

Maritime liens and claims

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One of the nine subjects of federal jurisdiction in Chapter III of the Constitution is that defined in section 76(iii) as "any matter . . . of Admiralty and maritime jurisdiction".¹ Section 10 of the Admiralty Act 1988 confers jurisdiction on the Federal Court and the Supreme Courts of the Territories and invests the Supreme Courts of the States with federal jurisdiction in respect of proceedings that may under that Act be commenced as actions in rem. Section 14 provides that, in a matter of Admiralty or maritime jurisdiction, a proceeding cannot be commenced as an action in rem except as provided by the Act. Sections 15 to 19 define the five cases where such a proceeding may be commenced. This paper deals with the claims that may be the subject of the proceeding.²

I. MARITIME LIENS

The first group of such claims are those to enforce "a maritime lien or other charge in respect of a ship or other property subject to the lien or charge": section 15. The Act expressly provides that maritime liens include those for salvage, damage done by a ship, master's and crew's wages and master's disbursements. In addition to liens for bottomry and respondentia (which were obsolete) they were the only maritime liens recognized by Australian law immediately before the Act came into force.³ Section 6(a) provides that the Act does not have the effect

* LLM (Melb); QC. A paper presented at the MLAANZ (Victorian Branch) Seminar on "The Admiralty Act 1988 and the Arrest of Vessels" held on 31 March 1989.

¹ The Hon Justice Zelling "Of Admiralty and Maritime Jurisdiction" (1982) 56 ALJ 101 and "Constitutional Problems of Admiralty Jurisdiction" (1984) 58 ALJ 8. The words come directly from Art III s 2 of the United States Constitution.

² The claims defined in s 4 may also be the subject of actions in personam, together with a claim for damage done to a ship: s 9(1).

³ Law Reform Commission Report No 33 on Civil Admiralty Jurisdiction (1986) (the "Report"), para 119; DR Thomas *Maritime Liens* (Stevens and Sons, London, 1980) para 16; W Tetley *Maritime Liens and Claims* (Business Law Communication, London, 1985) p 88.

of creating any new maritime lien or other charge.⁴ The words "or other charge" in section 15 are intended to cover charges created by the formula "[the amount] shall be a charge upon the ship" which is found in various statutes.⁵

The list of maritime liens in section 15(2) was included to help those unfamiliar with admiralty jurisdiction. Just as it is not exhaustive, so it is not definitive. To discover the scope of the liens in the list, one must have regard to the pre-existing law. For example, section 4(3)(t) draws a distinction between wages and other amounts. It cannot be read in conjunction with section 15(2)(c) to cut down the scope of the wages lien, which extends to other benefits incidental to a seaman's employment and claims for damages for wrongful dismissal.⁶ Moreover, section 15(2) leaves open the possibility that the High Court might not follow the decision of the Privy Council in *The Halcyon Isle*⁷ that the question whether a particular class of claim gives rise to a maritime lien is one to be determined by the *lex fori*.⁸

It may also prove to be significant that section 6(a) refers only to the creation of new maritime liens or other charges. At one time it was thought that the existence of a maritime lien and the availability of a proceeding in rem went hand in hand: "where such a lien exists, a proceeding in rem may be had, . . . where a proceeding in rem is the proper course, there a maritime lien exists."⁹ That is still the position in the United States but in England,¹⁰ and presumably in Australia,¹¹ the law developed differently. Where a statute authorizes a proceeding in rem, it is not taken to create a maritime lien but it may extend the scope of an existing maritime lien. Accordingly, a right to proceed in rem on a claim in respect of repairs does not create a repair lien,¹² but an expanded right to proceed in rem for wages expands the scope of

⁴ The nature and extent of the maritime liens for salvage, damage, wages and disbursements are examined in Thomas ch 4, 5, 6 and 7; Tetley ch 7-10 (see also ch 18).

⁵ Report para 122.

⁶ *Infra* n 62. Similarly no restriction on the damage lien is implied by the omission in section 15(2)(b) of the words "whether by collision or otherwise" that are found in section 4(3)(a); Tetley p 168. See also Thomas paras 313 and 221 respectively.

⁷ [1981] AC 221.

