SEMAPHORE

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Ship Arrest and Undertaking as to Damages – is it Time for a Change?

Forced Sale Raises Local Reform Question

The judgment of the UK Court of Appeal last year in the *Alkyon* [2019] 1 Lloyd's Rep 406, in which a simple difference of opinion over the market valuation of a mortgaged ship led to the arrest of that ship, an unsuccessful application by its owners for countersecurity from the arresting party and the eventual forced sale of the ship, led Gregory Nell SC to ask whether reform of the type rejected by the Court of Appeal could and should take place in this part of the world.

A barrister in Sydney-based New Chambers, Mr Nell addressed last year's MLAANZ Annual Conference in Auckland on this issue in his presentation entitled: "Ship Arrest and Undertaking as to Damages – is it Time for a Change?"

Background

In early 2015 the Royal Bank of Scotland (subsequently known as NatWest Markets PLC) loaned US$15.7 million to Stallion Eight Shipping Co SA, secured by a first-preferred mortgage over its ship, the 180-metre and 24,163-GRT bulk carrier Alkyon.

In March 2018, the bank informed the owners that the ship's market value was US$15.25 million, representing a value-to-loan (VTL) ratio of 112% of the amount outstanding on the loan. Being under its required level of 125%, the bank asked the owners to provide additional security of US$1.75 million. Although the owners disputed the valuation and provided a higher one, the bank subsequently issued notice of an alleged event of default, and on June 15 sent a notice of acceleration declaring the whole loan immediately payable as well as simultaneously commencing *in rem* proceedings against the ship and arresting it.

Disputing the bank's actions and contentions, the owners argued:

- while the ship remained under arrest, the owners' only asset could not trade
- the owners could not obtain a P&I Club letter for a disputed claim under a loan agreement and did not otherwise have funds to secure that claim
- the arrest would create a "potentially catastrophic" loss as their only income-producing asset was not in operation whilst under arrest

Accordingly, the owners applied for the release of the ship from arrest without the provision of any security, unless the bank provided a cross-undertaking in damages. The bank resisted.

In dismissing the owners' application, Teare J held that to exercise the court's discretion to release the ship from arrest in this way would:

(i) run counter to the principle that an *in rem* claimant may arrest as of right

(ii) be inconsistent with the court's long-standing practice that such a cross-undertaking is not required in arrest proceedings

(iii) be contrary to a decision of the UK Court of Appeal and *dicta* in the UK Supreme Court which as a first instance judge he must respect

Teare J concluded: "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."

The owners appealed to the UK Court of Appeal – which as Mr Nell noted – was "well aware of the significance of what it was being asked to do". As the Court of Appeal observed, the 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. Further, the potential ramifications of success for the owners would also very likely extend beyond England, given the international nature of the maritime industry and the interest there would be in the course adopted by English law.

The Court of Appeal dismissed the appeal, concluding (*inter alia*) that there were eight "formidable considerations" supporting the status quo and telling against departing from existing law and practice. Accordingly, the Court of Appeal found that "the case against an 'overnight' change to the settled law and practice is overwhelming" and that there was no call for its intervention in the circumstances before it where Teare J had "on completely standard facts" followed that existing "settled law and practice".

Following the Court of Appeal's decision, the bank's substantive claim was heard in May 2019 and the bank obtained an order for appraisement and sale of the Alkyon, which was actioned soon after, with the vessel sold and subsequently renamed the mv SSI Reliance.

Response and Local Ramifications

Sir Bernard Eder, who had originally proposed (in an address to the Tulane Maritime Law Centre in 2013) the method of obtaining an undertaking from an arresting party that the owners sought to use in the *Alkyon*, suggested that the outcome in that case "highlights once again the fundamental injustice of English law concerning the arrest of ships" and amounted to a missed opportunity for reform. On the other hand, Prof Tettenborn concluded the result was "actually correct and welcome". As did Martin Davies, from whose reply to Sir Bernard's Tulane address, the Court of Appeal cited passages with approval.

Turning attention to related issues that might arise in Australasian maritime law, Mr Nell asked:

- whether there was a need for reform here?
- if so, how might that be done?
- and in particular, might that be done by requiring an undertaking from the arresting party?

