Arresting a "Ship": Boats, Bunkers and Barometers

Matthew Harvey
Barrister
Victorian Bar

Watertight definitions do not exist even for ships.[1]

When Oliver Wendell Holmes wrote in 1882 that "a ship is the most living of inanimate things",[2] he was referring in part to actions in Admiralty against ships. The law still permits a proceeding in Admiralty to be commenced in particular circumstances against a ship. What constitutes a ship in most cases is pretty straight-forward; however, from time to time whether a particular object is a ship has been hotly contested. This paper considers the meaning of "ship" and what may be capable of arrest within that meaning.

The *Admiralty Act*

Subject to some exceptions, s 5(1)(a) of the *Admiralty Act* 1988 (Cth) provides that that Act applies in relation to "all ships, irrespective of the places of residence or domicile of their owners".[3] As to bringing an action *in rem* against a ship, s 14 provides:

> *In a matter of Admiralty or maritime jurisdiction, a proceeding shall not be commenced as an action* in rem *against a ship or other property except as provided by this Act.*

Sections 15 to 19 permit in particular circumstances a proceeding to be commenced *in rem* against a "ship or other property".[4] "Ship" is defined in s 3(1) to mean:

> *a vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved, and includes:*
>
> *(a) a barge, lighter or other floating vessel;*
>
> *(b) a hovercraft;*
>
> *(c) an off-shore industry mobile unit within the meaning of the Navigation Act 1912; and*

---

1 H Meijer *The Nationality of Ships* (1967) page 15, quoted by Longmore LJ in *Perks v Clark Same* [2001] 2 Lloyd's Rep 431, 441 [56].
2 OW Holmes, *The Common Law* (Macmillan & Co, London, 1882) page 26.
3 Section 4(4)(a) of the *Admiralty Act* 1973 (NZ), while differently expressed, is to similar effect about its own operation.
4 See ss 5(1) and (2) of the *Admiralty Act* 1973 (NZ).

> *(d) a vessel that has sunk or is stranded and the remains of such a vessel;*
>
> *but does not include*
>
> *(e) a seaplane;*
>
> *(f) an inland waterways vessel; or*
>
> *(g) a vessel under construction that has not been launched.*[5]

". . . a vessel of any kind . . ."

The first element of the statutory definition of "ship" is "a vessel of any kind". This bears some resemblance to definition in the *Merchant Shipping* Act 1854 (UK), namely that:

> *'ship' shall include every description of vessel used in navigation not propelled by oars.*[6]

In *Steedman v Scofield*[7] Sheen J said:

> *a vessel is usually a hollow receptacle for carrying goods or people. In common parlance 'vessel' is a word used to refer to craft larger than rowing boats and it includes every description of watercraft used or capable of being used as a means of transport on water.*

In *The Mac* the Court of Appeal held that "ship" in the *Merchant Shipping Act* should be understood within its common or popular meaning.[8] Here the court considered whether a hopper-barge (i.e. a barge used to remove mud and gravel dug up during dredging) was a ship. Brett LJ said:

> *In popular language, ships are of different kinds; barques, brigs, schooners, sloops, cutters. The word includes anything floating in or upon the water built in a particular form and used for a particular purpose.*[9]

Thus, a hopper-barge was held to be a ship. This is consistent with an earlier decision in which it was implicitly accepted that the barge that carried the stone obelisk known as 'Cleopatra's needle' from Alexandria to England was a ship.[10]

---

5 Under s 2 of the *Admiralty Act* 1973 (NZ), '"ship" includes any description of vessel used in navigation, and includes a hovercraft'. Note 'hovercraft' is defined in s 2 also.

6 This was subsequently re-enacted in 1894 and 1995 *Merchant Shipping Acts* (UK).

7 [1992] 2 Lloyd's Rep 163, 166.

8 (1882) 7 PD 126, 139 and 130.

9 (1882) 7 PD 126, 130.

10 *The Cleopatra* (1878) 3 PD 145. A barge is expressly included as a "ship" in s 31(a) of the *Admiralty Act*.