⁸ EL Sykes and MC Pryles *Australian Private International Law* (2 ed, Law Book Company, 1987, p 653 and pp 747-750; Tetley p 559.

⁹ *The Bold Buccleugh* (1851) 7 Moo PC 267 p 284.

¹⁰ *The Henrich Bjorn* (1886) 11 AC 270; *The Sara* (1889) 14 AC 209; *The Castlegate* (1893) AC 38.

¹¹ *The Rose Pearl* (1957) 2 FLR 219, pp 226-227.

¹² It does create a "statutory lien", as to which see Thomas paras 45-51 and Jackson *Enforcement of Maritime Claims* (1985), ch 11 and 13.

the wages lien.¹⁴ Some of the traditional liens may therefore have been expanded by the provisions of section 4(3).¹⁴

Maritime liens are of great interest to admiralty lawyers. They partake both of property rights and rights of procedure and thereby raise their own constitutional questions.¹⁵ They almost always take priority above mortgages and statutory liens¹⁶ and are enforceable even against a purchaser of a legal interest¹⁷ for value and without notice.¹⁸ In most cases however the statutory right to proceed in rem on the underlying claim is sufficient and there is no need to identify a maritime lien unless the *res* has changed hands¹⁹ or questions of priority arise.²⁰ The rest of this paper will therefore be concerned with the claims, that may be enforced by a proceeding in rem,²¹ which are divided by section 4(1) into proprietary maritime claims and general maritime claims.²²

¹³ *The Halcyon Skies* [1977] 1 QB 14, pp 28-31.

¹⁴ I agree with Mr Hetherington: *Annotated Admiralty Legislation* (Law Book Company, 1989) para A4/70, that s 4(3)(r) does not extend the master's disbursements lien to shippers, charterers or agents.

¹⁵ Report paras 80 and 121.

¹⁶ Thomas paras 449-452.

¹⁷ A maritime lien would naturally prevail against a subsequent equitable interest. As to a sale of cargo in market overt, see Thomas para 530.

¹⁸ They take priority below the Marshal's costs and expenses and the claims referred to in s 36(5). See, for example, *The Fairport* (No 3) [1966] 2 Lloyd's Rep 253. As to possessory liens, see Tetley 340-341, 408 and 558, and as to liens generally, see Jackson Pt III.

¹⁹ A proceeding on a general maritime lien may be commenced as an action in rem against a ship or other property only where a "relevant person", as defined in s 3, is the owner or demise charterer of the ship or the owner of the property: subs 17-19.

²⁰ Thomas ch 9; Tetley ch 22 and 558-559; Jackson ch 11, 12 and 17. In *Wallace v Proceeds of the ship "Otago"* [1981] 2 NZLR 740, 752, it was held that interest pursuant to statute, awarded on the enforcement of a maritime lien, has the same priority as the lien.

²¹ The distinction between maritime liens and maritime claims is clear enough in the Act. See the definition of "maritime claim" in s 3(1) and (4), 15-19, 20(4) and 37. Nor is the Act drafted on the assumption that all maritime liens are accessory to a maritime claim: Report para 122 n 45. In the Admiralty Rules the distinction is not so well maintained. If r 15 applies to a proceeding commenced under s 15, the "relevant person" must be the person, if any, who would be liable on the underlying maritime claim in an action in personam. Thomas, paras 7, 14, 61 n 1, 274, 309, 311 and 379; Tetley 101 and ch 23; Jackson pp 228-236. Even then compliance with the rule, in the case of a maritime lien, will not always serve a useful purpose. See also rr 61, 62 and 77.

²² The bulk of it was written before publication of Hetherington. It should be read in conjunction with the annotations to s 4 and the relevant chapters of Tetley. Most of the maritime claims in s 4 are discussed in Jackson pp 33-55, and some of them, even when not giving rise to a maritime lien, in Thomas.

