

Grounds for arrest — the “construction of ship” power

*LLOYD'S SHIPS HOLDINGS PTY LTD v THE SHIP “ISIS II”**
Supreme Court of Queensland, 7 September 1989

In one of the first cases to involve judicial scrutiny of the Admiralty Act 1988 (the Act), de Jersey J was called to rule upon the validity of an arrest effected on a commercial tourist/sight-seeing vessel anchored off Hamilton Island on 1 September 1989. The arrest was based upon a general maritime claim alleged to be “in respect of the construction of a ship” under section 4(3)(n) of the Act.

The case involved a fresh point not, to the writer’s knowledge, previously decided in countries with similar legislation (England and New Zealand), although there had been a previous Canadian decision of some relevance namely *R v Canadian Vickers Ltd*.¹ In that case, Addy J was of the opinion that a contract for the supply and installation of a propulsion system for a ship was an integral part of the actual construction itself and qualified as a claim which arose “out of a contract relating to the construction of . . . a ship” under section 22(2)(n) of the Federal Court Act 1970 (Canada).

The facts of the case do not appear in the (so far) unreported judgment of de Jersey J but can be summarized as appears below.

The plaintiff ship builders entered into a ship building agreement with Queensland Marketing Management Pty Ltd on 27 June 1985 for the construction of a power yacht named “Isis II”. The vessel was built at the plaintiff’s ship yards in Brisbane and was intended to be dedicated solely for use in the transport of paying passengers on regular sightseeing tours in and around the Whitsunday Passage and other areas off the Queensland coast.

The ship building agreement contained two relevant provisions, namely —

- (a) a clause in which the owner agreed to indemnify the plaintiff builder from, inter alia, any sales tax imposts levied on it or imposed on the vessel, its construction, sale or delivery; and
- (b) a clause in which both the builder and owner agreed to do all things necessary to secure an exemption of the vessel and the materials used in the construction of it from sales tax pursuant to

* Provided by W. J. Bardoel, Partner, Minter Ellison, Melbourne.

¹ [1976] 2 FC 410.

items 119(1), (1A), and/or (4) of the Sales Tax (Exemption and Classifications) Act 1935 (as amended).

Before handover of the vessel on 30 May 1988, disputes arose between the owner and the builder as to the design, construction and performance characteristics of the vessel. In addition, on 22 May 1989, a Notice of Assessment claiming payment of sales tax and other imposts on the vessel was issued to the builder by the Australian Tax Office. A Notice of Objection was subsequently lodged in response to the assessment but this did not have any bearing on the case. The parties resolved this dispute and the sales tax complication in two ways. First they executed a deed of indemnity effectively repeating the indemnity and exemption securing clauses of the ship building agreement. Second, they executed a Certificate of Handover, the relevant part of which stated —

In reference to the Contract dated 27th day of June, 1985, between Lloyd's Ships Holdings Pty Ltd (the Builder) and Queensland Marketing Management Pty Ltd (the Owner), the Builder having fulfilled his obligations under the terms of the Contract SAVE and EXCEPT as provided for in the Contract, and as specifically excluded herein below defined, and having handed over to the Owner the subject Vessel, the Owner HEREBY releases and discharges the Builder from any claims, demands, debts or further obligations in respect of the Contract other than the Warranty period of 12 months from 30th May, 1988 being the date of handover.

The Owner having fulfilled his obligations in respect of the Contract and by final payment of the Agreed Settlement of . . . is HEREBY discharged from any further claims by the Builder in respect of the Contract and all variations to the Contract.

Motivated by concern over the delay in the hearing of the Notice of Objection and the penalty interest theoretically accruing on the amount of sales tax levied in the assessment, the plaintiff instigated steps to arrest the vessel. Both the warrant of arrest and the supporting affidavit claimed the sum of \$593,181.79 "in respect of the construction of the ship Isis II" but gave no particulars as to how this sum was calculated.

A warrant of arrest was issued out of the Supreme Court at Mackay and the Marshall arrested the vessel. The owner immediately made application to set aside service of the writ and to have the writ quashed on the basis that the court lacked jurisdiction to deal with the matter. The owner's application was based on two grounds: the substantive ground that the claim for sales tax indemnity could not be properly characterized as one in respect of construction of a ship, and the procedural ground that the affidavit in support of the arrest warrant was insufficient and contrary to the rules of court in that it contained a conclusion without setting out the grounds for that conclusion.

The owner's application was met with a cross-application for leave to amend the writ to include as part of the \$593,181.79 sought, an

amount of approximately \$8,000 for repairs allegedly effected to the vessel and to make it clear that this component of the claim was pursued under section 4(3)(o) of the Act. Leave to amend in respect of this application was granted but the decision did not turn on this point and, in any event, the owner had in the meantime lodged a caveat against arrest to the extent of the repair claim.

Mr Fryberg, on behalf of the plaintiff, argued that the claim for sales tax indemnity had a relationship to construction and pointed to the indemnity clauses in the ship building agreement and subsequent deed of indemnity. Mr White QC, on behalf of the owner, argued that, if there was any liability to the builder, it did not arise out of, nor was it in respect of the construction of a ship, but arose out of a sales tax indemnity. He pointed to the release clauses in the Certificate of Handover, the fact that construction of the vessel had been completed approximately 16 months earlier and the fact that the 12 month defects liability period had, by then, run its course.

On the substantive point, His Honour had no difficulty upholding the arrest and dismissing the owner's application. In so doing he stated —

The words 'in respect of' may be wide and, prima facie, are But their connotation in any particular case may be affected by context . . . I consider that in this provision a reasonably close relation between the claim and the actual construction was envisaged and I reach that view by consideration of the whole of the subsection . . .

His Honour went on —

How close is the relation here between the construction and the sales tax claim? Well but for the construction the claim could not be made. Adopting the language of causation and going somewhat further, the sale, coupled with the construction, might be regarded as a proximate cause of the claim. In fact, the obligation to pay sales tax arose directly from the contract under which the plaintiff agreed to construct the ship for the owners. In my opinion that gave rise to a sufficiently close connection to warrant my regarding the claim as a claim in respect of the construction. To illustrate my reasoning further, I would regard the position as different were a ship like this being sold, as it were, from a showroom floor. Where, however, the contract for the construction itself includes an obligation to pay the sales tax, as an incident of the construction, then I believe the requirements of paragraph (n) have been satisfied.

His Honour also had no difficulty disposing of the procedural point, dismissing it as an "irregularity" and dispensing with further compliance with the Admiralty Rules 1988. The owner's application was therefore refused with costs.

By way of obiter dictum de Jersey J cited examples of claims obviously falling within paragraph (n) and included in that category claims for unpaid costs of construction and claims "sufficiently closely related to the actual construction . . . such as . . . a claim for damages arising from defective construction."

Although His Honour stressed the need to demonstrate a close connection between the cause of action and the construction, it is submitted that the closeness of the connection between the enforcement of a sales tax indemnity and the (by then historical) construction of the vessel was not obvious in conceptual terms. It is also submitted that the decision is instructive of the court's willingness to afford the Act a wide and liberal interpretation, a not altogether unexpected phenomenon having regard to the vintage, purpose and omnibus nature of the reforms intended to be effected by the legislation.

The owner lodged an appeal but the vessel's release was secured by other means and the appeal abandoned.