



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



Retirement of Justice Steven Rares

After almost 18 years of (as his Honour recently put it)¹ “navigating the judicial sea” as a Judge of the Federal Court of Australia, Justice Steven Rares retired on 14 November 2023 and (again to quote his Honour) sailed “into the constitutional scrapyard”.²

His Honour’s departure on that voyage was marked by a ceremonial sitting of the Full Court of the Federal Court in Sydney to farewell his Honour upon retirement, and where his Honour’s contribution to the development of Australian law, including maritime and admiralty law, was recognised.³

At the NSW Bar

After graduating in Arts and Law from the University of Sydney, and briefly working as a solicitor at Dudley Westgarth & Co in Sydney, his Honour was called to the NSW Bar in 1980. He took silk in 1993. Prior to his appointment to the Court, his Honour had practised extensively at the Australian Bar in many areas of law including defamation, media law, trade practices, commercial and corporations law, administrative law, aviation and (of course) maritime law. In that latter regard, he was for a time the counsel of choice of solicitors who customarily represented cargo interests, and his appearances as leading counsel included *BHP Trading Asia Ltd v Oceaname Shipping Ltd*,⁴ *Westpac Banking Corp v the Ship “Stone Gemini”*,⁵ and *Hi Fert Pty Ltd v Kiukiang Maritime Carriers Inc.*⁶



The Hon Steven Rares KC

In *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (the “Fortius”)*,⁷ his Honour appeared for the owners of the capesize bulk carrier Fortius in defending proceedings that the coal terminal had brought in the Federal Court for the almost A\$20 million damage that the vessel caused when it struck the wharf at the terminal as it was trying to berth. The allision occurred (as the Full Court later described it)⁸ when “on a fine sunny day, with hardly any wind, clear visibility and calm flat water the bow of the capesize bulk carrier SA Fortius struck at almost a right angle the bulk coal berth in Port Kembla inner harbour and one of the rail mounted ship loaders that happened to be parked at the point of contact”.⁹ Aided by his then junior, the now Chief Justice of the Supreme Court of New South Wales, his Honour sought to resist the terminal’s claim for damages (*inter alia*) on the grounds that the fixed and stationary wharf and rail-mounted coal loader sitting on it had been contributorily negligent. That argument was rejected, both at first instance and on appeal. That appeal was his Honour’s last substantive shipping case before his appointment to the Federal Court in February 2006.

A Judge of the Court

Following his appointment,¹⁰ Justice Rares found his way into what is now known as the Admiralty and Maritime National Practice Area (NPA) of the Federal Court, where he heard cases in the exercise of the Court’s admiralty and maritime jurisdiction. In due course, his Honour was appointed the New South Wales Registry Convening Judge for the Admiralty and Maritime NPA, and subsequently the National Co-ordinating Judge. For a number of years, he also chaired the annual meetings of the Federal Court’s Admiralty Users Group in Sydney.

From 2011, Justice Rares was also the presiding member of the Admiralty Rules Committee, a statutory body established by s 42 of the Admiralty Act 1988 (Cth), to advise the Commonwealth Attorney General about rules relevant to the practice and procedure followed by all courts exercising jurisdiction under the Act and other matters incidental thereto.

During his time on the Court, Justice Rares delivered 85 first instance judgments in matters of admiralty and maritime law. It is beyond the scope of this note to refer to them all. Suffice it to say, they included:

- a. *Strong Wise Ltd v Esso Australia Resources Pty Ltd*,¹¹ which is a (if not the) leading authority on the meaning and application of the words “on any distinct occasion” in Article 6 of the 1976 Convention on Limitation of Liability for Maritime Claims;
- b. his Honour’s exposition of the duty of disclosure owed by an applicant for the arrest of a ship under the Admiralty Act 1988 (Cth) (the Act) in *Atlasnavios Navegacao, LDA v Ship “Xin Tai Hai” (No 2)*;¹²
- c. his Honour’s discussion of the scope and availability of damages for wrongful arrest under s 34 of the Act in *Fuk Hing Steamship Co Ltd v Shagang Shipping Co Ltd*;¹³
- d. *Mount Isa Mines Ltd v the Ship “Thor Commander”*,¹⁴ a judgment in which his Honour was required to consider and determine a plethora of issues arising from the breakdown of that vessel’s main engine en route to Australia, including the nature of and parties to the contract for the carriage of the cargo onboard the vessel at the time of the breakdown and whose arrival in Australia was delayed, the cause of the breakdown, whether the carrier was liable for the consequences of the breakdown, whether the rescue of the vessel following the breakdown and as it was drifting towards the Great Barrier Reef amounted to salvage,¹⁵ and the reasonableness of cargo interests’ settlement of the claim for salvage that had been made against them

They also included *Euroceanica (UK) Ltd v Ship “Gem of Safaga” as Surrogate for Ships “JBU Opal” and “JBU Onyx” (Gem of Safaga)*¹⁶ a case that was notable because whilst she remained under arrest, the defendant ship, the Panamax bulk carrier Gem of Safaga, was moored off Point Piper in Sydney Harbour and (possibly for the first time in any admiralty proceeding in Australia) in full view of his Honour (through the windows of the Court) during the hearing of the shipowners’ application to set aside her arrest.

