
Arresting Surrogate Ships: Who Is An Owner?



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Introduction

In order to arrest a surrogate ship, there must be a nexus between the surrogate and the relevant person (i.e. the wrongdoer). Under s 19 of the *Admiralty Act 1988* (Cth) (*the Act*) that nexus relates to ownership – namely, the wrongdoer must be the owner of the surrogate ship. This article examines the extent to which a court is prepared to conclude that a wrongdoer is the owner of the surrogate ship, with particular reference to the division of opinion in the recent decision *Kent v The Vessel “Maria Luisa” (as Surrogate for the Vessels “Monica” and Boston Bay)* (*the Maria Luisa*).¹

Arresting a Surrogate Vessel in Australia

Part III of the Act provides that a matter of admiralty or maritime jurisdiction may be commenced as an action against a ship or other property. Sections 15 to 18 of the Act grant rights to proceed *in rem* against a ship or property, which may itself be the subject of a maritime lien, a proprietary maritime claim or a general maritime claim. Section 19 provides for something which is unknown at common law, namely, the right to proceed *in rem* against a surrogate ship in relation to particular claims. This section states:

A proceeding on a general maritime claim² concerning a ship may be commenced as an action *in rem* against some other ship³ if:

- (a) a relevant person⁴ in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and
- (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.

The Law Reform Commission (*the Commission*) in its 1986 report, *Civil Admiralty Jurisdiction*,⁵ (*the Report*) described the nexus between the relevant person and the surrogate ship in the following detail:

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¹ [2003] FCAFC 93.

² A list of general maritime claims is contained in s 4(3)(a) – (w) of the Act.

³ It is by operation of s 3(6) that the ‘other ship’ is known as the ‘surrogate ship’.

⁴ Section 3 of the Act provides that ‘relevant person’, in relation to a maritime claim, means a person who would be liable on the claim in a proceeding commenced as an action *in personam*.

⁵ The Law Reform Commission, Report No 33, *Civil Admiralty Jurisdiction*, Australian Government Publishing Service, Canberra, 1986 at [205].

If the purpose of the action in rem against a surrogate ship is to persuade the relevant person to appear and to provide security, the appropriate nexus is not with the wrongdoing ship but rather with the relevant person. In other words, the proper nexus requirements are, first, between the claim and the wrongdoing ship, then between the wrongdoing ship and the relevant person and finally between that person and that person's other ships. (Footnotes omitted.)

In order to establish that a nexus exists between the relevant person and the surrogate ship, one must determine whether the relevant person owns the surrogate ship. However, s 19 is not particularly forthcoming as to how this enquiry is to be determined. Who is an owner for the purpose of s 19? What constitutes ownership? While these questions appear to be relatively simple, they are not so in the present commercial context, which includes demise charterers, one-ship companies and, very occasionally, trusts. In analysing these issues, courts have had regard to the words of the Act itself, the Act's legislative antecedents, and judicial interpretation given to the Act and its antecedents.

Interpreting the Act

The Act reproduces in substance draft legislation prepared by the Commission in the Report.⁶ The Commission stated that an object of its draft legislation was to "strike a balance between following the English legislation and seeking to clarify and simplify the law".⁷ It is in relation to this second matter that the Act is regarded as being remedial in its effect and that the national interest is served by expanding admiralty jurisdiction.⁸ This in turn has affected the approach in interpreting the Act.

The High Court in *Owners of the Shin Kobe Maru v Empire Shipping Co Inc* said that in interpreting the Act one should have regard to the natural and ordinary meaning of the words and that "a statutory definition should be approached on the basis that Parliament said what it meant and meant what it said".⁹ Therefore, "a definition should be read down only if that is clearly required as, for example, if it is necessary to give effect to the evident purpose of the Act".¹⁰

In *Yulianto v Ship Glory Cape Murray J* referred to the High Court's interpretive approach to the Act in *Shin Kobe Maru* and concluded that the Act "should be construed expansively rather than strictly".¹¹ He concluded that "the principles thus expressed [by the High Court] are, of course, of an ordinary kind in relation to the task of statutory interpretation".¹² It is imperative that this latter point is borne in mind, as its neglect can lead one into error.

