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## Case Notes

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### *Tisand (Pty) Ltd v The Owners of the Ship MV "Cape Moreton" (ex "Freya")* [2005] FCAFC 68

Peter Dawson \*

#### Introduction

The process for the transfer of ownership in a vessel across jurisdictions takes time, and will normally follow a well trodden path. So much so that a series of standard form agreements are normally used. Where a vessel is arrested whilst the documentary processes are in progress in a jurisdiction remote from the domicile of the vendor or the purchaser, interesting questions of law may arise. When does "ownership" transfer? Is there a distinction between 'legal' and 'beneficial' ownership?

In a lengthy and thoroughly researched judgment of the Federal Court of Appeal, the full bench examined these issues and concluded that the "substance of the evidence"<sup>1</sup> should be relied upon rather than relying upon the "legal form" of the registration of the *MV Cape Moreton* ("the vessel").

This was a classic case of the Plaintiffs being too late from the starting blocks, having arrested the vessel for a cargo claim after title in the vessel had passed from the old owners (the carrier) to the new owners and having to cast about for an innovative remedy to assert their claim.

#### The Facts

The vessel was arrested on 8 June 2004 at the instance of the three Plaintiffs for a cargo claim totalling US\$224,000. At the time of the carriage of the Plaintiffs' cargo, Freya Navigation Shipholding Ltd ("*Freya*") was the carrier and thus liable for the damage to the cargo. This was not disputed. Two days after the arrest, Alico Marine Ltd ("*Alico*") entered appearance to defend the claim and by Notice of Motion, sought to set aside the arrest of the vessel. At the same time, the Plaintiff's claim was secured by a P & I Club letter made conditional upon the resolution of a jurisdictional point, which is the subject of the judgment. On 16 September 2004 the Chief Justice directed that the jurisdiction of the Court was to be exercised by a Full Court. The basic facts were agreed and the issue that was considered by the Full Court was agreed as follows:

[The Court] notes the agreement of the parties that the notice of motion filed in Court on 10 June 2004 to be the subject of the hearing by a Full Court on 18 November 2004 raises the following issues.

- (a) Whether as a matter of law upon the proper construction of s 17 of the Admiralty Act 1988 (Cth) the word "owner" necessarily includes "registered owner" (in the sense identified in paragraph [23] of the judgment delivered in these proceedings on 10 September 2004 [2004] FCA 1191);

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<sup>1</sup> See the judgement of Davis J in the South African Case of *MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* 2002 (2) SA 407, at 415.

- (b) Whether upon the agreed facts set out in attachment “A” hereto, the agreed bundle of documents identified in the index being attachment “B” hereto, and any inferences properly drawn therefrom, the plaintiffs have established the jurisdictional fact required by s 17(b) of the Admiralty Act 1988 (Cth) in relation to their claim in the present proceedings.

Put simply, if Alico could sustain the argument that ownership in the vessel had transferred to them prior to the arrest, the Plaintiffs could not assert that Alico was a relevant person for the purposes of s 17(b) of the Act and that there was no statutory basis on which to commence the action *in rem* or to arrest the ship.

The judgment contains a detailed exposition of the transaction. The facts are unremarkable and typify a normal transaction for the sale and purchase of a vessel between companies in two jurisdictions (the vendor company was Liberian and the purchaser company was domiciled in the Marshall Islands) and with two flags, in this case Liberia and Hong Kong. Additionally, both the vendor and the purchaser had mortgages registered over the vessel in favour of lending institutions in their respective jurisdictions. Both the vendor and purchaser companies were remote from Australia.

Standard form ship sale documentation was used, including a Norwegian Sale Form 1993 (with amendments and additional clauses) and a standard form Bill of Sale. The Bill of Sale recorded the transfer of the shares in the vessel on 24 May 2005. The following day the vessel was provisionally registered in Hong Kong and the purchase price (US\$7,225,000) exchanged hands.

