Case Notes

Det Norske Veritas AS v The Ship 'Clarabelle' [2002] 3 NZLR 52; [2002] 2 Lloyd's Rep 479 (CA)

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New Zealand, like many Commonwealth countries, has an admiralty jurisdiction which is based on the jurisdiction developed in the Admiralty Court of England and Wales. Applications for re-arrest in the admiralty jurisdiction are rare. Usually a ship, once released after the provision of security, cannot be arrested again for the same claim.[1] There is, however, an inherent jurisdiction to permit a further arrest in exceptional circumstances, provided the re-arrest is not vexatious or oppressive to the shipowner.[2] The New Zealand Court of Appeal had to consider the proper approach to the application to re-arrest on an appeal from the High Court in *Det Norske Veritas AS v The Ship "Clarabelle"*.

The *Clarabelle* was arrested on a claim which fell within the admiralty jurisdiction of the High Court. The ship was subsequently released by the Registrar of the High Court in circumstances where the plaintiff claimed that security for its claim had not been provided on a proper basis by the owner. The High Court declined an application for leave to re-arrest the ship. The Court held that the application to re-arrest involved a broad discretion to consider whether security sought was appropriate in all the circumstances of the case, and considered that the sum provided by the owner was adequate in the circumstances of this case.

In allowing the appeal, the Court of Appeal held that the approach to an application to re-arrest did not involve a broad discretion of the kind applied by the High Court. The Court found that the High Court had not properly taken into account the fundamental principle in the admiralty jurisdiction that a plaintiff with a claim falling within the jurisdiction is entitled to arrest the ship concerned as of right, and keep the ship under arrest as security for the claim,[3] or have proper security in substitution for the vessel, if the ship is to be released.

The facts

The *Clarabelle* is a New Zealand owned and registered ship. On 6 December 2001, the ship was arrested by Det Norske Veritas (hereafter "DNV") at Auckland in respect of a claim for an unpaid invoice for a survey which had been carried out in South Africa. The shipowner, rather than providing a guarantee or other form of security (which is the usual course), sought to lodge cash as security for the claim with the Registrar of the

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[1] See, e.g. , *The* "*Christianborg"* (1885) 10 PD 141 (CA).

[2] See, e.g., *Westminster Bank v West of England Steamship Owners Protection & Indemnity Association* [1933] Ll L Rep 101; *The "Hero"* (1865) 13 WR 927; see also *The "Ruta"* [2000] 1 Lloyds Rep 359 at 365-366 where the principles are outlined.

[3] Provided the statutory requirements for an arrest under sections 4 and 5 of the *Admiralty Act* 1973 (NZ) are fulfilled. The Act is based on the *Administration of Justice Act* 1956 (UK) which gave statutory force to the 1952 Arrest Convention.

High Court under the *High Court Rules*.[4] A dispute then followed between the parties and their legal advisers as to the sum of money which should be lodged in court as security. DNV requested that security in the sum of NZ$125,000.00 be paid into court on the basis that this sum represented its reasonably arguable best case at trial, being the principal sum claimed plus sums for interest and costs to the time of a likely judgment. The shipowner was only prepared to pay in NZ$73,927.74, which did not include interest and costs to the date of judgment, and paid that into Court.

The Registrar was under pressure to decide between the approaches put forward by the plaintiff and the shipowner, as the shipowner wanted urgent release of the ship. On the evening of 6 December 2001, the Registrar decided that the lower figure was appropriate and released the ship from arrest upon payment of NZ$73,927.74 into Court.

DNV then applied for leave to re-arrest the *Clarabelle* in order to obtain additional security for its claim in the sum of NZ$51,072.26. It claimed that the ship had been released on a mistaken basis by the Registrar with the result that it had been denied security calculated on a proper basis.

