

Writ or Wrong?

Protecting against a change of ownership before the vessel is arrested

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1. The particular expression at the heart of what I will speak about today is the “statutory lien”. It is sometimes, and perhaps more accurately, also referred to as the “statutory right of action *in rem*”. I am talking specifically about maritime claims that do not give rise to maritime liens and are not proprietary claims. In Australia they are referred to as “general maritime claims”.
2. There is some uncertainty, in Australia at least, with regard to what benefit, if any, a plaintiff enjoys in the period between having a writ *in rem* issued and having the ship arrested in reliance on that writ.¹ My attention was most recently drawn to this uncertainty when I read in a footnote to a recent South African judgment to which I will return that the position in Australia is doubtful and that the position in Singapore was one way and then the other.²
3. The principal place to commence any analysis of the beneficial effect of issuing a writ *in rem*, aside possibly from achieving the interruption of time for the purposes of any time bar or limitation period and as a necessary preliminary step to the arrest of the ship, is the fundamentally important judgment of Justice Brandon, as his Lordship then was, in *The Monica S.*³ I will return to that judgment in some detail, but in the meanwhile I acknowledge that Brandon J identified three main classes of cases in which the time when

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¹ See Damien J Cremean, *Admiralty Jurisdiction: Law and Practice: Australia, New Zealand, Singapore, Hong Kong and Malaysia* (Federation Press, 4th ed, 2015) 186 and *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170; 333 ALR 513, [20] per Allsop CJ.

² *MV Seaspans Grouse: Seaspans Holdco 1 Ltd v MS Mare Traveller Schiffahrts GmbH* [2019] ZASCA 02; 2019 (4) SA 483 (SCA), [20] fn 3, referring to Cremean (n 1).

³ [1968] P 741. Also reported at [1968] 2 WLR 431; [1967] 3 All ER 740; [1967] 2 Lloyd’s Rep 113.

a statutory right of action becomes effective may be important.⁴

4. The *first* is where there is a transfer of ownership either before or after an action is begun. In that class of case, the question is whether the right can be exercised at all against the *res* in the hands of a new owner.
5. Rearranging the order a little, the *second* is where the owner of the *res* goes bankrupt, or, if it is a company, goes into liquidation. The question then is whether the person or company claiming the statutory right of action *in rem* is to be treated as a secured creditor or not.
6. The *third*, which I will not address because none of the modern cases deals with it, is where there is another competing right of action *in rem*, for instance, under a mortgage. The question then is not as to the existence of the right, but as to its priority in relation to the competing claim.
7. There is a statutory context in which to better understand the issue at hand. In Australia, s 17 of the *Admiralty Act 1988* (Cth) provides for the right to proceed *in rem* on the owner's liabilities. The second of its two requirements, i.e. in s 17(b), is that the "relevant person", being the person who would be liable on the general maritime claim *in personam*, is the owner of the ship "when the proceeding is commenced". From that it can be seen that the question is: is the proceeding commenced for the purposes of this provision by the issue of the writ or by the arrest of the ship, or as a third alternative, by the service of the writ?
8. The same question of when is the proceeding commenced arises under s 18(b) in respect of rights *in rem* on a demise charterer's liabilities and s 19(b) in respect of the right to proceed *in rem* against a surrogate ship. For simplicity, if that is not too optimistic a descriptor, I shall consider the question only in the context of claims arising from the personal liability of the owner of the ship and leave out of account claims against demise charterers and the arrest of surrogate ships.
9. In New Zealand, s 5(2) of the *Admiralty Act 1973* (NZ) provides, as one of the requirements

⁴ Ibid 749A-B and 770B.

of an action *in rem*, that the ship is beneficially owned as respects all the *shares* in it “at the time when the action is brought”. The relevant question then is, in essence, the same, which is: is the time when the action is brought when the writ is issued, or when the ship is arrested, or as a third alternative, when the writ is served?