II. PROPRIETARY MARITIME CLAIMS

Proprietary maritime claims are defined in section 4(2).²³ They are mainly concerned with title to, or possession or ownership of, a ship and claims between co-owners on the one hand and with a mortgage of a ship or her freight on the other hand.²⁴ They also include a claim for the satisfaction or enforcement of a judgment (including a foreign judgment) in any admiralty proceeding in rem²⁵ and a claim for interest in respect of a proprietary maritime claim.²⁶ They are not limited to Australian registered ships²⁷ but, where an Australian registered ship is involved, the register may be rectified pursuant to section 32 of the Act or section 59 of the Shipping Registration Act 1981, depending on the court in which the proceeding is brought. The orders that may be made in relation to a co-ownership dispute include orders for the settlement of accounts and an order directing that the ship be sold.²⁸

Proceedings on proprietary maritime claims of the first kind mentioned above are exemplified by proceedings against a person wrongfully in possession (including the master) and proceedings between co-owners. In the former case it is obviously beneficial to be able to arrest the ship rather than to let her leave the country. In the latter case a majority of the co-owners²⁹ may wish to send the ship on a voyage but the minority have possession and decline to let her go. The majority may arrest the ship and proceed to obtain an order for possession to enable them to send her on the desired voyage, but they will be required to give security for her safe return in an amount sufficient to cover the value of the dissentients' interests. Similarly, where the majority are already in possession and about to send the ship on a voyage of which the minority disapprove, the latter may arrest her in an action of restraint and have her detained until security is given for her safe return.

Proprietary maritime claims of the second kind mentioned above are of entirely statutory origin, for the Admiralty Court had no

23 Roscoe *Admiralty Jurisdiction and Practice* (5 ed, 1987 reprint) Part 1 ch 1 and 2; *Halsbury's Laws of England* (4 ed, Butterworths, London) vol 1, "Admiralty", paras 313-318, pp 219-221; Report paras 39, 47, 149-152, 190-192 and 267-270.

24 For simplicity the references to a share in a ship are omitted in the text. "Freight" includes passage money and hire: section 3.

25 Not just a proceeding on a proprietary maritime claim.

26 See Hetherington para A4/1, for the comparable provisions of the Admiralty Court Act 1840 and the Admiralty Court Act 1861.

27 Section 5(1)(a).

28 Section 33.

29 Co-owners are to be distinguished from the shareholders in an owner company and the references to a majority are to a majority in interest.

inherent jurisdiction over mortgages.³⁰ That jurisdiction was conferred by section 3 of the Admiralty Court Act 1840 and section 11 of the Admiralty Court Act 1861. In *The Camosun*³¹ it was said that those sections appeared to be confined to claims by mortgagees, but the language of section 4(2)(a)(iii) is unrestricted. According to the Report, a mortgagor could therefore proceed in personam under section 9(1). A Mortgagor might also be able to proceed in rem if a mortgagee in possession were about to sell the ship at a gross under value.³² Although mortgages usually take priority below maritime liens, they rank above any later statutory lien.³³ It should be remembered that a mortgage includes a transaction that appears on its face to be an absolute transfer but in fact is intended as security.³⁴ Jurisdiction is no longer confined to registered mortgages or mortgages of ships that are already under arrest.³⁵

III. GENERAL MARITIME CLAIMS

General maritime claims are defined in section 4(3). There are 20 of them and, although some are familiar, they greatly extend the jurisdiction formerly available to Australian courts under the Colonial Courts of Admiralty Act 1890. The first is for damage done by a ship, corresponding with section 7 of the Admiralty Court Act 1861 and section 20(2)(e) of the Supreme Court Act 1981.³⁶ Damage is not confined to damage to other ships. The claim and the corresponding maritime lien apply equally in favour of the owner of a damaged structure on land.³⁷

30 "Mortgage" is defined in s 3(1) to include a hypothecation or pledge of, and a charge on, a ship or share in a ship, whether at law or in equity and whether arising under Australian or foreign law. Report para 151.

31 [1909] AC 597, 609.

32 Report para 151. The terms of the Administration of Justice Act 1956 (UK) s 3(4) make it clear that *The Eschersheim* [1976] 1 WLR 430 was not concerned with proprietary maritime claims. So long as his/her claim falls within section 4(2)(a)(iii) and concerns the ship, a mortgagor may proceed in rem against his/her own vessel under s16. A proprietary maritime claim exemplifies the first of the two kinds of action in rem referred to by Lord Watson in the passage quoted in *The Talabot* (1974) 132 CLR 449 p 445.

