Ship arrest and undertaking as to damages – is it time for a change ?

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Ship Arrest and Undertaking as to Damages Outline

A. Introduction

B. The "Alkyon"

- Teare J [2018] 2 Lloyd's Rep. 601
- UK Court of Appeal [2019] 1 Lloyd's Rep. 406

C. Commentary

D. Time for reform ?

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A. Introduction

- the nature of the action *in rem* and right to arrest
- judicial recognition of the benefits of the action in rem and right to arrest:
  - *Tisand v the owners of the "Cape Moreton"*
  - *Shagang Shipping Co Ltd v the ship "Bulk Peace"*
- two important incidents of the action in rem:
  - securing jurisdiction
  - obtaining security for the plaintiff's claim

Introduction (cont'd)

- security for the plaintiff's claim
  - the threat of arrest; and
  - the arrest of the ship and possibly judicial sale
- the action in rem compared with the Mareva injunction / freezing orders
- the consequences of arrest
  - Tamberlin J in the "*Zoya K*"
  - the "*Vasiliy Golovnin*"

Introduction (cont'd)

- damages for wrongful arrest
  - The "*Evangelismos*" – mala fides and crassa negligentia
  - The "*Kommunar*" No. 3
- criticisms of the common law test
  - Mobil Oil v the "*Rangiora*"
  - s.34 Admiralty Act and the ALRC Report 33
- the "*Alkyon*" – an opportunity to challenge the orthodox position

B. The "Alkyon"

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The "Alkyon" – the facts

- Royal Bank of Scotland loaned US$15.7 million to owners, secured by a first preferred mortgage over the "*Alkyon*"
- In March 2018, the Bank informed owners that the market value was US$15.25 m, which represented a value to loan (VTL) ratio of 112% of the then US$13.5 m outstanding
- As such this was less than the VTL of 125% required by the terms of the mortgage
- Accordingly, Bank asked owners to provide additional security of US$1.75m

The "Alkyon" – the facts

- Owners disputed the Bank's valuation as being too low and provided a higher valuation
- On 28 April the Bank notified owners of an alleged event of default, namely their failure to cure the shortfall in security
- On 15 June the Bank sent owners a Notice of Acceleration which declared the whole loan immediately due and payable
- On the same day, the Bank issued an in rem claim form and subsequently arrested the "*Alkyon*"

The "Alkyon" – the facts

- Owners denied that there had been any event of default and that the Bank was entitled to accelerate the loan
- Owners also contended that the Bank's valuation was off market and the Bank had not acted in good faith
- Owners also argued:
  - that the arrest would create a "potentially catastrophic" loss as their only incoming producing asset was not in operation
  - they could not obtain a P & I Club letter for a disputed claim under a loan agreement and did not have funds to secure it
  - for so long as the vessel remained under arrest, owner's only asset couldn't trade

The "Alkyon" – the facts

- On 3 July 2018 owners applied for the release of the vessel from arrest without the provision of any security
- In particular owners sought an order releasing the vessel from arrest unless the Bank provides a cross-undertaking in damages in the form using given in the context of freezing orders
- The Bank resisted the application, arguing that it would be contrary to the Court's practice both to require such an undertaking in an arrest and to order the release of the vessel from arrest save on terms that security be provided

The "Alkyon" – the facts

- On 3 July 2018 owners applied for the release of the vessel from arrest unless the Bank provided a cross-undertaking in damages in the form using given in the context of freezing orders and without offering any security
- The Bank resisted the application, arguing that it would be contrary to the Court's practice
  - to require such an undertaking in the context of an arrest and
  - to order the release of the vessel from arrest save on terms that security be provided

The "Alkyon" – the facts

- This method of obtaining an undertaking from the arresting party had been earlier proposed by Sir Bernard Eder in an address to the Tulane Maritime Law Centre in 2013 (published at 38 Tulane Maritime Law Journal 115 at 133)

The "Alkyon" – Teare J

- Owners' application was dismissed by Teare J

[57] The court is unable to accede to the application that the vessel be released in the event that the Bank fails to provide a cross-undertaking in damages. To exercise the court's discretion to release in that way would (i) run counter to the principle that a claimant in rem may arrest of right, (ii) be inconsistent with the court's long-standing practice that such a cross-undertaking is not required, and (iii) be contrary to the decision of the Court of Appeal in *Bazias 3 and Bazias 4* and to the dicta of Lord Clarke in *Willers v Joyce* which I, as a first instance judge, must respect. Finally, any change in Admiralty law and practice, given that the present position has prevailed for so long, is not a matter for the Court to change overnight (even assuming it could do so) but for Parliament or the Rules Committee to consider after proper consultation.