10. As in Australia, an action *in rem* is also available on a demise charterer’s liability⁵ and against a surrogate ship.⁶ In each case, the relevant relationship to the vessel must exist “at the time when the action is brought”.
11. In *The Monica S*, the owners of cargo laden on board the ship then named *Monica Smith* asserted a claim which arose from the personal liability of the owners as carrier of their cargo from Canada to England. At the time of the issue of the writ *in rem* the vessel was owned by the same owners, Smith. However, before the writ had been served or the vessel arrested, *The Monica Smith* was transferred by Smith to Tankoil and her name was changed to *Monica S*. The writ was then amended to describe the defendants as “the owners of the ship formerly called *Monica Smith* now known as *Monica S*” and it was served. Tankoil filed a notice of motion to set aside the writ or service of it.⁷
12. The principal question for decision in *The Monica S* was thus whether a cargo damage claimant who had issued a writ *in rem* against the carrying ship at a time when she was still owned by the carrier, but had not yet served the writ or arrested the ship, had a right to proceed with the action despite a subsequent transfer of the ownership of the ship to a third party.⁸
13. That question fell to be answered in the context of the *Administration of Justice Act 1956* (UK).⁹ In wording that is virtually identical to the present wording of the New Zealand statute, s 3(4)(a) required that the ship was owned “at the time when the action is brought”

⁵ Section 5(2)(b)(i).

⁶ Section 5(2)(b)(ii).

⁷ Above n 3, 742C – 743B.

⁸ Above n 3, 745F.

⁹ The same wording is now in s 21 of the *Senior Courts Act 1981* (UK) (formerly named the *Supreme Court Act*).

by the person who would be liable on the claim in an action *in personam*.¹⁰ The present Australian wording of “when the proceeding is commenced” is not materially different.

14. It was contended on behalf of the new owner, Tankoil, that although the action had been properly commenced because at that time the relevant person owned the vessel, it could not be properly continued after the transfer of ownership of the ship from Smith to Tankoil and that the service of the writ should therefore be set aside or the action against the ship stayed.¹¹
15. It was contended on behalf of Tankoil that the Act of 1956 should be interpreted in the light of decisions prior to it; that those decisions showed that a statutory right of action *in rem* only became effective on arrest of the *res*; and that s 3(4) of the Act of 1956 was, as regards actions against a ship in connection with which a claim not carrying a maritime lien arose, merely declaratory of the pre-existing law.¹²
16. That submission made it necessary for Brandon J to examine a large number of cases from 1864 onwards. It is not my intention to undertake the same exercise. For my purposes, it is sufficient to identify the conclusions that Brandon J came to.
17. Brandon J identified that the question to be determined on that part of the case was whether, under the law in force before the Act of 1956, a change of ownership of the *res*, occurring after institution of proceedings but before service of process or arrest, defeated a statutory right of action *in rem*.¹³
18. The first conclusion was that from a review of the authorities there is no decision on that question. The nearest case is *The Princess Charlotte*¹⁴ which, so far as it goes, is against the position contended for on behalf of Tankoil.¹⁵

¹⁰ Above n 3, 747A-B.

¹¹ Above n 3, 748B.

¹² Above n 3, 748E.

¹³ Above n 3, 769F.

¹⁴ (1864) 33 LJ Adm & A 188.

¹⁵ Above n 3, 769G – 770A.

19. The second conclusion was that such observations as there are in the authorities which bear directly or indirectly on the question, are conflicting.¹⁶
20. Returning to *The Princess Charlotte*, Brandon J had earlier discussed that case, a judgment of Dr Lushington (in which Dr Lushington's son, Vernon Lushington, appeared before him as counsel for the owner).¹⁷ It was decided that the court had jurisdiction in a cause for necessaries brought under s 6 of the *Admiralty Court Act 1840* (Imp) despite a sale to a new owner. The sale took place the day after the institution of the cause and on the same day as the arrest – this latter fact not appearing from the report of the case but having been ascertained by Brandon J from the Record Office.
21. The case was decided on two alternative grounds. The first was on the basis that a necessaries claimant had a maritime lien. That position was overturned some 20 years later by the Court of Appeal in *The Heinrich Bjorn*.¹⁸ The second ground was that the transfer of ownership was after the institution of the cause. That alternative ground, Brandon J observed, appeared to be based on the proposition that, even if there was no maritime lien, the institution of the cause gave the plaintiff an accrued right of action *in rem*, which could not be divested by a later sale. This second ground of decision makes the case, so far as it goes, authority in favour of the plaintiffs and against Tankoil. However, since it is not clear from the judgment that Dr Lushington was really applying his mind to the distinction between the time of institution of suit and the time of arrest, Brandon J did not think that the authority should be regarded as going very far.¹⁹
22. In the result, the conclusion at which Brandon J arrived from his examination of the authorities was that counsel for Tankoil had not made good his contention that, under the law in force before the Act of 1956, a change of ownership after the issue of the writ but

¹⁶ Above n 3, 770A.