In *Ex parte Ferguson*[11] it was argued that a fishing coble could not be a ship within the definition in the *Merchant Shipping Act*. The fishing cable was described as 24 feet long, not entirely decked over, having two masts, and a removable rudder. She also had oars but these were used to take her out of the harbour and were auxiliary to her sails. Blackburn J held:

> *Every vessel that substantially goes to sea is a "ship". I do not mean that a little boat going out for a mile or two to sea would be a ship, but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purpose of this Act.*[12]

The Court of Appeal held that a fishing coble was a ship. The fact a vessel is propelled by oars does not automatically exclude it from being a ship under the Australian *Admiralty Act.*

There is old authority that a raft of timber is not a ship or a sea going vessel.[13] In that case the raft was a large structure that at night was confused for a barge. The report states that, when the raft was found adrift, it was feared that it would sink many vessels in Yarmouth Harbour. However, in *Wells v Owners of Gas Float Whitton No 2.*[14] Lord Herschell's comments suggest that, as a general statement of the law, this may not hold true, particularly in the context of salvage:

> *But here again it must be remembered that rafts are frequently so constructed as to be in a sense navigated: they are capable of being and are steered. They often have crews resident on board; they are used for the transport, from place to place, by water, of the timbers of which they consist, and sometimes of timber placed upon them.*[15]

What constituted a vessel was considered in a number of appeals about the "Gas Float Whitton No 2".[16] This structure was moored on the River Humber as a beacon to warn vessels off a shoal. It was 50 feet long, 20 feet wide and shaped like a ship. It had no means of propulsion, could not be navigated and was "next to impossible to tow". The interior was occupied by a cylinder containing gas, which supplied a beacon which was

---

11 (1871) LR 6 QB 280.
12 (1871) LR 6 QB 280, 291.
13 *Raft of Timber* (1844) 2 W Rob 251.
14 [1897] AC 337, 345.
15 See also at 347 (per Lord Watson).
16 This case commenced as a decision before a County Court judge and then went through three successive appeals: [1895] P 301; [1896] P 42; and [1897] AC 337.

rigged on a pyramid of wood about 50 feet high. On each appeal it was held not to be a ship.

". . . used or constructed for use"

The second element of the statutory definition is "used or constructed for use". This means that a vessel that was constructed for use but is no longer, or yet to be, used for navigation in water can still be a ship. Some earlier English authorities took a different view. In *European and Australia Royal Mail Co v Peninsular and Oriental Co*[17] a vessel used only as a coaling hulk and warehouse, although it has previously been used to navigate the sea, was held not to be a ship. This received the support of the President of the Admiralty Division in *The Gas Float Whitton No. 2,*[18] where it was said:

> *There may, of course, be questions, and in some cases difficult questions, whether a vessel which has been, or may be, used in navigation becomes diverted of that character by disuse or non-use.*

Examples were referred to such as a lightship that had become an uninhabited beacon, a coal hulk, a training ship and HMS *Victory*, which was described as "a curiosity and a memorial". But this was firmly rejected by the Court of Appeal:

> *As to some instances which were proposed – such as the* Victory *in Portsmouth Harbour – I have no doubt that she is a ship. So was the* Dreadnought, *used for years as a hospital. So is a ship used as a coal hulk.*[19]

The expression "constructed for use" avoids such difficult questions not only where the actual use has changed or ceased but also, as was pointed out by the Australian Law Reform Commission, where the vessel has not as yet been used in navigation.[20]

As to new vessels, the exclusion in s 3(1)(g) of the *Admiralty Act* rests upon the fact that the vessel has not been launched.[21] Even if a vessel is incomplete at the time of her launch, she is considered to be a ship.[22]

---

17 (1866) 14 LT 704.
18 [1895] P 301, 308.
19 *The Gas Float Whitton No. 2* [1895] P 42, 64. See also *R v Carrick DC; ex parte Prankerd* [1999] QB 1119, where the Court held that an ocean going yacht used as a holiday home was a ship.
20 Law Reform Commission, *Civil Admiralty Jurisdiction,* Report No. 33, Canberra, 1986, page 70.
21 Cf *In re Softley; ex parte Hodgkin* (1875) LR 20Eq 746, 756: where a partly constructed vessel that had not been launched was apparently held to be a ship.
22 *The Andalusian* (1878) 3 PD 182, 189. See also *The "St Machar"*(1939) 64 Lloyd's Law Rep 27.