33 *Supra* n 14. As to when a statutory lien accrues and what founds jurisdiction in rem, see Thomas paras 47-49; subs 3(3) and 17-19; *The Talabot* (1974) 132 CLR 449; *The Deichland* [1988] 2 Lloyd's Rep 454 p 457.

34 Roscoe 55.

35 The Shipping Registration Act 1981 s 94A is accordingly repealed by s 59 of the Act. The priority of registered mortgages of Australian registered ships is governed by Part III of the Shipping Registration Act.

36 Examples of the kind of damage that are covered by the phrase are found in Halsbury para 319 and in Thomas para 176. Roscoe Part I ch 4; *Halsbury* paras 319-320; Report paras 43 and 165; *The Eschersheim* [1976] 1 WLR 430 pp 438-439. In *The Dagmara* [1988] 1 Lloyd's Rep 431, "damage" was held to extend to financial loss unaccompanied by physical damage.

37 Eg: *The Tolten* [1946] P 135.

After mentioning claims for maritime oil pollution,³⁸ section 4(3) defines two claims concerned with loss of life or personal injury. Both are modelled on section 20(2)(f) of the Supreme Court Act 1981, but the second has been widened to cover damage to property and economic loss³⁹ in cases where they are actionable.⁴⁰ The first claim is for loss of life or personal injury sustained in consequence of a defect in a ship or in her apparel or equipment. That overcomes the limitation that damage done by a ship requires the ship to be the instrument of the damage.⁴¹ The second is a claim, which may but need not be for loss of life or personal injury, arising out of an act or omission in the navigation or management of a ship. It must be an act or omission of the owner or charterer, a person in possession or control of the ship or a person for whose wrongful acts or omissions the owner, charterer or person in possession or control is liable, but it extends to an act or omission in connexion with loading or unloading, embarkation or disembarkation and the carriage of goods or persons on the ship.

Section 4(3)(d) therefore links up not only with the previous paragraph, in so far as it relates to loss of life and personal injury, but also to section 4(3)(e) and (f),⁴² which are claims for loss of, or damage to, goods carried by a ship and claims arising out of an agreement relating to the carriage of goods or persons⁴³ by a ship or to the use or hire of a ship. Goods includes the baggage and other possessions of a passenger or member of the crew⁴⁴ and there is no longer any requirement that the goods be carried into an Australian port.⁴⁵ The agreements referred to are all agreements of the kind described, including charterparties, as well as contracts of carriage evidenced by a bill of lading.

These two claims cover a wide variety of causes of action. The better view is that neither of them is limited to claims in contract.⁴⁶ In

³⁸ Report para 175. See also s 26.

³⁹ *Halsbury* para 322; Report paras 43, 166 and 179-184.

⁴⁰ Apart from s 34, the Act does not have the effect of creating new causes of action s 6(b).

⁴¹ *Nagrint v The Ship Regis* (1939) 61 CLR 688; *Union Steamship Co of NZ Ltd v Ferguson* (1969) 119 CLR 191.

⁴² Roscoe Part I ch 5; *Halsbury* para 321; Report paras 42 and 167-169.

⁴³ The first part of the Supreme Court Act 1981 (UK), s 20(2)(h) refers only to the carriage of goods.

⁴⁴ Section 3(3), overcoming the decision on this point at first instance in *The Eschersheim* [1976] 1 WLR 430.

⁴⁵ Admiralty Court Act 1861, s 6. Report para 42 and *The Rose Pearl* (1957) 2 FLR 219. Similarly the Act applies to all ships, irrespective of the places of residence or domicile or their owners: section 5(1).

⁴⁶ That is certainly true of s 4(3)(f). Despite *The Igor* [1956] 2 Lloyd's Rep 271, mentioned in Tetley p 320, it seems clear that the words of s 4(3)(e) would cover claims in tort.