The High Court judgment

In the High Court,[5] Fisher J accepted that the Court had jurisdiction to make an order for re-arrest. This jurisdiction existed both under Rule 767 of the *High Court Rules*, which empowers the Court to determine the most appropriate procedure in admiralty proceedings, and also under the inherent jurisdiction of the Court, as established in the old cases, such as *The Hero*.[6] His Honour also accepted that the principles in *The Moschanthy*[7] were applicable to the calculation of security in a usual case, and found that the sum sought by DNV as security — NZ$125,000.00 — was the appropriate amount of security because that sum would cover DNV's claim, interest and costs on the basis of its reasonably arguable best case. His Honour did not, however, see this as the end of the matter.

Fisher J adopts a broad discretion

Fisher J found that, on an application for release, for reduction of the security sum or for re-arrest, the Court has a broad general discretion to assess the adequacy of the security in each individual case. He based this approach on general dicta in two authorities,[8] a passage from a leading admiralty text[9] and (apparently), the general wording of the New Zealand Admiralty Rules on the release of the ship, which, it was claimed, provided a

[4] Rule 778(5) of the *High Court Rules* (NZ) provides that, subject to dealing with any caveats against release, ships may be released from arrest if the amount of the claim and costs is paid into court or security given to the satisfaction of the Registrar.

[5] Unreported, HC Auckland, AD 35SD01, 12 March 2002, Fisher J <http://www.maritimelaw.orcon.net.nz/0402.html> (at 15 March 2003).

[6] The jurisdiction established in the English High Court of Admiralty on procedural matters such as this is part of New Zealand law by virtue of the way in which New Zealand law has adopted and enacted the UK statutory regime and the inherent jurisdiction of the Admiralty Court.

[7] (1971) 1 Lloyd's Rep 37.

[8] *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 (HC); *General Motors New Zealand Ltd v The Ship "Pacific Charger"* Unreported, HC Wellington, AD 135, 24 July 1991, Savage J.

[9] N. Meeson, *Admiralty Jurisdiction and Practice* (hereafter "*Meeson*") 2nd ed, LLP Professional Publishing, London, 2000 at para. 4-066.

broad discretion to release.[10] His Honour then considered whether DNV's prima facie measure of security calculated in accordance with the *Moschanthy* approach was appropriate in all the circumstances of the case. His Honour took into account various factors such as the ship's strong connections with New Zealand (the ship is owned and registered in New Zealand and its 20 crew members were New Zealanders), a genuine dispute on the merits of the claim and affidavit evidence from the shipowner that it was a company of substance. Fisher J found that the usual reasons for ordering security at what he described as a "Rolls Royce" level in an admiralty case were diluted in this case because of the domestic circumstances of the ship and its owner, and that it would be oppressive to order re-arrest of the ship to obtain further security. While acknowledging that the rights to arrest in admiralty were different from common law claims, His Honour seemed to be influenced by the fact that at common law, security on the basis claimed would not be available on an automatic basis:

> [15] The plaintiff has no automatic right to security against a future judgment in other classes of litigation. Special grounds have to be shown, such as a reason for thinking that the defendant is making off with property which may later be required for execution purposes. Particularly strong grounds would have to be established before the Court would countenance seizure of a defendant's operating business assets until security was given, particularly security embracing not merely the principal claim and originating costs but an estimate of the full interest and costs which would be payable after any defended trial two years hence.
> [16] Admiralty cases are not immune from the need to justify the quantum of security and the terms on which it is ordered, however nominal that task may be in the majority of cases. The rationale for normally requiring a high level of security in Admiralty matters is the peripatetic nature of substantial vessels, the risk that they will not be around for the execution of a judgment later, and the likelihood that there will be difficulties in enforcing *in personam* judgments against foreign owners and charterers. Those considerations should not be unthinkingly applied where the owners and/or the vessel have strong connections with New Zealand. Each case needs to be closely examined to see what security, if any, is justified.

Fisher J declined the application to re-arrest, leaving DNV with the security already provided. He ordered costs against DNV on the application. DNV appealed against the dismissal of the application to re-arrest.