¹⁷ Above n 3, 751G – 752F.

¹⁸ (1885) 10 PD 44 per Brett MR and Bowen and Fry JJ. That was affirmed, with a variant spelling in two respects, by the House of Lords in *The Henrich Björn* (1886) 11 App Cas 276 per Lords Watson, Bramwell and FitzGerald.

¹⁹ Above n 3, 752E-F

before service or arrest defeated a statutory right of action *in rem*.²⁰ Brandon J went further, and stated that in his view, *on the balance of authority*, that contention was shown to be wrong.²¹ In his opinion, the law on the subject was accurately stated in a contrary sense by Lord Watson in *The Henrich Björn*²² and by Sir Boyd Merriman P in *The Beldis*.²³

23. The passage from the speech of Lord Watson in *The Henrich Björn* that Brandon J referred to stated that the position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* “unless at the time of its institution the *res* is the property of his debtor”.
24. In that case, there was a change in the ownership of the *Heinrich Bjorn* before the suit was instituted, so that the question concerning us, namely, whether a change in ownership after the suit was instituted will defeat the action, did not require to be decided. Brandon J nevertheless regarded Lord Watson as having used language chosen with care and that it was persuasive authority of some weight in favour of the plaintiffs in *The Monica S.*²⁴
25. *The Beldis* was a decision of the Court of Appeal.²⁵ Sir Boyd Merriman P said in respect of a necessities claim that, unlike a maritime lien it “did not relate back so as to be available against strangers to the claim for necessities to whom the property in the ship had passed before action is brought”.²⁶ Sir Boyd went on to describe “the material date” as being “the commencement of the action” and since at that time the ship “was not a *res* belonging to the defendant owner” the action had to fail.²⁷ As with *The Henrich Björn*, in that case

²⁰ Above n 3, 771C.

²¹ Above n 3, 771C-D.

²² (1886) 11 App Cas 270, 277.

²³ [1936] P 51, 65.

²⁴ Above n 3, 758C-E.

²⁵ [1936] P 51.

²⁶ Ibid 65.

²⁷ Ibid.

ownership had passed before the action was instituted so the point with regard to the position between the institution of the action and the arrest did not have to be decided.

26. Returning to *The Monica S*, Brandon J observed that if his conclusion with regard to the law prior to the Act of 1956 was correct, then it was unnecessary for him to consider the alternative argument put forward by the plaintiffs that the Act of 1956 altered the law.²⁸ Nevertheless, in case he was wrong with regard to the pre-1956 law, he went on to consider the requirements of s 3(4) of that Act and identified two requirements for an arrest. The first was that the person who would be liable on the claim *in personam* should have been the owner or charterer of, or in possession or control of, the ship when the cause of action arose. The second requirement was that, at the time when the action is brought, all of the shares in the ship should be beneficially owned by that person.²⁹
27. With reference to that wording, Brandon J stated that he could see no reason why, once a plaintiff has properly invoked jurisdiction by bringing an action *in rem*, he should not, despite a subsequent change of ownership of the *res*, be able to prosecute it through all its stages, up to and including judgment against the *res*, and payment of the amount of the judgment out of the proceeds.³⁰
28. Counsel for Tankoil had submitted that serious practical difficulties would arise. He said that a would-be purchaser of a ship would have to reckon with the possibility of numerous claims having already attached to the ship without having notice of them. In a passage that is significant to any debate about whether the fact of the issue of writs *in rem* should be publicly available for search by interested parties, Brandon J said he was not much impressed with that argument because a purchaser always has to reckon with the possibility of maritime liens. Under many foreign laws all or most of the claims which in England only give a right of action *in rem* give rise to such liens. Moreover, there is no means of ascertaining what maritime liens have attached to a ship, whereas it is at least possible, by enquiry of the Admiralty registry, to discover what writs have been issued against the ship.

²⁸ Above n 3, 772E.

²⁹ Above n 3, 772F-G.

³⁰ Above n 3, 773B-C.