The Arrest Convention

At common law it is generally accepted that there is no right of arrest in relation to a ship or to effect service upon a ship which is wholly unconnected with the cause of action.¹³

⁶ Ibid at Appendix A, 263 – 282.

⁷ Ibid at [95].

⁸ *Owners of the Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 416.

⁹ (1994) 181 CLR 404, 420.

¹⁰ (1994) 181 CLR 404, 420.

¹¹ (1995) 134 ALR 92, 99.

¹² (1995) 134 ALR 92, 96.

¹³ *The Beldis* [1936] P51, 72-76 and 83-84. This case overturns the decision in *Henrich Björn* (1885) 10 PD 44, 54. It should be noted, however, that W. Tetley QC in *Maritime Liens and Claims*, (2nd ed), International Shipping Publications, Montreal, 1989, at Ch 24, gives something of defence of the *Henrich Björn* judgment.

In common law jurisdictions, the right to arrest a surrogate vessel is founded on statute.¹⁴ In Australia s 19 of the Act is based upon s 21(4) *Supreme Court Act 1981* (UK) (*the 1981 UK Act*), which is based upon the *Administration of Justice Act 1956* (UK), which provided for “sister ship” arrest in s 3(4) (*the 1956 UK Act*).

The 1956 UK Act was enacted to integrate into English law the *International Convention relating to the Arrest of Seagoing Ships*, signed in Brussels in 1952 (*the Arrest Convention*).¹⁵ It is apparent, however, that the 1956 UK Act does not fully achieve this purpose.¹⁶ In any event, since the 1956 Act was passed to give substantial effect to the Arrest Convention in the United Kingdom, it has been held that:

If there be any difference between the language of the statutory provision and that of the corresponding provision of the Convention, the statutory language should be construed in the same sense as that of the Convention if the words of the statute are reasonably capable of bearing that meaning.¹⁷

Australia is not a signatory to the Arrest Convention but, given the Commission’s regard to the English legislation in preparing the draft legislation, consideration should and has been given to it.¹⁸ Art 3 of the Arrest Convention relevantly provides:

1. Subject to the provisions of paragraph 4 of this Article ..., a claimant may arrest either the particular ship in respect of which the maritime claim arose or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested may be ready to sail...
2. Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same persons.
- ...
4. When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

Under the Arrest Convention, the nexus between the defendant and the surrogate ship is that it must be *owned* by the defendant. Paragraph 1 simply states “owned” with no qualification. Having regard to paragraph 2, it must follow that “owned” in paragraph 1 applies to full ownership as opposed to co-ownership. This would also appear to be the law in Australia. The Act and, more particularly, s 19 make no provision for the arrest of a ‘surrogate’ ship which is only co-owned by the relevant person. As the Commission noted in the Report:

Where the other ship is only partly owned by the relevant person, neither the 1952 Arrest Convention Art 3(2) nor any of the recent Acts allow an action in rem to be brought ...

¹⁴ For example, see s 5(2)(b) *Admiralty Act 1973* (NZ); s 21(4) *Supreme Court Act 1981* (UK) (in England it is referred to as “sister ship” arrest); and s 3(6) *Admiralty Jurisdiction Regulation Act 1983* (SAf) as amended by *Admiralty Jurisdiction Regulation Amendment Act 1992* (SAf) (in South Africa it is referred to as “associated ship” arrest).

¹⁵ *The Eypo Agnic* [1988] 3 All ER 810, 812.

¹⁶ Tetley n13 at 464.

¹⁷ *The Jade, The Eschersheim* [1976] 1 All ER 920, 924.

¹⁸ See, for example, *Translink Pacific Shipping Ltd v Baltic Shipping Co* (unreported, Federal Court, Western Australian Registry, 6 October 1994, Lee J) at 5 – 7; *The Maria Luisa* [2003] FCAFC 93 [38] – [41].

there is no sufficient warrant for departing from the position adopted in the [Arrest] Convention and in all relevant overseas legislation. The proposed legislation should accordingly allow an action *in rem* against the other vessel only where all its co-owners are relevant persons on the original claim.¹⁹ (Footnotes omitted.)