At the time of the intervention of the arrest (8 June 2004) the vessel was provisionally registered in Hong Kong and not yet deleted from the Liberian Register, and still carried a Liberian Certificate of Registry and presumably was still carved and marked with the Liberian Flag’s Port of Registry and official number. Small wonder therefore, that the unsuspecting Plaintiffs thought they had arrested the right vessel. An enquiry made of Lloyds Register would not have revealed the passing of ownership.

Thus the battle lines were drawn. It seems that the lawyers acting for the Plaintiffs (apparently both Sellers and Purchasers of the damaged cargo) were left in the position of having (rather forlornly, in my view) to opt for a narrow interpretation of the word ‘owner’ by reference to the fact that the vessel remained formally registered on the Liberian Register, and as such remained legally owned by Freya, this ensuring, that they would come home against the correct owner.

Alico, on the other hand, stumped up with the facts described earlier, with supporting resolutions of the companies concerned and in addition showed that they had devolved the management of the vessel on to the bona fide vessel manager, who was in the process of finalising the documentary change to give effect to the new flagging on the Hong Kong Register.

### **The Judgment**

The judgment of Ryan J and Allsop J provides a comprehensive review of the meaning of ‘owner’ both in ss 17, 18 and 19 of the *Admiralty Act 1988* and in Australian law and practise. By reference to a range of authorities it is emphasised that the word ‘owner’ is not restricted to registered owner, but extends to the true or beneficial owner. They conclude:

The question is one as whether the relevant person answers the description of “the owner” in a proprietary sense, in all the circumstances. In our view in the circumstances here, Freya was not “the owner” of the ship at the commencement of the proceedings. As a

result there was no authority in the Act to proceed against the ship in rem and accordingly the in rem writ was set aside.<sup>2</sup>

In their lengthy judgment, the learned Judges resorted to international case law, texts and Conventions, and reviewed the Australian authorities. Their departure point was the ordinary meaning of the word and several references are made to non maritime judgments on the subject. The terms “true”, “real” and “beneficial” owner are examined at length along with the term “registered owner”. The competing theories underlying arrest (the personification and procedural theories) in Admiralty practice did not escape their attention, as they provide a context within which to view the term.

They found that for a ship to be subject to *in rem* jurisdiction and subject to arrest it must be the property of the “presumptively liable relevant person”<sup>3</sup>. This notion of proprietary ownership, which has its roots in the 1952 Arrest Convention and even further back in Dr Lushington’s judgments, supports the view that under English Law and practice the statutory action *in rem* required a proprietary connection of ownership between the debtor and the ship at the time of the instituting of proceedings. The proprietary connection falls to be examined by reference to the underlying facts; in the case law it did not appear to be examined by reference to legislation.

Ownership is found to be a slippery concept but what is clear is that it does denote the right or power to dispose of dominion, possession and enjoyment of the ship. This is essentially a matter of private law and arises from the dealings between parties with the ship and not in statute. This supports the view that the fact of registration of a vessel is at best *prima facie* evidence of ownership.

The legal consequences of registration are examined<sup>4</sup> in the judgment. The attribution of national character to the vessel is determined by the entry of a vessel into the public records of the state. These are sometimes referred to as the “public law” consequences of Registration, to be distinguished from the private law consequences, dealing with the title of the registered owner. The Register was found not to be determinative of title<sup>5</sup> and the underlying law of the transaction (and which law applies to the transaction) should be examined. Reference was made to the New Zealand court’s finding in the *Vostok*<sup>6</sup> case (which will be of interest to New Zealand practitioners) which seemed to suggest that the relevant law to determine the nature and extent of any rights (of ownership) in issue, is the law of the domicile of the registered owner. The learned judges in Australia differed with this view and chose to follow the judgment in the English Court of Appeal in *The Nazym Khikmet*<sup>7</sup>, which found that the law of the forum governs the characterisation of the rights.<sup>8</sup> Thus the court applied Australian (private international) law to the question as to who was the “owner”. Australian private international law in turn would apply the *lex situs* (the law of the national register).

Disappointingly, no evidence of foreign law was adduced in this case and the court was not able to comment on this aspect. The court was able to side step this issue by

<sup>2</sup> [2005] FCAFC 68, [92].