Brandon J noted that in practice a purchaser takes an indemnity from his seller against claims which have attached prior to the sale, and, unless the seller becomes insolvent, this affords adequate protection.³¹

29. *The Monica S* is thus, in England at least, clear authority for the proposition that the issue of the writ gives to the plaintiff a statutory right of action *in rem* or, as it is sometimes put, a statutory lien, against the vessel which is valid and can be carried into force by an arrest, even if there is a subsequent change of ownership. It is also an example of the first of the three classes of case where the time when a statutory right of action *in rem* becomes effective is important.
30. There is no subsequent case in England that has doubted that position. Indeed, it was adopted by Sheen J in *The Helene Roth* in deciding to renew a writ that had lapsed even though ownership of the defendant vessel had in the interim been transferred.³² But it is also true that that position has never been adopted *in terms* by an appeal court.
31. Insofar as the latter is concerned, it is necessary to consider *In re Aro Co Ltd*³³ in the Court of Appeal. This case is an example of the second class of cases where the time when a statutory right of action *in rem* becomes effective is important.
32. The plaintiffs' claim was for short delivery of cargo and breach of a contract of carriage. The ship was however arrested first by Shell for bunkers supplied to the ship. The plaintiffs then issued a caveat against the release of the arrested vessel, and against the distribution of the proceeds of any sale.³⁴
33. The plaintiffs subsequently issued a writ *in rem* against *Aro* as well as a writ *in personam* against her owners. They could also have had the ship arrested, but it was unusual for a second claimant to arrest a ship in those circumstances as the caveat procedure made it

³¹ Above n 3, 769C-F.

³² [1980] 1 QB 273; 1 Lloyd's Rep. 477.

³³ [1980] Ch 196. Also reported at [1980] 2 WLR 453 and [1980] 1 All ER 1067.

³⁴ Ibid 202E-F.

unnecessary.³⁵

34. A winding up order against the owning company was then made. The status of Shell as secured creditor was not challenged by the liquidator on the basis that Shell had arrested the vessel. The ship was sold and a fund was established. If Shell was the only maritime claimant against the fund, then its debt would absorb most of the fund and the remainder would be available for division among the unsecured creditors of the company. If, however, the plaintiffs could establish their rights to resort to the fund, Shell would share the fund with the plaintiffs and it was unlikely that there would be anything for the unsecured creditors. The contest, therefore, was between the plaintiffs on the one hand, and Shell and the liquidator, for the unsecured creditors, on the other hand.³⁶
35. Lord Justice Brightman delivered judgment for the Court, whose other members were Lord Stephenson and, notably, Lord Brandon.
36. Brightman LJ recorded that at first instance, the liquidator had conceded the correctness of *The Monica S* and the Court of Appeal had therefore not reviewed it. It was noted, however, that the decision had not been challenged and Brandon J's statement in *The Monica S* that "it is the arrest which actually gives the claimant security; but a necessary preliminary to arrest is the acquisition, by the institution of a cause *in rem*, of the right of arrest" was quoted and formed a central part of the reasoning of the Court of Appeal. Indeed, Brightman LJ stated for the Court that their Lordships did not think that anyone could quarrel with that analysis of the status of the plaintiff in an action *in rem*.³⁷
37. Brightman LJ stated that if it is correct to say, as was not challenged in the court below and was not challenged in the Court of Appeal, that after the issue of the writ *in rem* the plaintiffs could serve the writ on the *Aro*, and arrest the *Aro*, in the hands of a transferee from the liquidator and all subsequent transferees, it seemed to the Court difficult to argue that the *Aro* was not effectively encumbered with the plaintiffs' claim. In their judgment,

³⁵ Ibid 202G.

³⁶ Ibid 203A-D.

³⁷ Ibid 208A-D.

