8.5 Paper by Allsop J at 2003 MLAANZ Conference "Possible Issues in Admiralty Reform: (a) beneficial ownership and jurisdictional facts; and (b) the nature of arrest and disclosure"

Possible Issues in Admiralty Reform: (a) beneficial ownership and jurisdictional facts; and (b) the nature of arrest and disclosure

Beneficial Ownership and Jurisdictional Facts

Introduction

1. In 2000, I delivered a paper at the Queenstown conference dealing with the question of beneficial ownership, and, in particular, the decision of Sheppard J in *The Iron Shortland* (1995) 59 FCR 535. In that paper, I pointed out, amongst other things, the difficulty in Australia of piercing the legal structures put in place by those interested in ships in order to ensure that ships do not fall foul of, amongst other things, arrest provisions, including sister ship arrest provisions, such as s 19 of the *Admiralty Act 1988* (Cth) (the Australian Act). There are a number of strands dealt with in the 2000 paper which, in the light of recent authority, bear further examination and discussion.

2. I have not sought to express concluded views on any contentious questions, that the views expressed are without the benefit of argument, and, of course, are not the views of the Court.

3. The arrest provisions in Part III of the Australian Act deal with various bases for the right to proceed *in rem*. Rights to proceed *in rem* on a maritime lien or a proprietary maritime claim are dealt with in ss 15 and 16. The legitimacy of attempts to arrest on these grounds will be disposed of without reference to questions of ownership, with the exception of proprietary maritime claims contemplated by pars 4(2)(a)(ii) and (b). The rights to proceed *in rem* provided for

by ss 17, 18 and 19 depend on the confluence of a number of factors at various times. In tabular form, they can be set out as follows:

s 17	s 19	s 18
6. That there is a claim which is a general maritime claim.	2. The same.	6. That there is a claim which is a maritime claim (general or proprietary).
7. That the claim is concerning a ship or other property.	7. That claim is concerning the first ship.	6. That the claim is concerning a ship.
8. That a particular person would be liable on the claim on the assumption that the claim is successful: the relevant person.	8. The same.	7. The same.
9. When the cause(s) of action arose the relevant person was: • owner • charter • in possession • in control of the ship or property	9. The same in respect of the first ship.	8. The same in respect of a ship.
10. When the proceedings were commenced the relevant person was the owner of the ship or property.	10. The same in respect of the second ship.	9. When the proceedings were commenced the relevant person was the demise charterer of the ship.

4. For ss 17 and 19 (both limited to proceedings *in rem* in support of *general* maritime claims) the relevant person in relation to the claims must be "the owner" of the ship at the time of the commencement of the proceedings. I discussed the notion of relevant person and the approach of the High Court in *The Iran Amanat* in 2000.[110]

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* I wish to express my thanks to Mr Ian Benson and Mr Patrick Knowles for assistance in research on aspects of this paper.

[110] See the definition of "relevant person" in s 3. The purpose of the definition is to identify the person or persons whose ship may be arrested. Even if a challenge is brought on jurisdictional grounds, it is not necessary to prove the ultimate validity of the claim against this person in the arrest proceedings. It is

Ownership of the ship, or the first ship, at an earlier point of time (the accrual of the course of action) may become relevant for the application of any of ss 17, 18 and 19.

6. In each of these circumstances, the relevant person being the owner at the relevant time is a fact necessary for the right to proceed *in rem* under the Australian Act to be legitimately invoked. Such a fact is sometimes called a "jurisdictional fact", though care must be taken in the use of that phrase, for the reasons with which I deal below.

7. The table above sets out the things that must exist for the right to proceed *in rem* to be validly invoked under ss 17, 18 and 19 of the Australian Act. The underlying claim, whether it be proprietary or general, need only be that: a claim, or assertion, "relating to", "for", "in respect of", "arising out of" something or some circumstance described in s 4.

8. The Court has power to set aside the arrest in circumstances of the weakness of the arresting party's case, whether because of the lack of a *prima facie* case, or because of the difficulties faced by the plaintiff, or because the claim should be summarily dismissed. The Full Court of the Federal Court in *The Iran Amanat* (1997) 75 FCR 78, 85 said:

> *The arrest procedure provides a statutory method for maintaining the presence of a ship within the jurisdiction until the Court has determined a maritime claim made against it. Whereas a plaintiff seeking an order in the nature of a Mareva injunction will be required to satisfy a court that there is a risk that assets which would satisfy a judgment are being removed from the jurisdiction before judgment, in admiralty proceedings, no such onus is imposed upon the plaintiff. Rather, the plaintiff is given a statutory right and the onus is cast on to the owner of the ship to show why the ship should not be detained within the jurisdiction in order to satisfy a prospective judgment: [see generally the*