<sup>3</sup> [2005] FCAFC 68, [103].

<sup>4</sup> [2005] FCAFC 68, [123] *et seq.*

<sup>5</sup> As an aside, South African legislation states that legal ownership may only transfer by registration of a Bill of Sale made in the prescribed form. In South Africa the Register of Ships is held to be conclusive evidence of the legal ownership of a registered ship.

<sup>6</sup> *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37.

<sup>7</sup> *The Nazym Khikmet* [1996] 2 Lloyd’s Rep 362.

<sup>8</sup> [2005] FCAFC 68, [139-140].

stating that if no shipping registration legislation was to apply Alico became the owner of all right, title and interest in the ship.

Further, on the basis that the presumption that foreign law is the same as law of the forum, was said to apply (in the absence of proof of foreign law), and the law of the forum (Australia) does not provide title by registration, thus it was found that registration of title did not confer ownership.

### Comment

The Court, I believe came to the correct conclusion; however I was vaguely disappointed that it was not directed to deal with a few issues that I have often grappled with in practice. One particular issue that arises is the legal status of a vessel that remains registered on one flag (Liberia) but is provisionally registered on another. Provisional registration is commonly granted to bridge a gap in time between the deletion of a vessel from one registry and the re-registration on another but what nationality would prevail to determine liability as a consequence of a casualty? In that the legal effect of provisional registration, which is the public law consequence of registration, namely, safety and manning, falls to be determined by the new flag state, I believe that a line of argument could have been that had there been a casualty that required investigation, the Hong Kong regulations<sup>9</sup> would have applied. As such, if an operator been capable of investigation and prosecution under provisions of the *Hong Kong Shipping Act* it could be argued that he was the “owner”. Further, where mortgages have not been discharged on one flag (Liberia) and a new mortgage registered on another (Hong Kong), whose security would prevail? These issues have their root and their resolution in the factual ownership of the vessel.

A further question which the judgement is silent on relates to the link between Alico (incorporated in the Marshall Islands) as applicants for registration on the Hong Kong register and the Register itself. To register a vessel on the Hong Kong flag, the applicant must be a “qualified person”<sup>10</sup>. A “qualified person” includes a body corporate incorporated in Hong Kong or an overseas company (Alico!) registered in the Hong Kong Companies Registry. Assuming that a new Hong Kong entity was the applicant for registration, would that not mean that a third company could have put their hand up as the “owner” of the vessel and further complicated the choice of jurisdiction issue?

Another issue I thought might have been of relevance was that useful comparisons could have been made to the “Torrens System” of registration of property in Australia and New Zealand and the system of vessel registration followed by jurisdictions (including Hong Kong and Liberia) that base their vessel registrations on the English Template. The learned judges correctly pointed out that the Registration of a vessel is not determinative evidence of title,<sup>11</sup> however, were unable to explore this line any further as no evidence was presented on the law of the two jurisdictions concerned, namely Liberia and Hong Kong, which would have revealed that they are largely based on the English Template.

<sup>9</sup> Shipping (Formal Investigations) Regulations 2001

<sup>10</sup> See *Hong Kong Shipping Register User's Handbook*, p. 2.

<sup>11</sup> [2005] FCAFC 68, [127].

**Conclusion**

This vessel sale was clearly no sham transaction, designed to non-suit creditors and I believe that the judgment reflects this. However I am curious as to whether, as a result of this judgement (handed down on 29 April 2005), the underlying cargo claim was time barred. I note that the bill of lading was dated 25 July 2003, and given that it appears that the sellers *and* the purchasers of the cargo were cited in the proceedings, perhaps indicating some dispute as to title to the cargo, they had bigger problems than grabbing the wrong vessel.

As an aside, the Hong Kong flag is one of the fastest growing flags in the world, mainly at the expense of countries such as Liberia and Panama. It would be interesting to determine the operational reasons that drove the decision by Alico to change flags, as this is not an inexpensive exercise.