*The Antonis P Lemos*⁴⁷ a sub-charterer brought an action claiming damages for the owner's negligence in allowing the ship to be loaded to such an extent that her draught on arrival exceeded that guaranteed by the plaintiff in a sub-sub-charter. The House of Lords held that the language of section 20(2)(h) of the Supreme Court Act 1981 was wide enough to cover claims, whether in contract or in tort, arising out of an agreement of the kind described in that paragraph and that it was not necessary for the claim to be directly connected with the agreement or for the agreement to be one made between parties to the action. A policy of insurance on the cargo is not however an agreement relating to the carriage of goods.⁴⁸

The next four claims are claims relating to salvage (including life salvage and salvage of cargo or wreck found on land)⁴⁹ and claims in respect of general average,⁵⁰ towage or pilotage.⁵¹ They are wider than those in section 20(2)(j), (k), (l) and (q) of the Supreme Court Act 1981, which refer to claims in the nature of salvage, towage and pilotage and claims arising out of general average acts but, section 4(3)(g) would not permit an action in rem⁵² against negligent salvors, because the ship or other property that a salvage claim concerns, within the meaning of subsections 17 to 19, is the ship or property salvaged.⁵³ In most cases where there is a salvage agreement, a claim under section 4(3)(f) would be available.⁵⁴

At first sight *The Tesaba*⁵⁵ is a better illustration of the difference in language. In that case salvors sued the owners of the salvaged ship for wrongfully releasing cargo without obtaining security. That was held not to be a claim in the nature of salvage. It may have been a claim relating to salvage, although it is worth noticing that Sheen J also considered whether it was a claim "arising out of ... salvage" within the meaning of the Arrest Convention and held that it was not. It arose out

⁴⁷ [1985] AC 711.

⁴⁸ *The Sandrina* [1985] AC 255.

⁴⁹ Roscoe Part I ch 6; *Halsbury* paras 323-325; Report paras 45 and 155-157.

⁵⁰ *Halsbury* para 344; Report para 158.

⁵¹ Roscoe Part I ch 7; *Halsbury* para 336; Report paras 153-154. See also Carver *Carriage by Sea* (13 ed, 1982) ch 13 and 14 and the textbooks on salvage and general average.

⁵² Quære whether it would permit an action in personam.

⁵³ *The Eschersheim* [1976] 1 WLR 430, 439F.

⁵⁴ The salvor's vessel or a surrogate ship owned by the salvor would be liable to arrest, not the plaintiff's vessel: *The Eschersheim* [1976] 1 WLR 430. Towage may likewise fall within s 4(3)(f), as in *The Conoco Britannia* [1972] 2 QB 543.

⁵⁵ [1982] 1 Lloyd's Rep 397.

of the defendants' conduct after completion of the salvage services.⁵⁶ A more fundamental difficulty would seem to be that the ship would not be liable to arrest, because the claim would relate to salvage of the cargo.

The next three claims are in respect of goods, materials or services⁵⁷ supplied to a ship for her operation or maintenance or in respect of the construction, alteration, repair or equipping of a ship.⁵⁸ The services referred to expressly include stevedoring and lighterage services.⁵⁹ Although the jurisdiction formerly found in section 6 of the Admiralty Court Act 1840 and subsections 4 and 5 of the Admiralty Court Act 1861 is extended, there still has to be a nexus with a particular ship. Accordingly, in *The River Rima*⁶⁰ a claim in relation to leased containers failed because none of the contracts of hire provided that they were required for the use of a specified ship. They were contracts for the supply of containers to a particular shipowner rather than a particular ship.

After mentioning claims in respect of liability for port or harbour dues or the like or in respect of a levy for which Australian law permits a vessel to be detained,⁶¹ section 4(3)(r) refers to a claim by the master, shipper, charterer or agent in respect of disbursements on account of a ship.⁶² Section 10 of the Admiralty Court Act 1861 conferred jurisdiction over any claim by the master of a ship for disbursements made by him on account of the ship. The main change is to extend the disbursements claim to shippers, charterers and agents, although disbursements by charterers and shippers would often be pursuant to a charterparty or contract of carriage and recoverable under section 4(3)(f) and claims by agents would sometimes fall within section 4(3)(m). The omission of the word 'made' confirms the pre-existing law; that disbursements covered not only payments made but also liabilities incurred.⁶³ It may be that the substitution of "in respect

56 See supra n 57 p 400. Similarly not all claims under s 4(3)(g) will be proceedings "concerning a claim for salvage" within the meaning of r 51(2).