Having regard to the circumstances addressed in Art 3(4) of the Arrest Convention, it must also follow that “owner” in paragraph 1 does not include a demise charterer. There are a number of decisions that suggest “charterer” in paragraph 4 is not restricted to a demise charterer.²⁰ It is in part by reason of these decisions, among others, that in Australia “charterer” in s 19(a) of the Act is not confined to a demise charterer.²¹ Thus, under the Australian as well as some of the relevant overseas legislation, a ship of which the relevant person is merely a demise charterer cannot be arrested as a surrogate on that basis alone.

Ownership under the English Legislation

In relation to ownership of a sister ship both the 1956 UK Act and the 1981 UK Act refer to “beneficial ownership”. Section 3(4)(a) of the 1956 UK Act provided that the sister ship had to be “beneficially owned” as respects all the shares therein by the person who was liable by virtue of the section. Section 21(4)(b)(ii) of the 1981 UK Act provides for an action *in rem* against “any other ship at which ... the relevant person is the beneficial owner as respects all shares in it”. In simple terms, “beneficially owned” has been held to mean “equitable ownership, whether or not accompanied by legal ownership”.²² It has also been held that beneficial ownership does not include a demise charterer.²³ Robert Goff J in *The I Congreso Del Partido*²⁴ described the reason for the use of the expression “beneficially owned” as follows:

the intention of Parliament in adding the word ‘beneficially’ before the word ‘owned’ ... was simply to take into account of the institution of the trust, thus ensuring that if the ship were operating under the cloak of a trust, those interested in the ship should not thereby be able to avoid the arrest of the ship.

This reasoning in theory sounds convincing; however, as has been frequently pointed out, trusts of ships are rare.²⁵ Is it possible that Parliament intended that “beneficially owned” extended to allowing the arrest of ships owned by one ship companies within the one corporate group? This was dealt with conclusively by Lord Donaldson MR in *The Eppo Agnic*,²⁶ where his Honour said:

The truth of the matter, as I see it, is that s 21 does not go, and is not intended to go, nearly enough to give the plaintiffs a right of arresting a ship which is not “the particular ship” or a sister ship, but the ship of a sister company of the owners of “the particular ship”. The purpose at s 21 (4) of the 1981 Act is to give rights of arrest in respect of “the particular ship”, ships in the ownership of the owners of “the particular ship” and those

¹⁹ The Law Reform Commission, n5 at [206].

²⁰ *The Permina 108* [1978] 1 Lloyd’s Rep 311; *The Span Terza* [1982] 1 Lloyd’s Rep 22; *The Sextum* [1982] 2 Lloyd’s Rep 532; *Reef Shipping v The Ship Fua Kavenga* [1987] 1 NZLR 550.

²¹ *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181, 205-6.

²² *The I Congreso del Partido* [1978] QB 500, 538; *The Father Thames* [1979] 2 Lloyd’s Rep 364. In Australia the existence of beneficial interests in ships is acknowledged by ss 11(1)(b) and 47 *Shipping Registration Act* 1981 (Cth).

²³ *The I Congreso del Partido* [1978] QB 500, 539.

²⁴ [1978] QB 500, 542.

²⁵ The Law Reform Commission, n5 at 106 and cases referred to. However, as will be seen below in *The Maria Luisa*, they are not unknown.

²⁶ [1988] 3 All ER 810, 815.

who have been spirited into different legal, i.e. registered, ownership, the owners of “the particular ship” retaining beneficial ownership of the shares in that ship.

It is in relation to the prevalence of the one-ship companies, that pressure has come to bear on the meaning ‘beneficial ownership’ in the 1981 UK Act.

