

## **SURROGATE SHIP ARREST**

By way of introduction, before dealing with some of the complexities of surrogate ship arrest, it is worthwhile outlining the relevant underlying principles.

### **Underlying principles of surrogate ship arrest**

There are three categories of admiralty claims available under the *Admiralty Act 1988* (Cth) (**the Admiralty Act**) which give rise to an action in rem against a ship:

1. proprietary claims;
2. general maritime claims; and
3. maritime liens.

#### 1. Proprietary claims

A proprietary claim is defined in section 4(2) of the Admiralty Act and is commenced, most commonly, for claims arising from:

- possession, title or ownership;
- the mortgage of a ship or a share in ownership or the mortgage of a ship;
- the operations or earnings of a ship; and
- claims between co-owners relating to possession of a ship.

Importantly, surrogate ship arrest is not possible in proceedings commenced for a proprietary maritime claim.

#### 2. General maritime claim

A general maritime claim is defined in section 4(3) of the Admiralty Act and such claims can be brought in respect of a wide range of matters including:

- damage done by a ship;
- loss of life or personal injury sustained as a consequence of a defect in a ship;
- charter party claims;
- salvage, general average, towage and pilotage;
- construction of a ship; and

- the enforcement of arbitral awards.

This list is by no means exhaustive.

In contrast to proprietary claims, surrogate ship arrest is available for general maritime claims.

For the purposes of this paper it is not necessary to discuss maritime liens.

### **Relevant person test**

Once it is established that there is a claim which enables the commencement of an action *in rem* to arrest a vessel, it is necessary to satisfy the relevant person test. Broadly speaking, this test involves:

- (a) first determining who the relevant person is (that is, the person who would be liable for the plaintiff's claim if it had been commenced *in personam*); and then
- (b) considering the relationship of the relevant person to the ship in respect of which the claim for arrest is made (that is, to confirm their continued connection with the ship).

Whilst the satisfaction of the relevant person test may appear simple on its face, it can be problematic.

### **Arrest of surrogate ships**

The Admiralty Act specifically deals with the test associated with the arrest of surrogate ships.

Provided the relevant nexus is demonstrated, a sister or surrogate ship can be arrested in place of the ship that gave rise to the cause of action.

Section 19 of the Admiralty Act states that 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, on 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 (that is, the surrogate ship).

### ***The Ship "Gem of Safaga" v Euroceanica (UK) Ltd (2009) 182 FCR 27***

In the very recent Full Court of the Federal Court decision of *The Ship "Gem of Safaga"* and *Euroceanica (UK) Ltd* reported the question was whether the "relevant person" was the "owner" of the surrogate ship, the "*Gem of Safaga*" as required by section 19(b) of the Admiralty Act.

The "*Gem of Safaga*" (a panama-size bulk carrier 227m LOA) was arrested at Port Kembla in early November 2009. Euroceanica (**Euro**) arrested "*Gem of Safaga*" as surrogate on the basis of a

claim against West Asia Management (**West Asia**) for unpaid hire on her sister ships “*JBU Onyx*” and “*JBU Opa*”. The unpaid hire was in respect of sub-time charterparties by a subsidiary of West Asia.

West Asia sought to have “*Gem of Safaga*” released from arrest on grounds section 19(b) of the Act was not satisfied (that is West Asia was not **the owner** of the vessel). West Asia was unsuccessful at first instance before Justice Rares. West Asia then appealed to the Full Court of the Federal Court where it was successful in having “*Gem of Safaga*” released from arrest.

### **Facts of case**

The relevant facts of the case were:

- The “*Gem of Safaga*” sailed under the flag of India. Under the Indian Registry of Shipping the property of a ship is divided into 10 shares (as opposed to our 64 shares). The Indian Register Book showed that West Asia owned 9 shares and that a company, Four M Maritime Private Limited (**Four M**) owned the remaining one share.
- **This triggered the issue of co-ownership which is fatal to surrogate ship arrest, unless all co-owners are the subject of the underlying claim. It was not disputed that Euro had no issue with Four M.**
- Under a Memorandum of Agreement to purchase “*Gem of Safaga*”, West Asia **or its nominee** was listed as the buyer.
- In an Addendum to the Memorandum of Agreement, West Asia and Four M (as nominee) entered into a Co-ownership Agreement whereby Four M was to “absolutely own” one of the ten shares in the ship but West Asia alone was to remain fully responsible for all the buyer’s obligations in the Memorandum of Agreement
- Both companies entered into a mortgage facility in respect of the purchase of the ship.