Admittedly, not all of Justice Rares’ first instance judgments survived appellate review.¹⁷ But even those of his Honour’s judgments that were later overturned provided the opportunity for a more extensive exposition of maritime law by the Full Court, at least when that Full Court included former Chief Justice Allsop.

Justice Rares also participated in 28 judgments of the Full Court of the Federal Court in cases in the area of admiralty and maritime law. These included:

- a. *CV Sheepvaartonderneming Ankergracht v Stemcor (A/sia) Pty Ltd*¹⁸ on the meaning and application of Article 3 rule 2 of the Hague Visby Rules (and their analogues) in the context of cargo claims
- b. *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd*¹⁹ on the non-application of s 11 of the Carriage of Goods by Sea Act 1991 (Cth) (COGSA) to voyage charterparties and contracts of affreightment
- c. *the Ship “Sam Hawk” v Reiter Petroleum Inc (the Sam Hawk)*²⁰ – a case that his Honour described as a “standout decision” in his judicial career²¹ – on the nature and operation of foreign maritime liens in the context of in rem proceedings brought in Australia under s 15 of the Admiralty Act 1988 (Cth)²²

- d. judgments in *Daebo Shipping Co Ltd v the Ship "Go Star"*,²³ the Ships "*Hako Endeavour*", "*Hako Excel*", "*Hako Esteem*" and "*Hako Fortress*" v *Programmed Total Marine Services Pty Ltd*,²⁴ and *Programmed Total Marine Services Pty Ltd v the Ships "Hako Endeavour", "Hako Excel", "Hako Esteem" and "Hako Fortress"*²⁵ on the scope of maritime claims and their ability to be pursued *in rem*
- e. *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG ("BBC Nile")*²⁶ on the lacuna in the operation of s 11 of COGSA in relation to inter-state carriage of goods by sea
- f. *Poralu Marine Australia Pty Ltd v "Dijksgracht"*²⁷ on the formation and identification of a contract of carriage and the international cargo liability regime to which that contract is or may be subject
- g. *Carnival Plc v Karpik (the "Ruby Princess")*²⁸ on the validity of exclusive jurisdiction and class waiver clauses in the context of a passenger cruise ship contract of carriage

Extra-Judicial Contribution to the Development of Maritime Law

In his judgment in *Hur v Samsun Logix Corp.*²⁹ Justice Rares referred to "the peripatetic nature of ships".³⁰ The same might also be said of his Honour's extra-curial contribution to the exposition and development of maritime law both in Australia, and beyond.

Since his appointment to the Federal Court, Justice Rares has been an active member of the Maritime Law Association of Australia and New Zealand (MLAANZ), and has presented papers both at its annual conferences in 2009 in Queenstown New Zealand³¹ (in between runs on Coronet Peak with his son Quentin), and more recently in Melbourne in 2017,³² as well as at local NSW Branch events,³³ the most recent being his address to the NSW Branch's mini-conference in February 2023 titled "17 years in the judicial sea: a voyage through my experiences as an admiralty and maritime judge". At the joint MLAANZ/Maritime Law Association of the United States Conference in Hawaii in November 2011, his Honour shared with Nick Gaskell the award for the loudest Hawaiian shirt at the conference dinner (as pictured).



Perhaps more significantly, his Honour delivered MLAANZ's signature annual key note address – the Dethridge Address – at its annual conference in Sydney in 2013. In that address, which was titled "The far from Halcyon Isle: maritime liens, renvoi and conflicts of law",³⁴ his Honour discussed the history, nature and operation of maritime liens, including the contentious issue of the recognition of foreign maritime liens and the competing majority and minority views of the Privy Council in the *Halcyon Isle*.³⁵ This address was largely drawn from a draft judgment that his Honour had prepared in a case that he had heard earlier that year, which was not delivered, as the parties settled the case just as his Honour was about to deliver judgment. It is not known whether, after hearing what his Honour had to say in this address, the parties were relieved or disappointed by their settlement. This Address also served as a precursor to his Honour's subsequent judgment in the *Sam Hawk*.