It is common practice for shipping businesses to have a fleet of ships financed and managed by a single company but for each ship within the fleet to be owned by a separate company. Each of these companies is often wholly owned by the same principal company. Often the ship owning companies are registered in countries where the names of shareholders are not publicly available.²⁷

The use of one-ship companies was described in 1997 as follows:

Since 1952, the stratagem of the single-ship company has proliferated. As a result few ships have ‘sisters’ within the meaning of the 1952 Convention. The only option available to many claimants, therefore, is to arrest the particular ship in respect of who the maritime claim arises. The balance that the 1952 Convention sought to strike has tilted in favour of the shipowner.²⁸

Perhaps this “tilting” has been exacerbated by the courts, which in common law countries are reluctant to pierce the corporate veil where a corporate structure includes a number of one-ship companies. A court will only pierce the corporate veil where it concludes that the corporate form is being utilised to effect a fraud or a sham. Nigel Meeson in *Admiralty Jurisdiction and Practice*²⁹ summarises the current situation as follows:

it is clear that the courts have recognised that the “one-ship” company is a legitimate business arrangement, and in the absence of evidence of fraud it is not permissible to lift the corporate veil in order to look behind the “one-ship” company structure for the purposes of identifying the beneficial owner of the company and say that the beneficial owner of the company is the beneficial owner of the ship.

Ownership under the Act

In Australia the issue whether “ownership” under s 19 is confined to a registered owner was considered in *Malaysia Shipyard v Iron Shortland as Surrogate for the Ship Newcastle Pride*.³⁰ In that case Sheppard J concluded:

I think there are difficulties in taking the simple view that “owner” in the section means only “registered owner”. After all, the section does not use those words. Obviously the registered owner will, in the absence of other evidence, be taken to be the beneficial owner. But there seems to me to be no reason of policy why the section should not be construed to mean or to include a beneficial owner.³¹

Just as in the United Kingdom, “owner” does not include a demise charterer under s 19 of the Act.³²

In Australia courts are extremely reluctant to pierce the corporate veil. This is exacerbated by the fact that “it is still impossible to discern any broad principle of company law indicating the circumstances in which a court should lift the corporate

²⁷ Meeson, N., *Admiralty Jurisdiction and Practice*, LLP, London, 1993 at 78 – 9.

²⁸ Quoted in Berlingieri, F., *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions* (3rd ed), LLP, London, 2000 at 479.

²⁹ Meeson, n27 at 79.

³⁰ (1995) 131 ALR 738.

³¹ (1995) 131 ALR 738, 749.

³² *The Maria Luisa* [2002] FCA 1207. This matter was not raised on appeal.

veil³³ This was a matter considered by the Commission in the Report, which concluded that this was better left being addressed through company or insolvency law rather than in an admiralty context.³⁴

The judgments in *The Maria Luisa* not only contain a useful summary of the law in Australia in relation to s 19 of the Act but also demonstrate how far Australian courts are prepared to go in finding whether a wrongdoer owns a surrogate ship.

The Maria Luisa

The facts of the case can be stated as follows. Mr Kent was employed as a deckhand and diver in the tuna farming industry. He claimed that in the course of his employment he had suffered personal injury by the gradual onset of decompression illness, as a consequence of which he was irreparably disabled.

While in this employment, Mr Kent worked off a number of vessels, including the *Monika* and the *Boston Bay*. Both of these vessels were owned by a different company as the trustee of a different trust. The sole beneficiary of each of these trusts was Australian Fishing Enterprises Pty Ltd (*AFE*). *AFE* was the charterer of the two vessels.

Mr Kent alleged that his injuries were the result of negligent acts or omissions of *AFE* and that consequently this constituted a general maritime claim under s 4 of the Act. A writ *in rem* was filed and the fishing vessel, the *Maria Luisa*, was arrested as a surrogate for the two vessels.

Everdene Pty Ltd (*Everdene*), the registered owner of the *Maria Luisa*, made application to set aside the arrest, principally on the basis that *AFE* (the relevant person in the writ) was not the owner of the *Maria Luisa* at the time the proceedings were commenced.