". . . use in navigation by water . . ."

The third element of the statutory definition is "use in navigation by water". The meaning of "navigation" has been the subject of different judicial views. In *Steedman v Scofield*[23] Sheen J held that a type of jet ski was not a ship within the definition of the *Merchant Shipping Act* because, inter alia, it was not "used in navigation". He said:

> *Navigation is the nautical art or science of conducting a ship from one place to another. The navigator must be able (1) to determine the ship's position and (2) to determine the future course or courses to be steered to reach the intended destination. The word "navigation" is also used to describe the action of navigating or ordered movement of ships on water. . . . To my mind the phrase "used in navigation" conveys the concept of transporting persons or property by water to an intended destination. A fishing vessel may go to sea and return to the harbour from which she sailed, but that vessel will nevertheless be navigated to her fishing grounds and back again.*
>
> *"Navigation" is not synonymous with the movement on water. Navigation is planned or ordered movement from one place to another. A jet ski is capable of movement on water at very high speed under its own power, but its purpose is not to go from one place to another.*[24]

In *The Von Rocks*[25] the Irish Supreme Court considered whether a backhoe dredger was a ship or vessel capable of arrest. The Court considering *Steedman v Scofield,* said:

> *The finding in that case that a jet ski was not a "ship" within the meaning of the Merchant Shipping Act is hardly surprising, but it is questionable, with respect, whether, to come within the category of a "ship" the purpose of a craft must be "to go from one place to another". In the case of non commercial craft, it seems somewhat unreal to regard their purpose as being a journey from one point to a specific designation. Yachts which take part in the America's Cup are designed and constructed with a view to testing the excellence of their technology and the seamanship of their crews rather than transporting people from one place to another. On a less exalted level, people will for long continue to derive enjoyment from being on the sea, not because they are accomplishing a journey to an intended destination, but simply for the pleasure of – in the well worn phrase from <u>The Wind in the Willows</u> – "messing about in boats".*[26]

Although the backhoe dredger was not self-propelled, was not normally manned by a crew and had no form of rudder or other steering mechanism, its structure was designed

---

[23] [1992] 2 Lloyd's Rep 162.
[24] [1992] 2 Lloyd's Rep 162, 166.
[25] [1998] 2 Lloyd's Rep 198.
[26] [1998] 2 Lloyd's Rep 198, 207-208.

and constructed for the purpose of carrying out specific activities on the water, and was capable of movement across the water. The Irish Supreme Court held that it was a ship.

In *Perks v Clark Same*[27] the Court of Appeal was asked to determine whether a jack-up rig was a ship. The jack-up rig had a floating hull and retractable legs. It was used for drilling for oil. When it was stationary for the purpose of drilling, its legs were down so that its feet were on the sea floor and its hull was jacked up above the water. It had no engines of its own. It was moved either by being towed by two or more tugs or was carried upon a cargo vessel. It was argued that since the real work of a jack-up rig was its stationary drilling function and that its mobility was merely incidental to that function, it was not a ship.

The Court of Appeal rejected this argument, deciding that a jack-up rig is used in navigation. After reviewing a number of cases it concluded:

> *Those examples show that, so long as "navigation" is a significant part of the function of the structure in question, the mere fact that it is incidental to some more specialised function, such as dredging or the provision of accommodation, does not take it out of the definition . . . Those examples show that "navigation" does not necessarily connote anything more than "movement across waters": the function of conveying persons and cargo from place to place . . . is not an essential characteristic.*[28]

It is worth noting that a jack-up rig would be an "off-shore industry mobile unit" as defined in s 8(3) of the *Navigation Act* 1912 (Cth) and, by operation of s 3(1)(c) of the *Admiralty Act*, would therefore be a "ship".[29]

In *R v Goodwin*[30] the Court of Appeal considered whether a type of jet ski, different to the kind described in *Steedman v Scofield,* was a ship. The Court said:

> *We have come to the conclusion that for a vessel to be "used in navigation" under the Merchant Shipping Acts it is not a necessary requirement that it should be used in transporting persons or property by water to an intended destination, although this may well have been what navigation usually involved when the early Merchant Shipping Acts were enacted. What is critical in the present case is, however, whether, for the purposes of the Merchant Shipping Act definition of ship, navigation is*

---

[27] [2001] 2 Lloyd's Rep 431.
[28] [2001] 2 Lloyd's Rep 431, 439 [42].
[29] See, for example, *Frame v Woodside Energy Ltd* (2006) 88 ALD 433.
[30] [2006] 1 WLR 546.