Justice Rares has also been a strong contributor to the work of the Comité Maritime International (CMI), including as a member of (and an Australian representative on) the CMI's International Working Group on Offshore Activities since its creation in 2012. In June of this year, his Honour was afforded the honour of being elected a Titulary Member of CMI.

In 2019, his Honour presented a paper at the CMI's annual conference in Mexico titled "Charting a new course – promoting the development of an international convention on liability and compensation relating to transboundary damage from offshore oil and gas activities". That was not the first occasion that his Honour had spoken on this topic, having previously provided the introductory remarks at the CMI Colloquium in Istanbul in 2015 to a session (titled "The Way Ahead") to discuss the legal mechanisms dealing with the escape of hydrocarbons and other pollution arising from offshore activities, and before that having delivered a paper titled "An international convention on offshore hydro-carbon leaks?" at the International Conference on Liability and Compensation Regime for Transboundary Oil Damage resulting from Offshore Exploration and Exploitation Activities, in 2011 in Bali.³⁶

Central to the exercise of admiralty jurisdiction is the arrest of ships, and his Honour has spoken frequently and widely about the law relating to and practical aspects of ship arrests, including:

- a. at the 6th Annual World Congress of Ocean in 2017 in Shenzhen, China, with a paper titled "Ship arrests, maritime liens and cross-border insolvency"
- b. in 2016 at the National University of Singapore Colloquium on the Arrest Conventions of 1952 and 1999, with a paper titled "Declining jurisdiction following arrest"³⁷
- c. in a paper titled "From Genesis to Revelation: the origin and scope of the admiralty and maritime jurisdiction in the constitutions of the United States and Australia" at the Federal Court of Australia's International Commercial Law and Arbitration Conference in Sydney in 2013
- d. at the IBA Conference in Singapore in 2007, with a paper titled "Australia's sea change towards developing a comprehensive system of admiralty and maritime dispute resolution for 21st Century trade in the Asia-Pacific region"

Other topics in the maritime sphere that his Honour has also spoken on include cross-border insolvency and its interaction with the maritime law of priorities,³⁸ as well as maritime arbitration. The latter includes, in addition to his Honour's 2009 paper in Queenstown,³⁹ papers on the modern place of arbitration,⁴⁰ the role of the courts in arbitration,⁴¹ the Federal Court's own arbitration list⁴² (of which his Honour was a panel judge) and most recently his paper titled "The blurring of lines between shipping contracts" which he presented at the International Congress of Maritime Arbitrators (ICMA) XII, Dubai on 9 November 2023.

Justice Rares has also been a supporter of the work of the AMTAC (the Australian Maritime and Transport Arbitration Commission), having provided the introductory remarks to the 2011 Annual AMTAC Address. In 2018, his Honour delivered that year's AMTAC Annual Address (AMTAC's signature annual event) on "The rule of law and international trade".⁴³

Of the 55 papers that his Honour is listed on the Federal Court website as having presented and/or published,⁴⁴ a little over a third or 20 papers are on admiralty and maritime law.

Conclusion

Following his retirement from the Court, the Hon Steven Rares KC (as his Honour is now known as) has returned to his former chambers in Phillip Street Sydney and put up his shingle as an accredited mediator and arbitrator. During the ceremonial sitting on 14 November last marking his retirement, reference was also made to the pending publication of monograph on estoppel which his Honour has co-authored with his son, Quentin.

It is the hope of the Executive of MLAANZ that the Hon Steven Rares KC will continue his long association with MLAANZ and that the members of MLAANZ will thereby continue to benefit from his contribution to MLAANZ and his participation in its future activities. Although Justice Rares, in his address to the members of the NSW Branch earlier this year, equated his retirement from the Court as being cast on the “constitutional scrapyards”, perhaps the (paraphrased) words of Mark Twain are likely to be more apt, namely that “The reports of his [Honour’s] demise are greatly exaggerated”.