It was common ground between the parties that:

- Everdene was the registered owner of the *Maria Luisa* in the Australian Register of Shipping;
- *AFE* was the sole shareholder of Everdene;
- Everdene was the trustee of the *Maria Luisa* Unit Trust (*the Trust*);
- the *Maria Luisa* was an asset of the Trust;
- *AFE* held all of the units in the Trust.

The application by Everdene was heard and determined at first instance by Beaumont J.³⁵ The plaintiff submitted that since *AFE* was the demise charterer of the *Maria Luisa* it was therefore the owner for the purpose of s 19. This was rejected by Beaumont J who accepted Everdene's proposition of law that:

a person is not a 'beneficial owner' merely by being in possession as operator and manager, or under a demise charter.³⁶

In reaching this conclusion, Beaumont J followed Robert Goff J's reasoning in *The I Congreso del Partido*. (See above)

The plaintiff also submitted that an inference could be drawn from the surrounding circumstance as to matters, including the method of operation of the *Maria Luisa*, which

³³ Ford, H. A. J., et al. *Ford's Principles of Corporations Law* (10th ed), Butterworths, Australia, 2001 at 138. While the 11th, and latest, edition of this work does not repeat this conclusion, little has changed in Australian law to derogate from it.

³⁴ The Law Reform Commission, n5 at [141].

³⁵ [2002] FCA 1207.

³⁶ [2002] FCA 1207, [32].

suggested that AFE was in fact the owner. In rejecting this submission, Beaumont J said that he had difficulty in locating the facts which supported this inference. He added that:

... so far as all the formal records go ... they are consistent with full (that is, both legal and equitable) ownership residing in Everdene. So far as the informal material is concerned, this is, I think, equivocal.³⁷

It appears that the plaintiff's principal submission, which was the only matter raised on appeal, was that AFE's interest under the Trust was such that it was the owner of the *Maria Luisa*. For what was to be *the* issue on appeal, it is somewhat ironic that Beaumont J dealt with it (with respect, correctly) in the space of one sentence:

AFE's rights under the trust deed constituting the Trust do not confer upon it equitable ownership in the Trust's individual assets (see eg *Official Receiver in Bankruptcy v Shultz* (1990) 170 CLR 306 at 313 – 314; *MSP Nominees Pty Ltd v Commissioner of Stamps (SA)* (1999) 198 CLR 494 at 509).³⁸

On appeal the plaintiff/appellant submitted that the trial judge erred in reaching this conclusion. Could it be said that the existence of the Trust meant that AFE was a beneficial owner of the *Maria Luisa*? The Full Court of the Federal Court split 2:1 in favour of the respondent, Everdene.

The Maria Luisa - The Majority Judgment

Tamberlin and Hely JJ (*the majority*) started with a consideration of the effect of the provisions of the Trust deed. They noted that it provided that:

- the trustee held the trust fund and income thereof in trust for the unit-holders (cl 1);
- the beneficial interest in the trust fund was held by the unit-holders in proportion to their units (cl 2(a));
- each unit-holder with the other holders was entitled to a beneficial interest in the trust fund but that did not entitle the unit-holders to any particular security or investment comprising the trust fund (cl 2(c));
- subject to cl 12, no unit-holder was entitled to the transfer to him of any property comprising the trust fund (cl 2(c));
- the Trust continued until the vesting day, which the trustee may appoint with the consent of all unit-holders (cl 12(a));
- after the vesting day the trustee was to convert the property comprising the trust fund into money and to divide the proceeds between the unit-holders; however, the trustee in its discretion may, at the request of a unit-holder, transfer to him any asset of the trust fund on account of the unit-holder's entitlement on the termination of the Trust (cl 12(a)).

The respondent submitted that, if AFE had a beneficial interest in the *Maria Luisa*, it was not the beneficial owner, as the terms of the Trust denied AFE any entitlement to call on the vessel except in the circumstances provided in cl 12(a) of the deed. It further submitted that there was not such entitlement because the trustee may also have a beneficial interest in the trust property, by reason of an entitlement to indemnity from the trust fund for expenses incurred. Accordingly, if the trustee had an equitable interest in the Trust property, then the unit-holder was not *the* beneficial owner.³⁹

³⁷ [2002] FCA 1207, [40].