> *"planned or ordered movement from one place to another" or whether it can extend to "messing about boats" involving no journey at all.*[31]

The Court concluded that:

> *Those authorities which confine "vessel used in navigation" to vessels which are used to make ordered progression over the water from one place to another are correctly decided. The words "used in navigation" exclude from the definition of "ship or vessel" craft that are simply used for having fun on the water without the object of going anywhere, into which category jet skis plainly fall.*[32]

In the various appeals about the *Gas Float Whitton No 2* the owners argued that, although the float was itself unnavigable, it was used in navigation to keep vessels off a shoal. Despite the owners' persistence with this submission, this was finally rejected in House of Lords, where Lord Watson said:

> *It is used for purposes connected with navigation in the same sense as a lighthouse, or as a buoy, whether as a beacon or for mooring a ship; but it appears to me to be wholly unfit for the purpose of being navigated as a vessel, and that it never was used, or intended to be used, for any such purpose.*[33]

Similarly, Lord Herschell said:

> *It was not constructed for the purpose of being navigated or of conveying cargo or passengers. It was, in truth, a lighted buoy or beacon. The suggestion that the gas stored in the float can be regarded as cargo carried by it is more ingenious than sound.*[34]

The expression "use in navigation by water" may also require careful consideration of the waters said to be navigated. In *Southport v Morriss*[35] the Court considered whether a launch used for carrying passengers on pleasure trips around an artificial lake some 180 yards in width and half a mile long was a ship under the definition in the *Merchant Shipping Act.* It was concluded that it was not a vessel because it was not a vessel used in navigation (and, therefore, not a ship) because "navigation is a term which in common parlance, would never be used in connection with a sheet of water half a mile long".[36]

---

[31] [2006] 1 WLR 546, 555 – 556 [27].
[32] [2006] 1 WLR 546, 557 [33].
[33] *Wells v Owners of Gas Float Whitton No 2* [1897] AC 337, 348.
[34] [1897] AC 337, 343.
[35] [1893] 1 QB 359.
[36] [1893] 1 QB 359, 361.

This decision was followed in *Curtis v Wild.*[37] There the Court held that a dinghy used on a reservoir was not a ship because it was not being navigated in the sense of proceeding from A to B for the purpose of discharging people or cargo at the destination point. It was simply used for pleasure purposes by people who were "messing about in boats".[38]

The decision in *Southport v Morriss* was distinguish in *Weeks v Ross,*[39] a case involving two petrol-driven motor boats that carried passengers from the River Exe to Exeter Canal. Bray J said that:

> *A river is a place for navigation and a canal is a place for navigation, and they are none the less places for navigation because as it happens this vessel only used a portion of them.*[40]

Lord Coleridge J noted that the waters in this case were in fact used by ships going to and from the sea. He concluded that, since sea-going ships were navigating these waters, it followed that the boats in question must also be engaged in navigation although they themselves did not go to and from the sea.[41]

Since inland waterways vessels are expressly excluded from the ambit of the Australian *Admiralty Act*, these decisions are of marginal value in this country; however, that may not be the case under the New Zealand legislation. The exclusion of inland water vessels under the Australian *Admiralty Act* by inference extends the Act's operation to vessels which may not at first glance be thought to be a "ship". "Inland waterways vessel" means "a vessel used or intended to be used wholly on inland waters". "Inland waters" means "waters within Australia other than waters of the sea". "Sea" includes "all waters within the ebb and flow of the tide". Thus, vessels used in estuarine rivers like the Swan River, in Western Australia, or the Yarra River, in Victoria, may be "ships" within the meaning of the *Act*, as long as they operate or are constructed to operate within those parts of the rivers which are subject to the ebb and flow of the tide.

---

37 [1991] 4 All ER 172.
38 [1991] 4 All ER 172, 176.
39 [1913] 2 KB 229.
40 [1913] 2 KB 229, 234.
41 [1913] 2 KB 229, 234-235.