Euro argued that West Asia was the owner at law and in equity of Four M's one share in the ship for many reasons, and I will deal with the most cogent argument.

An argument raised by Euro was that there were inconsistent entries in the various Indian Registries regarding ownership of “*Gem of Safaga*”; some recorded West Asia as the only owner. Under Australian law, registration is not proof of title. It has been established since the mid 19<sup>th</sup> century that the system is one of registration of title not title by registration (Ref: *The Spirit of the Ocean* (1865) 12 LT 239). However, whether legal ownership depends

upon registration or some other act is not settled by the authorities. What is clear in the authorities is that registration gives rise to a rebuttable presumption of ownership.

The records of the Indian Register of Shipping (a classification society) WAM was shown as the registered owner of “*Gem of Safaga*” and no reference was made to Four M. However, sometimes West Asia appeared as owner of only 9 shares in the various registers maintained by the Republic of India, ship classification societies and Lloyds. Those records left the issue equivocal. This gave rise to a rebuttable presumption, capable of being overturned after consideration of all the evidence.

More substantively, Euro argued there was no evidence of actual payment of the purchase price by Four M. The company records showed no payment being made by Four M. In the absence of consideration passing from Four M, the court could find that the share was owned by West Asia by way of a resulting trust. A trust may arise in the case of a ship as with any other chattel. In the *Iron Shortland*<sup>1</sup> it was held for the purposes of section 19(b) of the Admiralty Act, the beneficial owner is the owner.

In the result, the Appellate Court determined that Four M’s ownership of one share in the ship was not a sham and that there was consideration for the Addendum by Four M. In the lead judgment delivered by Justice Besanko, the following points were made:

- A bill of sale has long been recognised as the usual and customary method whereby title in a ship is passed (Ref: This was established in the *Cape Moreton*<sup>2</sup>).
- The bill of sale in this case referred to West Asia and Four M as the joint buyers and transferees, and to both of them having paid the Seller the purchase price.
- West Asia and Four M obtained the purchase moneys by borrowing money under a Facility Agreement and they were joint borrowers and jointly and severally liable for the loan. Therefore, Four M provided the purchase moneys in the same way West Asia did.

In the result, Euro failed to satisfy the relevant person test, that is at time the arrest proceedings commenced:

- (c) West Asia was the owner, charterer or in possession or control of the vessels “*JBU Onyx*” and “*JBU Opa!*”; and
- (d) that West Asia was the owner of the second vessel (that is the surrogate vessel), the “*Gem of Safaga*” when the arrest proceedings were commenced.

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<sup>1</sup> (1995) 59 FCR 535.

<sup>2</sup> 143 FCR 43 at [129] per Ryan and Allsop JJ.

## Summary

Courts are bound to be cautious when applying the relevant person test to surrogate ship arrests. The Australian Law Reform Commission in its report on *Civil Admiralty Jurisdiction* (Report No 33 (1986)) said:

*"All co-owners of the surrogate ship must be relevant persons in respect of the claim. Where the relevant person is merely a charter of the surrogate ship no action should lie. Surrogate ship arrest should not apply to proprietary maritime claims, but should apply to all general maritime claims. Actions in rem against a surrogate freight and cargo should not be possible..."*

Therefore **all co-owners** of the surrogate ship must be **relevant persons** in respect of the subject claim.

It is a reasonable view that allowing an action *in rem* against a surrogate ship only partly owned by a relevant person may result in unwarranted and unfair interference with the rights of an innocent co-owner.

For surrogate ship arrests, it is not enough to be **an owner**, but rather the relevant person must be **the owner** of both vessels.