the plaintiffs ought to be considered as secured creditors.³⁸

38. Thus, although the Court of Appeal in *In re Aro Co Ltd* did not review and have to decide on the correctness of *The Monica S*, the central proposition in *The Monica S* was integral to the reasoning of the Court of Appeal in its conclusion that the institution of the action *in rem* by the issuing of the writ gave to the plaintiffs a security *interest* in the ship even though they had not arrested her.
39. I turn now to consider the position in Australia.
40. Prior to the *Admiralty Act 1988* (Cth), the position must be regarded as the same as it was in England, at least prior to the *Administration of Justice Act 1956* (UK). That is because prior to the *Admiralty Act*, the admiralty jurisdiction of Australian courts was conferred by the *Colonial Court of Admiralty Act 1890* (Imp). Under s 2(2) of that Act, that jurisdiction was to be exercised over “the like places, persons, matters, and things” and “in like manner and to as full an extent” as the jurisdiction of the High Court in England. That preserved in Australia provisions of the *Admiralty Court Act 1840* (Imp) and the *Admiralty Court Act 1861* (Imp) which conferred jurisdiction upon the High Court in England in 1890.³⁹
41. It is noteworthy that the Law Reform Commission in its report *Civil Admiralty Jurisdiction* which preceded the *Admiralty Act*, and therefore dealing with the law immediately prior to the *Admiralty Act*, cited as a main characteristic of the statutory right of action *in rem* that the right does not survive a *bona fide* change in ownership “unless already carried into effect by the commencement of proceedings *in rem*”.⁴⁰ It was also stated that once proceedings have been commenced on a statutory right of action *in rem* they are not defeated by subsequent sale of the *res*, even if it has not been served, and *The Monica S* was cited as authority.⁴¹
42. Given the similarity in wording, as I drew attention to at the outset, between the UK Act of

³⁸ Ibid 209C-D.

³⁹ Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, 1986) [35]-[37].

⁴⁰ Ibid [15].

⁴¹ Ibid [15] and [191].

1956 and the Australian *Admiralty Act*, one might think that on the reasoning of Brandon J in *The Monica S*, it would be clear that the issuing of the writ would be sufficient to create the security and that it could be the basis for an arrest even if there was an intervening change of ownership.

43. However, Dr Cremean in *Admiralty Jurisdiction Law and Practice* concludes differently.⁴² The learned author says that it is “doubtful” that *The Monica S* applies because “it is difficult to see how a security interest is created merely by filing a writ without also serving it” and because s 6 of the *Admiralty Act* states that the provisions of the Act do not have effect to create “a new maritime lien or other charge”. On that basis, the learned author says that to hold that a statutory lien arises upon the issue of proceedings would be to hold that it arises by virtue of the Act and not by virtue of a source other than the Act which would be contrary to s 6.⁴³
44. The learned author refers to a passage in the judgment of Davies J in the Full Court in *The Shin Kobe Maru*.⁴⁴ It will be recalled that *The Shin Kobe Maru* in the High Court is a case of fundamental importance with regard to interpreting the provisions relating to the boundaries of the admiralty jurisdiction under the *Admiralty Act*.⁴⁵
45. The issue in that case was whether a claim that asserted a beneficial interest in the ship was a “proprietary maritime claim” within the meaning of s 4(2) of the *Admiralty Act* such as to justify an arrest under s 16. One of the arguments advanced by the owners of the arrested ship was that since a statutory right *in rem* creates a security interest in the ship by virtue of the institution of the proceedings and that a plaintiff, by virtue of the issue of a writ *in rem*, acquires a charge upon a ship – in reliance on *The Monica S* and *In re Aro Co Ltd* – to recognise a beneficial interest in a ship as a proprietary maritime claim would give rise to a charge which was previously unknown to the law. It was submitted that that

⁴² Cremean (n 1) 185-186.

⁴³ Ibid 186.

⁴⁴ *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* [1992] FCA 476; 38 FCR 227 at 234.

⁴⁵ *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* [1994] HCA 54; 181 CLR 404.

would be contrary to s 6, and therefore could not be the position.⁴⁶

46. At first instance, Gummow J had held with reference to *The Monica S* that to extend, by way of statute, jurisdiction *in rem* for maritime claims is to create procedural rights in respect of subsisting causes of action, rather than new substantive rights, such that there would be no conflict with s 6.⁴⁷
47. On appeal to the Full Court, Davies J and Lockhart J each wrote separate reasons in support of the same orders dismissing the appeal, and French J agreed with the reasons of Lockhart J. Davies J was thus on his own. In the passage referred to by Dr Cremean, Davies J held that s 6(a) in its reference to “maritime lien or other charge” is limited to being given effect to in relation to s 15, which provides for rights to proceed *in rem* on maritime liens and other charges. By limiting the operation of s 6 in that way, and since the claim was brought under s 16 and not s 15, Davies J was able to dismiss the argument by the vessel’s owners.⁴⁸ On the basis of that reasoning, s 6 would not stand in the way of s 17 (and ss 18 and 19) being read as giving rise to a statutory lien from when the proceeding is commenced.
48. Lockhart J referred to the Second Reading Speech of the Attorney-General of the Commonwealth when introducing the *Admiralty Bill 1988* (Cth), and the Explanatory Memorandum, where it was said that the Act did not create new causes of action or new substantive rights, as distinct from creating new procedures.⁴⁹ His Honour held that s 4 does not create new causes of action, new maritime liens or other charges, or substantive rights.⁵⁰
49. The High Court, per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, dismissed the owners’ reliance on s 6 on the basis that it has long been accepted that the mere conferral by statute of a right to proceed *in rem* on an existing cause of action does