Some Examples

In *Merchants' Marine Insurance Co Limited v North of England P & I Association*[42] the craft in question comprised a crane attached to a pontoon. The pontoon was in the shape of a ship, it had decks and bollards and were staffed by a "crew". Although it had moved on occasion, movement was "the exception in its career and not the rule". While the Court accepted that there are some floating trains that are ships, the pontoon in question was held not to be a ship.

It is doubtful whether a court would reach the same conclusion under the *Admiralty Act*. First, the judge in this case relied upon *European and Australian Royal Mail Co v Peninsula and Oriental Co*, the ratio of which is no longer accepted (see above); and secondly, regardless of its actual use, a court will have regard to whether a craft is constructed for use in navigation by water.

In *Addison v Denholm Ship Management (UK) Limited.*[43] The question was whether a "flotel" was a ship. The flotel was essentially a platform attached by columns to pontoons which enabled it to float on water. It carried accommodation for several hundred workers; it had offices, workshops and storage areas. The flotel could be moved under its own power but usually under tow. This was held to be a ship. Under s 3(1)(c) of the *Admiralty Act* a flotel would constitute a ship because it is an "off-shore industry mobile unit" as defined in s 8(3)(c) of the *Navigation Act*.

In *Polpen Shipping Co Limited v Commercial Union Assurance Co Limited*[44] the Court rejected the submission that a "flying boat" was a ship or vessel, reasoning that the ability of a "flying boat" to navigate was merely incidental to its real work, namely to fly. Seaplanes are expressly excluded from the definition of "ship" in s 3(1)(e) of the *Admiralty Act.*[45]

---

[42] (1926) 25 Lloyd's Law Rep 446.
[43] [1997] ICR 770.
[44] [1942] 74 Lloyd's Law Rep 157.
[45] Section 5 of the *Admiralty Act* 1973 (NZ) permits an action in rem to be commenced against an aircraft.

What may be Included with a Ship?

A ship is more than a hull; it includes motors or engines, equipment, stoves, bunkers,[46] etc. In the days of sail, "ship" was understood to include her sails and rigging, even if they had been detached for the purpose of safe custody, but with the intention of being refitted upon her next adventure.[47]

In *The "Silia"* "ship" was held to include "all property aboard the ship other than that which is owned by someone other than the owner of the ship".[48] In that case a writ *in rem* was issued against the "Silia". Consequently, the Admiralty Marshal sold her with everything on board, including her bunkers. The owners of the "Silia" claimed to be entitled to the proceeds of the sale of the bunkers; they argued that the ship did not include its bunkers. Sheen J rejected this submission for three reasons.

First, he referred to the old approach that extended "ship" to her sails and rigging. He reasoned that, if Parliament had intended "ship" to have a narrower meaning in the relevant admiralty legislation at that time,[49] it would have said so expressly. Second, he noted that the advantage of an action *in rem* is that it enables a plaintiff to detain the shipowner's property when it enters the territorial jurisdiction of the Court in order to serve a maritime claim. That advantage would be eroded if some of the owner's property were exempt from attachment. Third, he pointed to the absurdity if oil in drums on the ship were part of the "res" but the bunkers were not.[50]

In the course of his judgment, Sheen J referred to the Admiralty Marshal's practice of selling a ship and her contents, other than property belonging to another. He said that barometers, chronometers and stores were sold with the ship. He set out several practical reasons why the bunkers must be sold with the ship. He noted that, if anyone other than the owner asserted ownership over the bunkers, the Marshal referred the matter to the Court for determination. The Admiralty Marshal accounted separately for the proceeds of

---

[46] Fuel oil is frequently referred to as "bunkers". A meaning of "bunker" is "a compartment for fuel on ships" (Macquarie Dictionary 2nd ed, 1991).
[47] *The "Alexander"* (1812) 1 Dods 278, 282.
[48] [1981] 2 Lloyd's Rep 534, 537.
[49] *Administration of Justice Act* 1856 (UK).
[50] [1981] 2 Lloyd's Rep 534, 537.

sale of fuel and lubricating oil because the brokers were entitled to a commission on the sale of the ship only.[51]

In Australia are bunkers part of a ship or are they property capable of arrest separate from a ship? This question was addressed by the Full Court of the Federal Court in *Scandinavian Bunkering AS v The Bunkers on Board the Ship FV Taruman.*[52] Here the "FV Taruman" had been seized by officers of the Australian Fisheries Management Authority for suspected breaches of the *Fisheries Management Act* 1991 (Cth). The plaintiff commenced a proceeding *in rem* against the vessel's bunkers under s 17 of the *Admiralty Act*. The Court was asked to determine whether the plaintiff or the Authority had an interest in the bunkers that prevailed over the other.