If such an undertaking were to be required, the first step would be to identify the terms of that undertaking. But if those terms merely reflected the arresting party's existing potential liability for damages for wrongful arrest, then Mr Nell questioned the utility in extracting or requiring such an undertaking. That is beyond possibly providing a means of securing a foreign plaintiff's potential liability for wrongful arrest – the existing right being unsecured and therefore possibly of little practical worth even where damages were awarded.

However, in the *Alkyon*, the undertaking that the owners sought from the bank was not reflective of the bank's potential liability for wrongful arrest under the English common law, but more extensive and akin to the usual undertaking as to damages required of an applicant for a freezing order. To that extent, the extraction of such an undertaking was seen as both a means of circumventing a perceived imbalance in favour of the arresting party and against vessel interests inherent in the common law test for awarding damages for wrongful arrest, and remedying a concern that the circumstances in which such damages are available under the common law test were too narrow.

But according to Mr Nell, if there is such an imbalance, it would be preferable for this to be addressed directly by amending the test by which such damages are awarded, rather than by some sidewind (as was sought to be done in the *Alkyon*). This is especially if that test can be changed judicially. Although Teare J suggested in the *Alkyon* that this was a matter for Parliament and not the courts, as had Giles J in *Mobil Oil v mv Rangiori*.

As Mr Nell noted, different considerations apply in Australia, where the test for damages for wrongful arrest differs from that under the English common law (and in New Zealand) and is arguably more balanced in favour of vessel interests. Although, that test does not go so far as the usual undertaking as to damages and there are still those who suggest that the balance should be moved even further in favour of vessel interests. But the test in Australia is enshrined in statute (s.34 of the Admiralty Act) and apart from possible judicial creativity in construing the terms of that section, there is limited scope for Australian courts to impose judicially a different test to that stated in s.34. In those circumstances, there may also be (and perhaps should be) a reluctance by the courts to circumvent the will of Parliament as embodied in the express terms of s.34 by imposing an undertaking upon the arresting party in broader terms.

A further reason often given for seeking to require an undertaking from the arresting party in the same wide terms as that required of an applicant for a freezing order is the similarities between arrest with freezing orders. However, that reason was expressly addressed and rejected by the Court of Appeal in the *Alkyon*. The distinctions between these two remedies and the maintenance of different requirements for each had also been earlier considered and retained by the Australian Law Reform Commission in its 1986 Report on Civil Admiralty Jurisdiction. According to Mr Nell, these similarities are (despite the urgings of Sir Bernard Eder) unlikely to be found to be sufficient to justify changing existing law and practice to require an arresting party to give an undertaking, especially as a matter of course.

Finally, Mr Nell noted that there was an issue as to the means by which and when such an undertaking might be extracted from the arresting party, even if that were thought desirable. If an obligation upon the arresting party to provide an undertaking is to be applied to arrests generally and imposed at the time of arrest, then it would require amendment to the current Admiralty Rules. Whilst alternatively, that obligation could be sought to be imposed at the time of an application for release from arrest – as it was in the *Alkyon* – this would be in the exercise of the court's existing discretion to order a release from arrest on terms (for instance under r.52 of the Rules in Australia). But that offers only very limited scope for the operation of such a requirement. It would also require a shift in the "settled law and practice" by which courts (including those in Australia and New Zealand) have historically exercised this discretion, and to which there is bound to be resistance, as demonstrated by the judgments of both Teare J and the Court of Appeal in the *Alkyon*.

It is difficult to think of circumstances in which the extraction of a cross-undertaking from the arresting party would seem more appropriate, than those in the *Alkyon*. Yet Teare J was not prepared to depart from "settled law and practice" and order such an undertaking. Nor was the Court of Appeal prepared to intervene in the exercise of Teare J's discretion in that regard and on what it described as "completely standard facts". Whilst there may be some albeit limited scope for an Australasian court to make an order along the lines of that sought by the owners in the *Alkyon* in similar circumstances, the prospects of it doing so seem slim. This is especially if, the approach and reasoning of Court of Appeal is applied and maintained in the Antipodes, as seems likely.

As Martin Davies concluded following the Court of Appeal's decision in the *Alkyon*: "The world remains safe for arresting parties."

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