⁴⁶ Above n 44.

⁴⁷ *Empire Shipping Co Inc v Owners of the “Ship Shin Kobe Mara”* [1991] FCA 499; 32 FCR 78 at 86.

⁴⁸ Above n 44.

⁴⁹ Above n 44, 243.

⁵⁰ Above n 45, 244.

not effect a new maritime lien or charge.⁵¹ As authority, reference was made to *The Two Ellens*,⁵² *The Pieve Superiore*,⁵³ *The Rio Tinto*,⁵⁴ *The Henrich Bjorn*⁵⁵ and the Law Reform Commission Report No 33.⁵⁶

50. 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. But in any event, as the analysis of *The Monica S* shows, even prior to the *Admiralty Act* the statutory lien was recognised as being effective from the time that the writ was issued. Therefore, the lien or charge was not created by the Act, so s 6 could not have precluded it.
51. I now turn to look at what other cases subsequent to the commencement of the *Admiralty Act* have considered the statutory right of action *in rem* – both with respect to *The Monica S* proposition that the right attaches when the writ is filed and the *In re Aro Co Ltd* proposition that the issuing of the writ gives security for the claim in the event of the subsequent winding-up of the owner.
52. The first is *The Cape Moreton*.⁵⁷ There the issue was whether the expression “the owner” in s 17 of the *Admiralty Act* encompassed a registered owner of a vessel who no longer had legal title to the vessel because it had been sold and delivered to a new, as yet unregistered, owner. Reference was made by Ryan and Allsop JJ to *The Monica S* and *The Henrich Björn* in a discussion of the requirement of ownership in the proprietary sense as being the necessary nexus between the *in personam* debtor and the *res*.⁵⁸ Neither of these cases was

⁵¹ Above n 45, 418-420.

⁵² (1872) LR 4 PC 161.

⁵³ (1874) LR 5 PC 482.

⁵⁴ (1884) 9 App Cas 356.

⁵⁵ (1886) 11 App Cas 270.

⁵⁶ Above n 39, [15]-[16] and [126].

⁵⁷ *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* [2005] FCAFC 68; 143 FCR 43; 219 ALR 48. There was prior to that passing but for present purposes irrelevant reference to *The Monica S* in *Ocean Industries Pty Ltd v Owners of the Ship MV ‘Steven C’* [1994] 1 Qd R 69 at 74 by McPherson CJ, Thomas J and Byrne J agreeing.

⁵⁸ *Ibid* [107] and [116].

expressly adopted or approved insofar as the question of when the statutory lien attaches is concerned, but equally, neither was disapproved of.

53. Next is *The Comandate*.⁵⁹ In a comprehensive analysis of the nature of the admiralty action *in rem*, Allsop J (Finn and Finkelstein JJ agreeing) referred to *The Monica S* as establishing that once the action is commenced a change in ownership will be ineffective to prevent the action proceeding against the ship.⁶⁰ The reference was made in such a way as to show acceptance of the correctness of *The Monica S* and its application in Australia, but not so as to be part of the *ratio* of the judgment.
54. Next, there is *The Hako Endeavour*.⁶¹ Besanko J, with whom Allsop CJ and Rares J agreed, similarly made passing reference to *The Monica S* without expressing any view on its currency in Australia.⁶² Allsop CJ cited *In re Aro Co Ltd* as authority for the proposition that from the date of the filing of the proceedings *in rem* a species of security is created in the ship by reference to the proceeding.⁶³
55. In *Kim v Daebo International Shipping Co Ltd*,⁶⁴ Rares J held that the UNICTRAL Model Law on Cross Border Insolvency (given legal force by the *Cross-Border Insolvency Act 2008* (Cth)) does not supervene or impliedly repeal a maritime creditor's rights under the *Admiralty Act* to proceed *in rem* on a secured or proprietary claim that pre-existed any order recognising a foreign proceeding. In his reasoning, his Honour cited *In re Aro Co Ltd* as authority for the proposition that a plaintiff who commences a proceeding on a maritime claim against a ship as an action *in rem* under any of ss 17, 18 and 19 of the *Admiralty Act* before any stay came into effect under Art 19 or Art 20(2) of the Model Law, will have a secured interest in respect of that claim simply because of the timing of