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enough that the claim, as made, can be seen as one which leads to the liability of the relevant person on the hypothesis of its success: *The Owners of MV 'Iran Amanat' v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130, applying *The St Elefterio* [1957] P 179, 185-6 and *The Moschanthy* [1971] 1 Lloyd's Rep 37, 42; see also *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37, 44, *The Ship Fua Kavenga* [1987] 1 NZLR 550, 561, *The Antonis Lemos* [1985] AC 711, *Sin Hua Enterprise Co Ltd v Owners of Motor Ship Harima* [1987] HKLR 770 (CA), *Kingstar Shipping Ltd v Owners of the Ship Rolita* [1989] 1 HKLR 394 (CA) and, generally, Australian Law Reform Commission Report No 33 [118] and [124]. This approach is in accordance also with many cases in the field of insurance dealing with the word "claim": *Walton v NEM* [1974] 2 Lloyd's Rep 385, 391 (Bowen JA NSWCA); *Trollope* & *Colls v Haydon* [1977] 1 Lloyd's Rep 244; *Thorman v New Hampshire Insurance Co. (UK) Ltd and Home Insurance Co.* [1988] 1 Lloyd's Rep 7*; ANZ v Colonial & Eagle Wharf* [1960] 2 Lloyd's Rep 241; *West Wake Price & Co v Ching* [1957] 1 WLR 45; *Haydon v Lo & Lo* [1997] 1 WLR 198, 204-206; *Burlington County Abstract Co. v QMA* 400 A. 2d 1211 (1979); *Cox v Deeny* [1996] Lloyd's Rep IR 288; *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437

Australian Law Reform Commission's Report on Civil Admiralty Jurisdiction, (186, par 245)].

The owner of a ship under arrest would be entitled to move for summary dismissal of proceedings on the ground that they were vexatious or frivolous or disclosed no reasonable cause of action. Further, when hearing an application for release of a ship from arrest, the court may be entitled to consider the strength of the plaintiff's claim. If the court were satisfied that there was no serious question to be tried as to the plaintiff's claim, the court may be loath to maintain the arrest or to require security for the claim.

See also *The Ship Alnilam* [2001] FCA 411, *Sun Lucky Co Ltd v The Mu Gung Wha* [1999] FCA 220, *The Yuta Bondarovskaya* [1998] 2 Lloyd's Rep 357, *Paramount Enterprises International Inc v Beston Chemical Corporation* (2001) 198 DLR (4d) 719, *The Opal 3* [1992] 2 SLR 585, 590, *The Wigwam* [1983] 1 MLJ 148.

9. The High Court in *The Iran Amanat* (1999) 196 CLR 130 applied *The St Elefterio* [1957] P 179 and *The Moschanthy* [1971] 1 Lloyd's Rep 37[111] and made clear that, to use the words of Lord Brandon in *The Moschanthy,* the question of jurisdiction must be answered by reference to the nature of the plaintiff's claim as put forward, without reference to the further point whether it is likely to succeed or not. It is the person who *would* be liable, not the person who *is* liable: see definition of "relevant person". Thus, the question of the existence of the claim and the connection with the relevant person is based on the existence of an arguable claim, it is not based on the showing of a "strong prima facie case".[112] If the case is said to be hopeless or attended with such difficulties as to warrant the discharge of the warrant it is for the defendant to show this. If the defendant puts the merits of the claim in issue, in effect and in practice, the plaintiff will need to show that the claim is arguable, no more. As Clarke J said in *The Yuta Boudarovskaya* at 359:

It appears to me that on Mr. Justice Brandon's approach, in order to be allowed to proceed the plaintiff's case must be arguable because otherwise it would be bound to fail, in which event it would be oppressive or vexatious to allow it to proceed. The Court should however, only regard the plaintiff's case as unarguable in a plain case.

Beyond these sorts of cases the Court, in an examination of whether the *in rem* claim is properly brought, does not generally examine the merits of the claim. Such

[111] As did the Queensland Court of Appeal in *Ocean Industries Pty Ltd v Owners of M V 'Steven C'* [1994] 1 Qd R 69

[112] cf Gummow J in the *The Shin Kobe Maru* (1991) 32 FCR 78, 84; and Cremean *Admiralty Jurisdiction* (2nd Ed) pp 88-9. With respect, I doubt whether the authorities are in "disarray" on this point. There appears to be a clear line of authority since 1956.

matters, accordingly, are well able to be dealt with in a context of urgency and despatch. This limitation on the examination of the merits of the claim in assessing whether the *in rem* claim is brought within the relevant section is relevant to the question of disclosure discussed below.