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December 2023

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- ¹ in an address given at the NSW Branch of MLAANZ’s mini-conference on 28 February 2023, titled “17 Years in the judicial sea: a voyage through my experience as an admiralty and maritime judge”
- ² (ibid)
- ³ <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/justice-raises/raises-j-20231114>
- ⁴ (1996) 67 FCR 211
- ⁵ [1999] FCA 434; (1999) 110 FCR 47; (1999) 2 Lloyd’s Rep 255
- ⁶ [2000] FCA 660; (2006) 173 ALR 263
- ⁷ [2004] FCA 1211; (2004) 140 FCR 445
- ⁸ *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd* [2005] FCAFC 256, (2005) 148 FCR 68 at [1]
- ⁹ the vessel had been trying to berth parallel to the wharf, port side to
- ¹⁰ and despite his lack of success in the *Fortius*
- ¹¹ [2010] FCA 240; (2010) 185 FCR 149
- ¹² [2012] FCA 1497; (2012) 215 FCR 265
- ¹³ [2015] FCA 682
- ¹⁴ [2018] FCA 1326; (2018) 263 FCR 181
- ¹⁵ in respect of which his Honour’s *obiter* remarks as to voluntariness and whether an activity still needs to be voluntary to qualify as “salvage” subsequently caused “some minor controversy”, as his Honour noted in his address referred to in fn 1 above
- ¹⁶ [2009] FCA 1467, (2009) 182 FCR 1
- ¹⁷ for example, *Pan Australian Shipping Pty Ltd v the Ship “Comandate” (No 2)* [2006] FCA 1112; 234 ALR 483 which was overturned by the Full Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, (2006) 157 FCR 45, and of which his Honour noted (in his address referred to in fn 1 above) “Indeed, Finn, Finkelstein and Allsop JJ overturned me on almost every finding”. Although as his Honour also went on to observe “in my own lamentable defence, one might have thought it difficult to foresee that the Full Court would say that not only was the House of Lords [in *Indian Grace*] wrong but so too the earlier Full Court’s *obiter dicta* interpretation of the arbitration clause”

18 [2007] FCAFC 77; (2007) 260 FCR 342

19 [2013] FCAFC 107; (2013) 216 FCR 469 (or as it was more affectionately known “*Damp Biscuits*”)

20 [2016] FCAFC 26; (2016) 246 FCR 337

21 in his address referred to in fn 1 above

22 although his Honour concurred in the ratio and outcome of that appeal, he differed from the other members of the Full Court on the question as to when Australian law would accord recognition to a foreign maritime lien that is outside of the liens listed in s 15 of the Admiralty Act

23 [2012] FCAFC 156; (2012) 207 FCR 220

24 [2013] FCAFC 21; (2013) 211 FCR 369

25 [2014] FCAFC 134; (2014) 315 ALR 66

26 [2022] FCA 171; (2022) 295 FCR 81

27 [2023] FCAFC 147

28 [2022] FCAFC 149

29 [2015] FCA 1154; (2015) 238 FCR 483 at [31]

30 see also his Honour’s comments in *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684; (2015) 232 FCR 275 at [14] and “Admiralty law the flying dutchman of cross-border insolvency” at [27] a paper presented at the Federal Court of Australia International Commercial Litigation Conference (Sydney) in 2009

31 “International arbitration of admiralty and maritime disputes in Australia”

32 “Ships that changed the law – the Torrey Canyon disaster”

33 including “An international convention on off-shore hydrocarbon leaks?” (14 Oct 2012); “Some issues that arise in arrest of ships” (19 Sept 2012); “The need for an international convention to deal with off-shore hydrocarbon leaks” (11 March 2011); “The onus of proof in a cargo claim – Articles III and IV of the Hague-Visby Rules and the UNCITRAL draft convention” (23 July 2008)

34 the address is also published in (2014) 28(1) Australian and New Zealand Maritime Law Jnl 1

35 *Bankers Trust International Ltd v Todd Shipyard Corp* [1981] AC 221

36 his Honour has also spoken on this topic at local MLAANZ Branch meetings (see fn 33 above)

37 and which is reproduced as chap 4 of “The Arrest Conventions: International Enforcement of Maritime Claims” (Hart Publishing, 2019) edited by Paul Myburgh

38 “Consistency and conflict – cross-border insolvency” a paper presented at the 32nd Annual Conference of the Banking & Financial Services Law Association 2015; “Admiralty law the flying dutchman of cross-border insolvency” a paper presented at the Federal Court of Australia’s International Commercial Litigation Conference (Sydney) in November 2009

39 referred to in fn 31 above

40 “The modern place of arbitration – celebration of the centenary of the Chartered Institute of Arbitrators”, presented to the Chartered Institute of Arbitrators in celebration of its centenary at Sydney in 2015

41 “The role of courts in arbitration”, presented at the NSW Bar Association and Australian Centre for International Commercial Arbitration (ACICA) “2012 ADR in Australia and Beyond” seminar

42 “The Federal Court of Australia’s international arbitration list”, presented at the NSW Bar Association’s Senior Counsel Arbitration Seminar in 2011

43 <https://amtac.org.au/wp-content/uploads/2018/12/AMTAC-Address-2018-Justice-Rares.pdf>

44 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/justice-ares>