⁵⁹ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; 157 FCR 45.

⁶⁰ *Ibid* [108]. See also [102] and [117] for other references.

⁶¹ *Programmed Total Marine Services Pty Ltd v Ships 'Hako Endeavour', 'Hako Excel' and 'Hako Esteem'* [2014] FCAFC 134; 315 ALR 66.

⁶² *Ibid* [145].

⁶³ *Ibid* [22]. Rares J agreed, [37].

⁶⁴ [2015] FCA 684; 232 FCR 275.

the commencement of the proceeding *in rem*.⁶⁵

56. Allsop CJ referred to what Rares J had said in *Kim* in *Yakushiji v Daiichi Chuo Kisen Kaisha* and stated that non-lien claims “may, once reflected in a filing in this Court, be seen to create a form or species of qualified or quasi security”, but that whether they amount to secured claims “remains a live issue”.⁶⁶
57. To summarise the position in Australia, 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 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.
58. With regard to the *In re Aro Co Ltd* point, it has been referred to as reflecting the law in Australia but it has also been described as remaining a “live issue”.
59. In New Zealand, the principal case (insofar as my necessarily incomplete researches have shown) is *Kim v STX Pan Ocean Co Ltd*.⁶⁷ Gilbert J followed *In re Aro Co Ltd* and held that by issuing admiralty proceedings *in rem* against the *New Giant*, even though they had not served those proceedings or arrested the ship, the claimants obtained a security and the rights of the demise charterer, STX, became immediately subject to these secured claims.⁶⁸
60. On this basis, and because of the common origins and almost identical wording between the UK Act of 1956 and the New Zealand Act of 1973, there does not seem to be any reason why *The Monica S* would not also be followed in New Zealand.
61. Turning now to the position in Singapore, Dr Cremean in his book refers to *Dauphin Offshore Engineering and Trading Pte Ltd Inc v Owners of the Vessel Capricorn*,⁶⁹

⁶⁵ Ibid [8].

⁶⁶ [2015] FCA 1170; 333 ALR 513, [20].

⁶⁷ [2014] NZHC 845.

⁶⁸ Ibid [10], [26] and [29].

⁶⁹ [1999] 2 SLR 390.

drawing particular attention to where S Rajendran J “specifically held” that it was the arrest of the vessel in that case which created a statutory lien in favour of the plaintiffs.⁷⁰ Whilst it is true that S Rajendran J stated that the arrest of the vessel created a statutory lien in favour of the plaintiffs, in that case the arrest occurred prior to the insolvency of the owner of the vessel.⁷¹ Therefore, the question of whether the issue of the writ would have been sufficient to create the statutory lien, or the security for the claim, did not arise.

62. In the immediately preceding two paragraphs, his Honour dealt at length with two previous cases in Singapore where the effect of the issue of the writ was specifically dealt with. In *Lim Bock Lai v Selco (Singapore) Pte Ltd*,⁷² Lai Kew Chai J held that the issue of a writ *in rem* in exercise of the statutory right of action “has crucial consequences, which enure to the benefit” of the plaintiffs.⁷³ His Honour considered that as the writs *in rem* had been issued before the winding-up petition, the plaintiffs were secured creditors.⁷⁴
63. In *The Hull 308*,⁷⁵ the Singapore Court of Appeal (Yong Pung How CJ, LP Thean and Chan Sek Keong JJ) upheld a decision to set aside a writ that was issued after provisional liquidators were appointed. The Court of Appeal followed *In re Aro Co Ltd* and approved *Lim Bock Lai*, stating that in both cases the plaintiffs took out the writ *in rem* against the ships before the commencement of winding up of the respective owners, and the plaintiffs could at that point of time “properly assert against all the world” that the ships in question were a security for the claims respectively.⁷⁶
64. In *The Bolbina*,⁷⁷ G P Selvam JC accepted the correctness of *The Monica S* in Singapore,⁷⁸

⁷⁰ Above n 1, 186.