10. On the other hand, the relationship that the relevant person bears to the ship or the first or second ship, and whether this satisfies the terms of the relevant section, depend upon whether the circumstances fall into one or more of the various categories of legal relationship enumerated: that the relevant person was at the relevant time the owner, charterer, in possession, in control or demise charterer of the ship. This is really not to posit different tests. The relevant provision is to be satisfied. As one element, the relevant qualifying relationship with the ship must exist for the right to proceed *in rem* to subsist. Another element must exist: a *claim*; the *claim* need only be shown to be arguable, because once that is done, one can conclude that that qualifying fact (the existence of a *claim* against the person who would be (not is) liable – if the claim succeeds) is proved. The other qualifying factors, however, if challenged, need to be substantiated; for them, the question, on the basis of the authorities discussed below, becomes: was X the owner (or charterer etc) at Y time, *not* can a non-colourable assertion be made that X was the owner (or charterer etc) at Y time. Before coming to the question of the ramifications of the ownership of the ship being a qualifying or jurisdictional fact or issue in this sense, I will first deal with what the courts have said about who is the "owner" in this context.

the owner

11. The word "owner" is not defined in the Australian Act. In 2000, I discussed various issues raised by the fact that in s 3(4) of the *Administration of Justice Act 1956* (UK) ("the previous UK Act"), s 21(4) of the *Supreme Court Act 1981* (UK) ("the UK Act") and s 5(2) of the *Admiralty Act 1973* (NZ) ("the NZ Act") there was a distinction drawn between "owner" at the first qualifying time (the accrual of the cause of action) and "beneficial owner of that ship [or that ship is beneficially owned] as respects all the shares in it", at the second qualifying time (the commencement of suit).

12. In *The Evpo Agnic* [1988] 1 WLR 1090 the phrase "the owner" at the first qualifying time was said by the English Court of Appeal to mean registered owner. Regard was had, in particular, to the different ways of expressing the matter in the section. In *The Ohm Mariana* [1993] 2 SLR 698 the Singapore Court of Appeal declined to follow *The Evpo Agnic*. Thean J at 711 said the following about the content of the phrase "the owner":

> *However, in the context of s 4(4) of the Act and for the reasons we have given, we respectfully adopt the construction that the term 'owner' means a person who is vested with such ownership as to have the right to sell, dispose of or alienate the ship. Such an owner may or may not be the registered or legal owner depending on the circumstances as, for instance, in the case of 'The Opal 3; but, in our opinion, a beneficial owner clearly comes within the meaning of the term. As we have said, registration is prima facie evidence that the registered owner is the owner of the ship, and in determining the ownership of a ship the court is not confined merely to the register of ships; quite often the court has to look behind the register and determines who in fact is the owner of the ship.*

13. *The Evpo Agnic* was, however, applied by the English Court of Appeal once again in *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep 337, 353 and by the Hong Kong Court of Final Appeal in *The Tian Sheng No8* [2002] 2 Lloyd's Rep 430, 438-39. See also *The Asean Promoter* [1982] 2 MLJ 108, *The Thorlina* [1986] 2 MLJ 17, and *The Opal 3* [1992] 2 SLR 285.

14. The meaning of "owner" first appearing in the legislation founded on the United Kingdom legislation appears settled.

15. Thus, little assistance is gained for understanding the content of the phrase "the owner" in the Australian Act from the phrase first used in the legislation based directly on the United Kingdom legislation, used, as it is, in juxtaposition to a phrase expressly incorporating notions of beneficial ownership.

16. The second limb of the statutory provisions in the United Kingdom, Hong Kong, Singapore and New Zealand Acts refer expressly to "beneficial ownership". I referred in the 2000 paper to the debate as in the cases to whether this included a demise charterer. Brandon J in *The Andrea Ursula* [1973] QB 265, in the context of no demise charterer arrest in s 3(4) of the previous UK Act, found that the phrase included demise charterer. The weight of authority, both before and after, was and is to the contrary: Hewson J in *The St Merriel* [1963] P 247, Goff J in *I Congreso*

del Partido [1978] QB 500, Sheen J in *The Father Thames* [1979] 2 Lloyd's Rep 364 and the Singapore Court of Appeal in *The Permina 3001*[1979] 1 Lloyd's Rep 327. See now, with the express inclusion of demise charterer arrest: *The Union Darwin* [1983] HKLR 248; *The Loon Chong* [1982] 1 MLJ 212; and *Colombo Drydocks Ltd v The Ship Om Al-Quora* [1990] 1 NZLR 608. An exception to these cases was Slicer J in *Swards v Owners of the Ship Pyungwha 36*, Tas SC 22 October 1996, dealing with the Australian Act.