The Court concluded that "ship" in the *Admiralty Act* includes the ship's bunkers.[53] Bunkers are not immune from a sale of a ship arising out of an arrest,[54] nor are they amenable to a separate arrest and sale.[55]

There are several English cases about the entitlement to the proceeds of sale of bunkers on board a ship that has been arrested and subsequently sold by the Admiralty Marshal. [56]

In *Morlines Maritime Agency Ltd v The Ship "Skulptor Vuchetich"*[57] the defendant sought a declaration that forklift trucks, fork hoists and other equipment that were on board the vessel when it was arrested and sold did not form part of the ship. Sheppard J rejected the application. He noted that the equipment was equipment which was used by the vessel in the course of its operations. Even though It may have been that the equipment was not essential because stevedores would have prevented it, Sheppard J took the view that form a safety perspective the vessel might well have benefited from its presence because of the need perhaps to move cargo in an emergency in order to retain the vessel or to carryout some other operation when it would have been possible to

---

51 [1981] 2 Lloyd's Rep 534, 535.
52 (2006) 151 FCR 126.
53 (2006) 151 FCR 126, 129 [5] and 131 [12].
54 (2006) 151 FCR 126, 129 [7]
55 (2006) 151 FCR 126, 131 [12]
56 *The "Honshu Gloria" No. 2; The "Saint Anna"*[1980] 1 Lloyd's Rep 180; *The "Pan Oak"* [1992] 2 Lloyd's Rep 36; and *the "Eurosun" and "Eurostar"*[1993] 1 Lloyd's Rep 106.
57 (1996) 62 FCR 602.

engage stevedores."[58] Accordingly, the Court was satisfied that the equipment In question was part of the ship for the purposes of the arrest and sale.

In *Opal Maritime Agencies P/L v The Proceeds of Sale of the Vessel MV "Skulptor Konenov"*[59] an issue for the Court was whether shipping containers were part of a ship. The Court said:

> *There must be some sufficient connection between the property and the ship to justify the former being an integral part of the latter.*[60]

While it took the view that a container of itself is not a ship, it said that it was a question of fact whether the carriage of a container for the purpose of containing cargo involved the container became in integral part of or an item used in the operation of a ship. In the circumstances, it concluded that there was no basis to find that a container is part of a ship.[61]

Consistent with the general principles, mooring ropes have been held to be part of a ship[62] and fishing equipment has been held to be part of a fishing vessel.[63]

Conclusion

In the vast majority of cases in Australia, the *Admiralty Act* provides clear guidance as to what constitutes a ship. In the rare ambiguous instances, whether a vessel is a ship is more about impression than fine legal analysis. While the activity of "messing about with boats" has led courts to conclude that, for example, a jet ski is not a ship, this seems to be that very same activity that leads to people to race maxi-yachts, just on a bigger scale. The search for a clear, watertight definition of ship is a fruitless exercise: the more general a definition, the more likely it will include all kinds of vessels; the more specific a definition, the more likely it will exclude vessels that one would ordinarily consider ships. Ultimately, one looks at the features and use of a vessel and then concludes, largely on the basis of impression, whether it is a ship or not.

---

58 (1996) 62 FCR 602, 605-606.
59 (2000) 98 FCR 519.
60 (2000) 98 FCR 519, 556 [135].
61 (2000) 98 FCR 519, 557-558 [138]-[142].
62 *Re Queensland Alumina Ltd and Chief Executive Officer of Customers* (2003) 73 ACD 759.
63 *The "Dundee"* (1823) 1 Hagg 109.

Once the conclusion is reached that the particular craft is a ship, then the further interesting question of what constitutes the ship is considered. When one concludes that the boat in question is a ship, its bunkers and barometers should ordinarily follow.