- unsurprisingly, this decision criticised by Sir Bernard Eder

The "Alkyon" – Court of Appeal

- Owners appealed to the UK Court of Appeal
- The CA was well aware of the significance of what it was being asked to do (at [5])
  - Owners' case if accepted would undermine both the availability of arrest as of right and well established authority that no damages are recoverable for wrongful arrest absent malice / gross negligence
  - the potential ramifications of success for Owners on this appeal, would very likely extend beyond this jurisdiction given the international nature of the maritime industry and the interest there would be in the course adopted by English Law.

The "Alkyon" – Court of Appeal

- The CA dismissed the appeal
  - [94] … **we conclude that the case against an "overnight" change (Teare J, at [57]) to the settled law and practice is overwhelming**. We remind ourselves, in any event, that this is an appeal against a discretionary decision by the Judge; adapting Mr Bright's powerful submission, there is no case for this Court to intervene on a discretionary matter **when, on completely standard facts, the Judge had followed the usual practice**. In full agreement with the Judge's conclusion, we would dismiss the appeal (emphasis added)
  - that "settled law and practice" is outlined at [42]-[49]

The "Alkyon" – Court of Appeal

- CA's reasons for dismissing the appeal
- First
  - rejected Owners' submission that Teare J had wrongly supposed that he was bound to refuse Owners' application
  - stated the essential question on appeal was whether Teare J erred in the exercise of his discretion associated with an application for the release of a ship from arrest

The "Alkyon" – Court of Appeal

- Secondly
  - CA was not bound to dismiss appeal by either the *Evangelismos* or *Bazias 3* judgments
  - *Tjaskemolen* – plaintiff ordered to provide counter security
- Thirdly
  - neither legislation nor intervention of Rules C'ee necessary
  - open to first instance judge to depart from usual practice in the exercise of the Court's discretion
  - although Court would think long and hard before departing from usual practice re release of ship from arrest

The "Alkyon" – Court of Appeal

- Fourthly
  - CA understood concerns re rule in *Evangelismos* which can work harshly
  - the rule cannot be defended by reliance upon its original rationale (where arrest was essential to establishing jurisdiction)
  - asks rhetorically – why should position of a plaintiff in an action in rem differ from a claimant obtaining a freezing order where the underlying objective of maritime arrest and freezing order is very similar ?

The "Alkyon" – Court of Appeal

- Fourthly (cont'd)
  - if successful owners' claim would
    - undermine longstanding domestic law both as to (i) arrests being of right and (ii) the unavailability of damages save for cases of malice and gross negligence
    - result in far reaching change to longstanding settled practice of requiring security as price for releasing a ship from arrest
  - need for circumspection before judicial law making and allowing a change in established practices

The "Alkyon" – Court of Appeal

- Fifthly, CA found that there were 8 formidable considerations that support the status quo or at least tell against departing from existing law and practice
  - availability of arrest – unique feature of action in rem
  - if owners succeed, it is overwhelmingly likely that requirement for cross undertaking would become routine, making the stakes in an action in rem "*vertiginously high*" and was bound to have a "*chilling effect*" on the use of arrest
  - resistance to altering the status quo did not rest simply on tradition or the distinctive feature of admiralty – but relies on its efficiency in procuring security for the underlying claim

The "Alkyon" – Court of Appeal

- Fifthly (cont'd)
  - ship arrest is asset specific
  - analogy between maritime arrests and interlocutory injunctions / freezing orders is neither exact nor compelling
  - there has been ample time to reconsider the law and practice relating to maritime arrests in England and yet no such reconsideration has taken place
  - powerful inference is that there is no or no significant pressure from maritime industry for a change in the balance struck between claimants and shipowners

The "Alkyon" – Court of Appeal

- Fifthly (cont'd)
  - nor is there any international consensus
  - any disturbance of the practical and commercial arrangements in place premised on settled, existing state of the law and practice and by which P&I Clubs / hull underwriters give undertakings either to avoid arrest or to secure release of ships from arrest should not be lightly embarked upon
  - case against overnight change to the settled law is overwhelming and there was no case for Court to intervene on a discretionary matter here

The "Alkyon" – Court of Appeal

- Finally
  - CA rejected submission that the Court should balance risk of injustice to Owners if no cross-undertaking supplied against no prejudice to Bank if the cross undertaking was ordered
  - this was esp. in view of Teare J conclusion that Owners' evidence was insufficiently particularised as to establish an inability to provide security, which CA found was fatal to Owners' assertions of hardship and thereby injustice
  - CA's low opinion of reliance upon one ship company structure

