim is disputed pending determination, the vessel can be restrained within the jurisdiction or a fund established in its stead, or some other security procured pending resolution on liability, issues of limitation and priorities. If it is the vessel that is restrained, then procedures are available for appraisalment

and sale. As can be seen in respect of wages it is necessary to resort to a Court with exclusive jurisdiction to deal with matters arising under an employment contract to determine liability and then return to the Court with admiralty jurisdiction for enforcement. It is not always necessary though with claims, which are strictly admiralty claims, to resort to the procedures under the Admiralty Act and Rules. As I started out by saying, the ultimate objective is recovery of the debt. In keeping with the procedural theory, the Admiralty Act procedures are one way of procuring security and representation of the *in personam* defendant. Clearly these procedures are powerful remedies but other remedies, which may be equally effective and sometimes speedier, should not be overlooked.