SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

Developments in Ship Arrest – a Case Note by Stefanie Andrensek and Michelle Taylor

Viva Energy Australia Pty Ltd v MT "AG Neptune" *[2022] FCA 522 and* Viva Energy Australia Pty Ltd v MT "AG Neptune" (No 2) *[2022] FCA 533*

On May 8, 2022, Stewart J in the Federal Court of Australia made urgent orders that the ship "AG Neptune", a 244-metre product tanker laden with 62,000 metric tonnes of diesel anchored under arrest off the Port of Newcastle, New South Wales, be:

> "permitted whilst under arrest as soon as practical with all dispatch and without deviation and at all times remaining the territorial sea to sail to Gladstone, Queensland and proceed directly to a designated lay up berth, buoy or other anchorage, stem LSMGO and VLSFO and remain there until further order of the Court."

Within a matter of hours of the orders being made in *Viva Energy Australia Pty Ltd v MT "AG Neptune"* [2022] FCA 522, the AG Neptune commenced its urgent voyage to Gladstone for bunkering.

Moving a Ship Whilst Under Arrest

It is not unusual that a ship under arrest may be permitted to sail by order of the Court, for the purpose of retaining the safe custody, control and preservation of that ship[1] by the Admiralty Marshal. In fact, ships under arrest have been permitted to sail to avoid safety hazards associated with remaining at berth, such as running aground due to seasonal falling tides, to discharge and load various cargoes, and even remain trading whilst under arrest in circumstances where it was considered preferable to the shipowner putting up security for the ship.

Sparke Helmore Lawyers partner Michelle Taylor and lawyer Stefanie Andrensek

[1] See rule 47(2)(d) of the Admiralty Rules 1988 (Cth) (Admiralty Rules)

But what facts and circumstances led to the AG Neptune, described by the Court as a "large, specialised and unwieldly vessel" to be ordered to urgently sail some 700 nautical miles (1300 kilometres) to obtain critical fuel whilst under arrest?

Ship Arrested at Newcastle Anchorage

The AG Neptune was arrested in an action in rem brought by cargo interests off the Port of Newcastle on Tuesday, May 3, 2022.

By Saturday, May 7, 2022, it became clear that the MARPOL [International Convention for the Prevention of Pollution from Ships] Annex VI-compliant low sulphur fuels required to keep the cargo-stabilising inert gas system working, low sulphur marine gasoil (LSMGO) and very low sulphur fuel oil (VLSFO), were in precariously low supply. Once those fuels were used up, the heavy fuel oil (HFO) used to run the engine would cool, the main engines would not be able to be started, and the vessel would face a grave risk of becoming a "dead ship".

A "dead ship" condition means that the main source of power is out of operation and not able to be restored, rendering the auxiliary and propulsion operations of the ship unusable.

Without a working inert gas system, the pressure required to safely stow a cargo of diesel cannot be maintained, creating a risk of ignition, and presenting a severe safety hazard to a ship, its crew, and the surrounding marine environment.

Ship Permitted to Sail to Gladstone, Queensland, to Stem Bunkers

In his Honour's reasons for making the orders permitting the AG Neptune to sail to Gladstone for bunkers whilst under arrest, the following material considerations were taken into account:

1. there was a "considerable, even overwhelming, public interest" in avoiding the AG Neptune becoming a dead ship, or in the alternative, burning fuel that was not compliant with Annex VI of MARPOL;
2. the required bunkers were available at the Port of Gladstone at short notice, the owners had accepted the costs of sailing to Gladstone and bunkering there and this was not opposed by the plaintiff;
3. the ship could not enter the Port of Newcastle;
4. out of the alternative bunkering options, Gladstone was the most preferable because port charges were not payable; and even though Sydney and Brisbane were closer, the costs of maintaining the ship there were likely to be far higher;
5. the ship could sail to Gladstone without leaving territorial waters and at all times remain in the custody of the Admiralty Marshal; and
6. it was reasonably convenient for both parties to attend on the ship while in Gladstone to undertake court ordered inspections.

The Court also considered that there was little risk the ship would sail out of the jurisdiction, given it had not done so in the time since its arrest, and that there were "limited measures that could be taken to reduce that risk still further".

Navigational Hazards

Shortly after the AG Neptune commenced its two-day voyage to Gladstone for bunkering, it became apparent that the ship would need to leave the territorial sea for approximately two hours to avoid running aground in shallow water on Breaksea Spit, located north of Sandy Cape, Fraser Island, Queensland.

By an urgent application made by the defendants, the Court varied its previous orders to permit the ship to leave the territorial sea. In *Viva Energy Australia Pty Ltd v MT "AG Neptune" (No 2) [*2022] FCA 533, the AG Neptune was ordered to follow a course identified in the evidence tendered by the defendants, marked on an admiralty chart and a screenshot of the ship's Electronic Chart Display and Information System (ECDIS).

In making the variation, his Honour remarked that leaving the territorial sea would not invalidate the arrest, and that while s 22 of the Admiralty Act 1988 (Cth) (Admiralty Act) provides that a ship may be arrested at any place within the territorial sea, there is no provision to the effect that a ship must remain within the territorial sea for the arrest to be valid.

In addition, the Court was assured by an undertaking provided by the demise charterer of the AG Neptune that no point would be taken in the proceedings about the validity of the arrest on account of the ship leaving territorial waters, as well as an undertaking from the registered owner of the ship that it would not instruct or permit the demise charterer to breach its undertaking.

The State of the Law

By the unique circumstances at hand, the AG Neptune decisions constitute a development to the law regarding the movement of ships whilst under arrest.