The "Alkyon" – Postscript

- no appeal to the UK Supreme Court
- substantive claim was heard and in May 2019 Court held that the Bank was entitled to an order for the appraisement and sale of the "*Alkyon*"
- on 2 July 2019 Notice was given that the "*Alkyon*" had been sold and the proceeds were in Court and claimants were invited to bring claims against the fund
- the vessel now named "*SSI Reliance*"

The "Alkyon" – Commentary

- "*Enforcing security by the arrest of a ship: the urgent need for change*" by Sir Bernard Eder (Butterworths Journal of International Banking and Finance Law May 2019 p.323)
- "*Ship Arrest and Undertakings in Damages*" by AM Tettenborn ([2019] LMCLQ 167)
- Martin Davies
  - "The world remains safe for arresting parties"

Reform ?

- Response to the *"Alkyon"* in the UK
  - *"lost opportunity"*
  - *"fundamental injustice of English law"*
  - reform in the UK halted at least for the present time
- Questions that might arise in the Antipodes
  - is there a need for reform ? and if so
  - how might it be done ?
  - in particular might it be done by requiring an undertaking from the arresting party ?

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Reform ? (cont'd)

- If by way of undertaking – in what terms ?
  - an undertaking that reflects the existing test ? or
  - an undertaking in the usual terms ?
- What are the arguments in favour of reform ?
  - concern that the circumstances in which damages for wrongful arrest are too narrow
  - similarity between arrest and Mareva injunctions / freezing orders

Reform ? (cont'd)

- Damages for wrongful arrest – imbalance
  - questions posed
    - should the existing test be retained ? if not
    - what should it be replaced by ?
    - how might that be done ?
  - position in New Zealand
    - *Nalder & Biddle (Nelson) Ltd v C&F Fishing*
    - *Mobil Oil v "Rangiori"* – concerns of Giles J
    - legislative action required

Reform ? (cont'd)

- Damages for wrongful arrest – imbalance (cont'd)
  - position in Australia
    - same issues not directly arise
      - *Evangelismos is no longer the law*
      - test is a statutory one in s.34 of the Admiralty Act
    - nevertheless remains some uncertainty (due to a dearth of authority) as to precisely what this test entails / requires
      - Woodford (2005) 19 MLAANZ Jnl 115
      - Cremean (2016) 90 ALJ 96; 4th Ed at pp. 113-16

Reform ? (cont'd)

- Damages for wrongful arrest – imbalance (cont'd)

34 Damages for unjustified arrest etc.

(1) Where, in relation to a proceeding commenced under this Act:

(a) a party **unreasonably and without good cause**:

(i) demands excessive security in relation to the proceeding; or

(ii) obtains the arrest of a ship or other property under this Act; or

(b) a party or other person **unreasonably and without good cause** fails to give a consent required under this Act for the release from arrest of a ship or other property;

the party or person is liable in damages to a **party to the proceeding**, or to a **person who has an interest in the ship** or property, being a party or person who has suffered loss or damage as a **direct result**. (emphasis added)

Reform ? (cont'd)

- Damages for wrongful arrest – imbalance (cont'd)
  - summary re s.34
    - not restate common law test
    - intended to reform and bring balance back in favour of owners
    - nevertheless remains scope for debate as to where balance lies
    - but not so far back as equivalent to the usual undertaking
    - if there remain concerns that s.34 is still imbalanced, then it is more appropriate that that be remedied legislatively cf by judicial law making requiring an undertaking to be given

Reform ? (cont'd)

- Comparison with freezing orders
  - expressly addressed by CA in "*Alkyon*"
  - competing views canvassed by Eder and Davies
  - see also ALRC report 33 at [245]
  - but in the end the comparison was inexact and similarities not sufficient to persuade CA to impose a requirement of an undertaking even on the particular facts of the "*Alkyon*" case
  - conclusion – doubtful that similarities are likely to be sufficient to justify requiring a cross-undertaking

Reform ? (cont'd)

- Mechanism for imposition of an undertaking
  - require change to the Rules – esp if to be applied generally and at time of arrest (Court has no way of imposing then)
  - otherwise open to impose at time of release (r.52) – as in "*Alkyon*" but in exercise of Court's discretion
  - very limited scope for operation – ongoing arrest
  - difficult to see applying for earlier arrest on release
- Conclusion

THE END

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