⁷¹ Ibid [17].

⁷² [1987] SLR 423. Also reported at [1987] 2 MLJ 688.

⁷³ Ibid 426E.

⁷⁴ Ibid 426I.

⁷⁵ [1991] SLR 304. Also reported at [1991] 3 MLJ 393.

⁷⁶ Ibid 310E.

⁷⁷ *The Bolbina et al; Owners of Cargo Lately Laden on board the Ship or Vessel ‘Fierbinti’ v Owners and Other Persons Interested in the Ship or Vessel ‘Bolbina’ and 18 other vessels (Romline SA Shipping Co, Interveners)* [1994] 1 SLR 554.

⁷⁸ Ibid 559F.

and stated that the instrument that creates the statutory lien is the writ.⁷⁹ That was upheld on appeal in *The Fierbinti*.⁸⁰

65. More telling against Dr Cremean's citing of a loosely worded dictum in *Dauphin* as reflecting the law in Singapore than the detailed discussion in that case of the previous cases, including in the Court of Appeal, which show quite clearly that both *The Monica S* and *In re Aro Co Ltd* principles apply in Singapore, is the fact that *Dauphin* itself was appealed and the Court of Appeal was unequivocal. In *Kuo Fen Ching and Another v Dauphin Offshore Engineering & Trading Pte Ltd*,⁸¹ the Singapore Court of Appeal held that once a writ is issued the claim is not affected by any subsequent change in ownership.
66. The position in Singapore accordingly appears to be consistent with the position in England.
67. There is, however, a twist to Dr Cremean's citing of the statement in *Dauphin* that it is the arrest that in that case created the security. It is in the context of the position in South Africa to which I now turn.
68. In *The Seaspan Grouse*,⁸² the South African Supreme Court of Appeal earlier this year addressed the consequences of a change in ownership of the vessel between the time when the summons *in rem* and arrest warrant is issued and the arrest. In that case, the question arose specifically in the context of an associated ship arrest – the broadened surrogate ship arrest jurisdiction in South Africa. However, it was accepted in argument that the position would be no different in the case of a summons *in rem* and warrant of arrest issued against the ship in respect of which the maritime claim arose.⁸³
69. The majority (Wallis and Schippers JJA, Maya P and Molemela JA concurring, Makgoka

⁷⁹ Ibid 560B. Also cited by Cremean (n 1) 186.

⁸⁰ *The Fierbinti; Romline SA Shipping Co v Owners of Cargo Lately Laden on Board the Ship or Vessel 'Fierbinti'* [1994] 3 SLR 864.

⁸¹ [1999] SGCA 95; 3 SLR 721, [31].

⁸² *MV Seaspan Grouse: Seaspan Holdco 1 Ltd v MS Mare Traveller Schiffahrts GmbH* [2019] ZASCA 02; 2019 (4) SA 483 (SCA).

⁸³ Ibid [1].

JA dissenting) cited *The Monica S* and then stated that it is not clear that that case is as widely accepted as suggested by counsel for the respondents.⁸⁴ The footnote at that point refers to Dr Cremean's treatment of the subject, both in respect of the learned author's doubts with regard to whether *The Monica S* principle applies in Australia by reason of the operation of s 6 of the *Admiralty Act*, and also the position in Singapore. The footnote states that *In re Aro Co Ltd* was apparently initially followed in Singapore, but was rejected in *Dauphin*. The Court apparently misunderstood that position in reliance on what Dr Cremean stated.

70. The judgment ultimately turned on the particular wording of the South African statute, and the reservation 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 accordingly held not to apply in South Africa.
71. I hope that the above survey of the question of what security, if any, the issuing of a writ *in rem*, or equivalent process, gives prior to its service or the arrest of the vessel across a number of jurisdictions has proved helpful. Or, that it might prove helpful sometime in the future when you have to face this question in the context of a particular case. I should emphasise that to the extent that I have expressed my own views, which I think is quite limited, I do not hold those views in any concluded way. I remain open to persuasion in an appropriate case that they are wrong.

⁸⁴ Ibid [2].