57 The Supreme Court Act 1981 (UK) s 20(2)(m) does not refer to services. Both provisions go beyond the requirement that "necessaries" be supplied or that they be supplied to a foreign ship or a ship away from her home port. See also s 5(1)(a).

58 Roscoe Part I ch 8; *Halsbury* para 337; Report paras 40-41 and 170-171.

59 Tetley ch 16.

60 [1988] 1 WLR 758.

61 *Halsbury* para 337; Report para 174.

62 Roscoe Part I ch 9; *Halsbury* paras 338-343; Report paras 44 and 164.

63 Report para 44 n 58.

of" for "for" slightly widens the claim, especially as the latter has been retained in defining the wages claim in section 4(3)(t).⁶⁴

Section 4(3)(s) specifies a claim for an insurance premium, or for a mutual insurance call, in relation to a ship.⁶⁵ In doing so the Act follows the CMI draft revision of the 1952 Arrest Convention. The reasons for doing so, and the significance of the convention, are discussed in the Law Reform Commission's Report.⁶⁶ The Canadian and South African legislation goes much further by giving Admiralty courts general jurisdiction over marine insurance. The main reason for not following that course is that the hallmark of Admiralty is jurisdiction in rem and, except in the cases mentioned, there would normally be no res to arrest; but, like the CMI draft revision, section 4(3)(s) does not extend to claims for premiums by cargo underwriters, where that objection would not have applied.⁶⁷

Section 4(3)(t) refers to a claim by the master or a member of the crew for wages⁶⁸ "Member of the crew" is defined in section 3(1). Section 4(3)(t)(ii) refers to any amount that an employer as such is under an obligation to pay an employee, but the expression "wages earned ... on board the ship" in section 10 of the Admiralty Court Act 1861 had already received a very liberal construction.⁶⁹ It has been held that the claims of the master and of members of the crew should now be accorded equal priority.⁷⁰ The last two claims in the list are; a claim for the enforcement of, or arising out of, an arbitral award (including a foreign award)⁷¹ in respect of any maritime claim⁷² and a claim for interest in respect of a general maritime claim.⁷³

IV. MISCELLANEOUS

Section 5(1)(b) provides that, subject to two minor exceptions, the Act applies in relation to all maritime claims wherever arising. Section 8 provides that it binds the Crown in all its capacities but that a proceeding may not be commenced as an action in rem against a government ship or government property.⁷⁴

64 The draftsman probably preferred "in respect of" because the claim would not be to recover the disbursements themselves but rather to be reimbursed in respect of them.

65 Report para 173.

66 Report paras 94 and 173.

67 Cargo underwriters might in an appropriate case have recourse to a Mareva injunction. Tetley 387; Thomas para 113; Report paras 245-247.

68 Roscoe Part I ch 9; *Halsbury* paras 338-343; Report paras 44 and 159-163.

69 *The Halcyon Skies* [1977] QB 14; Thomas paras 308 and 319-321. The same words appear in the Navigation Act 1912 (Cth), s 91, amended by s 52 of the Act.

70 *The Royal Wells* [1985] QB 86.

71 Report paras 185-189. See s 4(2)(c) and (d).

72 Not just a general maritime claim.

73 Report paras 267-270.

74 See also the Navigation Act 1912 (Cth) s 405A, amended by s 57 of the Act.

Consistently with section 2A of the Trade Practices Act 1974 and the modern approach to sovereign immunity,⁷⁵ that restriction does not apply to ships belonging or demised or sub-demised to a government trading corporation or to the property of such a corporation. The availability of equitable remedies depends on whether the court in which the proceeding is brought ordinarily has equitable jurisdiction and probably, in the case of an action in rem, whether the owner or other relevant person enters an appearance.⁷⁶

⁷⁵ *The Philippine Admiral* [1977] AC 373; *The I Congreso del Partido* [1983] AC 244; Foreign States Immunity Act 1985 (Cth).

⁷⁶ *The Conoco Britannia* [1972] 2 QB 543; Thomas para 96; Report para 248.