Judgment of the Court of Appeal

On appeal, DNV contended that there was no reason to deny the application for re-arrest because the situation fell within the limited exceptional circumstances where a re-arrest should be permitted. DNV said that there was no proper basis for Fisher J to depart from the usual requirement that security be provided on the basis of the reasonably arguable best case and order security on a some more limited basis. The effect of the High Court decision was to undermine the plaintiff's fundamental right either to arrest the vessel (and keep it under arrest) as security for its claim or to have appropriate security in place of the vessel if it was released. Significant uncertainty would result in admiralty matters if the approach of the High Court Judge was adopted on an application to re-arrest, to release or to reduce security. DNV submitted that it was fundamentally wrong to view an application to re-arrest or, indeed, an application to release the ship or to reduce security, as involving a broad general discretion in the same way as, say, a common law application for an injunction.

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[10] In the *"Pacific Charger"*, *supra* n. 8, Savage J said obiter that the Rule 17(4) on release (now Rule 778(4) of the *High Court Rules*) gave the Court a complete discretion as to release.

The Court of Appeal allowed the appeal. The two New Zealand authorities relied on and the passage from *Meeson* did not, when properly examined, support a broad general discretion on an application to re-arrest.[11] The New Zealand *Admiralty Rules*, which are in the same terms as earlier UK *Admiralty Rules*, did not support a broad discretion on a release when read in the context of the rights of the arresting party in a claim falling within the admiralty jurisdiction. This case fell within the exceptions to the rule against re-arrest because it involved a situation where security had been fixed at an inadequate level at the outset. The plaintiff had not agreed to this security. Rather the security had been fixed for it.[12] There was nothing oppressive or unfair in DNV seeking to re-arrest the vessel where it had moved promptly to challenge the decision of the Registrar as soon as it was evident that the situation could not be retrieved by negotiation. The Court found that there was no reason for the plaintiff not to have security on the basis of its reasonably arguable best case.

Comment

At various times throughout its history, the jurisdiction in admiralty has come under attack from the common law courts. A common criticism of the admiralty jurisdiction is that it provides a very powerful ex parte right to seize property without any of the usual conditions which would be applicable on an ordinary application for security pre-judgment at common law. New Zealand judges have, from time to time, expressed some disquiet at the power of the admiralty jurisdiction, particularly where small or locally based vessels are arrested in proceedings in rem. The established (and important) role of the admiralty jurisdiction has, however, been expressly emphasised by the Court of Appeal in earlier decisions.[13] It may well generally be for the best that the features of admiralty law are described in terms which reflect common law principles as far as possible.[14] However, the rights given to a plaintiff in the admiralty jurisdiction are fundamentally different from those afforded a plaintiff at common law. An application for the release of a ship, for the reduction of security or, more rarely, for leave to re-arrest a ship, all have to be approached with the fundamental nature of those rights in mind.

The restatement of fundamental principle by the Court of Appeal and the acceptance of established international practice are to be welcomed. This approach provides a necessary element of certainty as to the proper approach in an area where legal advisers and their clients have to act quickly to bring about the release of vessels against the provision of appropriate levels of security. There is no basis in most situations for any departure from the basic position that a plaintiff, which has properly arrested a vessel on a claim within the admiralty jurisdiction, should have security on the *Moschanthy* basis. Any approach based on a broad discretion, which would create significant uncertainty and delay with owners contesting the appropriate level of security in many cases by reference to a range of factual matters, has been held by the Court of Appeal to be contrary to established principle.

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[11] The *Meeson* passage (*supra* n. 9), in fact, underlined the "normal" position on security.

[12] See *The "Hero" supra* n. 2*; The "Arctic Star"* (*The Times*, 5 February 1985) and also Article 5 of the 1999 Arrest Convention where specific provision is made for re-arrest in certain circumstances.

[13] See, e.g., *Baltic Shipping Co v Pegasus Lines SA* [1996] 3 NZLR 641 (CA).

[14] For a well-known and strong example of this trend to assimilate admiralty law into the general law (which has been criticised for going too far), see Lord Steyn's speech in *Republic of India v India Steamship Co Ltd (Indian Grace (No 2))* [1998] AC 878 (HL).