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Rights of Arresting Parties After Issuing of Writs but Before Arrest or Service

Readers of this publication will not be strangers to the issuing of writs and the arresting of vessels. They are important steps in enforcing the rights of people and companies who deal with ships. An important question, however, is what role does the issuing of a writ play in preserving the rights of a claimant before a ship is arrested (or served)?

This issue was explored by His Honour Justice Angus Stewart of the Federal Court of Australia at the 46th National Conference of the Maritime Law Association of Australia and New Zealand held on September 12, 2019.

Focusing his paper on the English authority of *The Monica S*, Justice Stewart identified three main classes where the issue of what rights accrue on the issuing of a writ for arrest on a maritime lien, as opposed to on arrest of the ship or service of the writ, may become relevant, as follows: "where there is a transfer of ownership either before or after an action has begun … where the owner of the *res* goes bankrupt, or, if the company goes into liquidation … (or) where there is another competing right of action *in rem*, for instance under a mortgage, giving rise to a dispute as to the priorities of competing claims".

His Honour explained that in *The Monica S*, a cargo interest pursued the owners of the vessel. At the time a writ *in rem* was issued, the vessel was in the same ownership as when the claim arose. However, by the time the writ was served, ownership had transferred to Tankoil and the name of the vessel changed. The new owners of the vessel sought to set aside the writ which was reissued to the "the owners of the ship formerly called *Monica Smith* now known as *Monica S*".

His Honour drew special attention to the reasoning of Brandon J in that case, saying that *The Monica S*, in England, is clear authority for the proposition that the issue of the writ gives to the plaintiff a statutory right of action *in rem*, though noting the case has not been adopted in *terms* by an appeal court.

After dealing with English authorities, in particular, *In re Aro Co Ltd*, His Honour turned to the Australian authority of *The Shin Kobe Maru* which he described as "a case of fundamental importance with regard to interpreting the provisions relating to the boundaries of the admiralty jurisdiction under the *Admiralty Act*". The High Court held that s 6, which provides that the Admiralty Act does not have effect to create any new maritime lien or other charge or cause of action, [therefore -Ed] does not have the effect that the statutory right *in rem* [creates -Ed] a security interest in the ship.

Noting the High Court's determination in that matter, Justice Stewart said "on the basis of this, the highest of authorities, s 6 is not an obstacle to s 17 (and ss 18 and 19) being read as giving rise to the statutory lien from the time when the proceeding is commenced".

There have been a number of cases in Australia which have dealt with similar issues but which have neither approved nor disapproved of *The Monica S*. His Honour discussed *The Cape Moreton*, *The Comandate*, *Kim v Daebo International Shipping Co Ltd*, and in particular drew attention to what Allsop CJ said in *Yakushiji* that non-lien claims once filed with the Court may be seen to create a form of species of qualified or quasi security, but whether they amount to secure claims remains a live issue.

His Honour summed up the position in Australia by saying "there is no judgment which decides *The Monica S* point on terms, but there are two reasons why it is tolerably clear that the statutory right

of action *in rem* attaches when the writ is issued. The first is that was, on the balance of authority, the law in Australia before the Admiralty Act. The second is that the wording of s 17 (and ss 18 and 19) makes the position quite clear, and s 6 is not an obstacle".

His Honour further discussed the position in Singapore, citing *Kuo Fen Ching and Another v Dauphin Offshore Engineering & Trading Pte Ltd* amongst other cases as authority that *The Monica S* and *In re Aro Co Ltd* are good law in Singapore.

Finally, Justice Stewart turned to South Africa, and specifically *The Seaspan Grouse* decision of the Supreme Court of Appeal. His Honour stated while the judgment ultimately "turned on the particular wording of the South African statute, and the preservation under the statute of the South African common law attachment procedure which is not available in England and therefore was not taken into account in *The Monica S*, *The Monica S* principle was held not to apply in South Africa".

Adapted from a presentation by His Honour Justice Angus Stewart of the Federal Court of Australia at last year's MLAANZ Federal Conference in Auckland.

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