³⁸ [2002] FCA 1207, [38].

³⁹ [2003] FCAFC 93, [54] – [55].

The majority accepted this submission. They noted the difference between equitable ownership and an equitable interest:

Ownership, whether legal or equitable, therefore involves something greater than beneficial interest. Equitable ownership of property is commensurate with the right to relief in a Court of Equity ... If a person has contractual rights in relation to a ship which, if performed with result in the person becoming the owner of the ship, then the person will be regarded as the equitable owner of the ship provided that specific performance of the contract would be decreed ... Thus entitlement to a vesting order or equivalent relief would be necessary before AFE could be regarded as the equitable owner of the ship as at the relevant date ... But that does not mean that AFE does not have an interest in the trust property, including the ship, which equity would protect regardless of whether AFE could be called an equitable owner.⁴⁰

The appellant had responded in argument that AFE was the owner of the *Maria Luisa* under s 19 of the Act because it had the ability to become the owner by taking steps which were within its power to take.⁴¹ This was rejected by the majority, who expressed the opinion that s 19 is concerned with title to or proprietorship of the vessel at a particular point in time. The capacity of AFE to become the owner lacked the directness and immediacy to confer title or ownership on AFE.⁴² The majority concluded:

The circumstance that AFE may be said in general terms to enjoy “a bundle of rights” which may enable it by a series of discrete actions to obtain ultimately possession of the ship, control its activities, and entitle it to alienate the ship, does not equate to present ownership at the particular point in time. Rather, it indicates the potential to become the owner. The bundling of a series of discrete entitlements which if exercised could lead to ownership does not satisfy the requirement of s 19.

The majority judgment is with respect legally correct and is probably consistent with the approach taken in England as regards the definition of “beneficial owner” in the 1981 UK Act.⁴³ However, as a matter of public policy it only adds weight to the complaint that the balance has tilted in favour of the ship owners. It is perhaps with regard to this matter of policy that the minority judgment was written.

The Maria Luisa – The Minority Judgment

Moore J examined the varying judicial opinions as to what constitutes “beneficial ownership”. His Honour then referred to *McIlwraith McEacharn Ltd v Shell Co of Australia* in which the High Court concluded that “owner” in s 503 *Merchant Shipping Act 1894* (Imp) could include the charterer of the ship in question.⁴⁴ This led his Honour to conclude that “in the realm of Admiralty law, the notion of ownership does not have a fixed content”.⁴⁵

⁴⁰ [2003] FCAFC 93, [66]. Interestingly, *Arjon Pty Ltd v Commissioner of State Revenue* [2003] VSCA 213 seems to contradict the majority’s conclusion. Whether *Arjon* will be adequately distinguished or become a focal point of dispute in future arrest cases remains to be seen.

⁴¹ [2003] FCAFC 93, [71].

⁴² [2003] FCAFC 93, [72].

⁴³ See the definition of “beneficial owner” referred to at n22. The High Court in *Owners of the Motor Vessel Iran Amanat v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130, 138 [20] said that the Act should be construed in the same way as the English legislation, unless the construction is unreasonable or inapplicable to Australian circumstances.

⁴⁴ (1945) 70 CLR 175 at 194, 199, 213 and 218.

⁴⁵ [2003] FCAFC 93, [25].

His Honour's conclusion ignores the fact that "owner" in the *Merchant Shipping Act*, by reason of its context and that particular Act's purpose, includes a charterer. On the other hand it is patent from the words of s 19 *Admiralty Act* that an owner does not include a charterer. This is consistent with a reading of the Arrest Convention, the interpretation adopted in England and the judgment of Beaumont J at first instance, which was not subject to appeal. The *Merchant Shipping Act* and the *Admiralty Act* are not to be read as the one document in relation to the issue of ownership: they are separate and distinct Acts passed by different Parliaments, each giving effect to its own purpose. To conclude that the definition of "owner" in one Act impacts upon the definition of "owner" in the other (without any express provision to that effect) involves a leap in logic.