In the 1996 Federal Court decision of *Martha II*,[2] a vessel arrested in the Port of Melbourne was permitted to sail to Port Botany to discharge cargo and then load cargo. Justice Olney's orders included permission for a representative of the plaintiff, and a representative of the Marshal, for the retaining the safe custody and preservation of the ship, to be onboard for the voyage. Following the discharge of cargo, Justice Sheppard varied the orders by consent of the parties to remove the orders to take on new cargo, and the vessel was instead directed to berth, buoy or anchorage nominated by the Admiralty Marshal at Port Jackson. It then arose that, in preparation for judicial sale of the vessel, the remaining cargo would have to be discharged, some in Port Botany and the remainder at the Port of Newcastle, which was alleged to be the be only suitable discharge location for cargo of that type.

Justice Sheppard refused to allow the vessel to proceed to Newcastle. He distinguished the matter from his earlier decision in the *Iron Shortland*,[3] where his Honour made orders to permit a ship to sail from Port Hedland, Western Australia, to Port Kembla, New South Wales. In that case, allowing the ship to continue trading would prevent a "grave shortage of iron ore" at Port Kembla, which was considered a matter involving the public interest. In addition, in the *Iron Shortland*, the orders were made by consent, and an undertaking was provided by Australian third-party charterers.

Returning to the first AG Neptune judgment, in permitting the ship to steam to Gladstone to take bunkers, his Honour Justice Stewart distilled the material considerations discerned from *Martha II*, including the risk to the plaintiff's security in the vessel by a voyage on the open sea, and risk to the cargo, convenience and cost, the risk of the ship absconding even with a representative of the Marshal onboard, the importance of not leaving the jurisdiction, and whether appropriate undertakings were given for costs of the moving the vessel.

His Honour then provided his own evaluation of the material considerations at hand, with particular regard to the public interest in the ship not becoming a dead ship, leading to the ultimate conclusion to permit the AG Neptune to move. In this way, the reasoning of the first AG Neptune decision reflects the

---

2 *Den Norske Bank (Luxembourg) SA v The Ship "Martha II"* [1996] FCA 136

3 *Malaysia Shipyard and Engineering Sdn Bhd v The Iron Shortland* (1995) ALR 738, (1995) 59 FCR 535

4 *Tai Shing Maritime CO SA v The Ship "Samsun Veritas" as surrogate for the Ship "Tai Hawk"* [2008] FCA 1546

Myrto II decision, as well as the *Tai Hawk*,[4] a case where a ship was permitted to leave Port Hedland to sail to the Port of Dampier, the overriding factor being the significant public policy consideration of preventing a ship from running aground. These cases provide a synthesis of material considerations, with overarching consideration given to any public interest factor that may be at play.

Jurisdictional Issues

The AG Neptune considers two important live jurisdictional issues regarding the custody of the Admiralty Marshal of ships that move while under arrest pursuant to s 47(2) of the Admiralty Rules.

The first issue concerns a distinction which has been drawn between allowing a vessel to move, versus continuing to trade, whilst under arrest. The former situation has concerned applications made by cargo interests (who may or may not be party to proceedings) to the Marshal to have cargo discharged from the vessel in a different port to the one the ship is arrested in, or to move the ship for other reasons, such as safety. The latter situation concerns applications made to enable a ship to continue trading between ports within the jurisdiction whilst under arrest.

In the first AG Neptune decision, his Honour remarked that allowing a vessel to trade whilst under has been the subject of criticism.[5] This is because it cannot be said that the Marshal's duty to retain the safe custody of a ship and to preserve it extends to operation of a ship for purpose of generating an operational profit.[6] In the AG Neptune matter, this issue was raised but not developed, as the ship was moved for bunkering rather than for trade.

The second jurisdictional issue raised involves whether, once under arrest, a vessel must remain at all times within the territorial sea for that arrest to remain valid, and to remain within the custody of the Admiralty Marshal.

The circumstances before the Court in the second AG Neptune judgment resembles those in the *Tai Hawk*, in that the ship was permitted to leave territorial waters, albeit briefly, in the interests of safety. In handing down the second AG Neptune decision, the Court took a similar pragmatic approach to Justice McKerracher in the *Tai Hawk*, considering practical considerations of safety to the ship.

In addition, his Honour remarked, the power to arrest a vessel within the Australian jurisdiction, contained in s 22 of the Admiralty Act, does not state that once arrested, a vessel is required to remain at all times within the territorial sea.

Along with the pragmatic considerations of safety, his Honour was assured by the ongoing contact between the Marshal and Master of the Ship that the risk of absconding was low. In addition, an unconditional appearance had been entered by the defendants. Taken together, his Honour considered that the vessel will remain under arrest, and in the custody of the Marshal, despite the "minor deviation" outside the territorial sea.

Lessons Learned

The AG Neptune matter is a prime example of a situation where understanding the systems and operation of a specialised vessel is crucial to ensuring that serious risks to the ship, crew and marine environment are prudently managed, and ultimately avoided, whilst under arrest.

Other insights gained include:

- arresting parties and the owner of arrested ships all have a responsibility to ensure that issues with respect to the preservation of vessels in custody are raised with the Court promptly, to avoid risks to the ship, crew and environment;

---

5 Derrington SC and Turner JM, *The Law and Practice of Admiralty Matters* (2nd ed, OUP, 2015)

6 See Derrington and Turner at [7.30]

- in deciding whether to permit a ship to move whilst under arrest, the Court will carefully consider the risks of it absconding the jurisdiction against other relevant factors, including safety and the public interest; and
- in arrest matters, the utilisation and pairing of legal knowledge with an in-depth operational knowledge of the ship in question is an advantage to ensuring the safety of the ship whilst in the custody of the Admiralty Marshal.

June 2022