Moore J, while adopting part of the majority's judgment, rejected their ultimate conclusion. His Honour focused upon the fact that the AFE was the sole shareholder of Everdene, was the sole unit-holder under the Trust and that, in effect, under the Trust deed AFE had complete control over the *Maria Luisa*. He concluded:

...having regard to the circumstances ... AFE presently enjoys a bundle of rights which enables it to exercise control over and enjoy possession of the ship, and it is able to resist any alteration to that position. It can take steps to, and ultimately can, alienate the ship. Everdene does not enjoy the same comprehensive a range of rights and is constrained by the trust deed and its obligations to AFE under the deed (as well as being denied possession and control by the charter party). I would conclude that AFE (and not Everdene) was the owner of the ship for the purposes of para 19(b) of the Act and the Court has jurisdiction to determine this proceeding.

His Honour's judgment does two things: first, it interprets "owns" in s 19 extremely widely; and, second, it obfuscates the distinction between ownership and control.

It would be extraordinary, if in using "owns" in s 19 of the Act, Parliament intended courts not to follow the common law in deciding what constitutes ownership. Without clearly expressing its intention to the contrary, Parliament is presumed not to be abrogating fundamental principles of common law.⁴⁶ Accordingly, in determining the question of ownership, the approach of the majority is to be preferred because it is consistent with previous common law authority.

As to the second limb of Moore J's conclusion, undue emphasis was given to the control AFE exercised over the *Maria Luisa*. Ownership and control are not to be confused. While control may be a right that flows from ownership, this is not always the case. Exclusive right to control premises or chattels may be given to a person even to the exclusion of the owner: examples include, a lease of premises or the bailment of goods. As the High Court said in *Shin Kobe Maru*, the Parliament said what it meant and meant what it said. In using the word "owns" it cannot be reasonably said that Parliament in fact intended the word to mean "controls".

Conclusion

The *Maria Luisa* is yet another example of the pressure that has come to bear from time to time on statutory provisions in common law countries which permit the arrest of surrogate vessels. On the one hand the majority judgment applied the law strictly and, with respect, correctly. On the other hand, the impotence of s 19 is demonstrated by the effect of the majority's conclusion and by Moore J's attempt to 'right the balance'.

⁴⁶ *Davern v Messel* (1984) 155 CLR 21, 31.

Whether the balance needs to be ‘righted’ and how it should be done are really questions of policy, which require substantial industry input. It is interesting to note that at the 1997 Diplomatic Conference, which led to the final draft of the 1999 Arrest Convention, the United Kingdom delegation proposed that control should be the criterion in deciding whether there is a nexus between the wrongdoer and the surrogate ship. It suggested that a court should take into account factors including whether the wrongdoer is able to:

- (a) make decisions in respect of that ship;
- (b) influence the implementation of those decisions; and
- (c) direct the distribution of profits from the operations of that ship.

The proposal was rejected by a large majority of the delegations in attendance, which included Australia.⁴⁷

It is also interesting to note that recently Professor Cremean, in the light of *The Maria Luisa*, has suggested that Australia follow the New Zealand legislation by including a demise charterer in s 19(b).⁴⁸

Where this debate will end I am reluctant to say; however, in the meantime our Courts have no option other than to interpret s 19 in accordance with common law principles of ownership and in the light of the decisions both in Australia and in England.

High Court

On 12 March 2004 the High Court heard the unsuccessful appellant’s application for special leave to appeal. After hearing counsel for the applicant, the Court did not call upon counsel for the respondent. Special leave was refused.⁴⁹

⁴⁷ Berlingieri, n28 at 322 – 3.

⁴⁸ Cremean, D., *Admiralty Jurisdiction Law and Practice in Australia and New Zealand*, (2nd ed), The Federation Press, Sydney, 2003 at 119.

⁴⁹ *Kent v “Maria Luisa” as Surrogate for the Vessels “Monika” and “Boston Bay”* [2004] HCATrans 63.