17. This debate was important, not merely in order that the position of the demise charterer be clarified under previous legislation, but also for the discussion of the extent of the concept of "beneficial ownership", which discussion was of lasting importance to the jurisprudence in this area. Brandon J in *The Andrea Ursula* saw the content of the phraseology in the second limb ("beneficially owned as respects all the shares therein") as not limited to questions of title or property as might concern a court of chancery, but as extending to more practical matters of lawful possession and control with the use and benefit which are derived therefrom. His Honour said the following at 269:

> *There is no definition in the Act of the expression "beneficially owned" as used in section 3(4). It could mean owned by someone who, whether he is the legal owner or not, is in any case the equitable owner. That would cover both the case of a ship the legal and equitable title to which are in one person, A, and also the case of a ship the legal title to which is in one person, A, but the equitable title to which is in another person, B. In the first case the ship would be beneficially owned by A, and in the second case by B. Trusts of ships, express or implied, are, however, rare, and* ***the words seem to me to be capable also of a different and more practical meaning related not to title, legal or equitable, but to lawful possession and control with the use and benefit which are derived from them. If that meaning were right, a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such possession and control, had all the benefit and use of her which a legal or equitable owner would ordinarily have.***
> [emphasis added]

18. This view, however, did not prevail. The phrase equivalent to "beneficial ownership" was interpreted as only dealing with the concepts of property, even if exemplified by ultimate practical concerns. Hewson J in *The St Merriel* [1963] P 247, 258 said that "beneficial owner" in this second limb (of the then s 3(4) of the previous UK Act) meant:

> *… the only person with the right to sell all the shares*

The logical consequences of this approach lead to the result in *The Maria Luisa*, discussed below.

19. The phrase "beneficial ownership" was said by Goff J in *I Congreso del Partido* to refer to cases of equitable ownership. This emphasis on concepts of property and title led immediately to questions of commercial substance and legal form. That, perhaps, is too rhetorical. It led to questions of commercial substance and legal substance (the latter being far more concerned with form than the former). This was especially so with the growth of sister ship arrest. Since title, property and the right to sell were the issues at hand, careful planning enabled well directed corporate form to quarantine assets. Thus began the debate in this area about the so-called process of "piercing the corporate veil". In *I Congreso del Partido,* Goff J said that the phrase "beneficial ownership" was not a phrase of such breadth as to entitle a court to look behind the corporate structure (to "pierce the corporate veil") in circumstances where the law would not otherwise allow that to be done. Other English cases also made that clear: *The Aventicum* [1978] 1 Lloyd's Rep 184; *The Maritime Trader* [1981] 2 Lloyd's Rep 153; and *The Saudi Prince* [1982] 2 Lloyd's Rep 255. Expressions of the matter such as those by Slynn J in *The Aventicum* and Sheen J in *The Saudi Prince,* whilst giving superficial hope to the arrestor, were firmly rooted in respect for the corporate and legal form, if such could not, on ordinary principles of company and general law, be set to one side. Slynn J in *The Aventicum* at 187 said:

> *I have no doubt that on a motion of this kind it is right to investigate the true beneficial ownership. I reject any suggestion that it is impossible "to pierce the corporate veil". I of course remember, as Mr Howard urges, the case of Saloman v Saloman & Co., [1897] A.C. 22, but of course it is plain that s. 3(4) of the Act intends that the Court shall not be limited to a consideration of who is the registered owner or who is the person having legal ownership of the shares in the ship; the directions are to look at the beneficial ownership. Certainly in a case where there is a suggestion of a trusteeship or a nominee holding, there is no doubt that the Court can investigate it.*

20. This view that the issue is one of title, including the rights of exclusive enjoyment, destruction and alienation has been consistently followed: see for example *The Nyzam Khiket* [1996] 2 Lloyd's Rep 362, 363, 371. See also the Court of Appeal in Singapore: *The Permina 3001* [1979] 1 Lloyd's Rep 327, 329; [1975-1977] SLR 252, 254, *The Ohm Mariana* [1993] 2 SLR 698; *The Andres Bonifacio* [1993] 3 SLR 521; *The Kapitan Temkin* [1998] 3 SLR 254; *The Skaw Prince* [1994] 3 SLR 379,

386-88; *The Ivanovo* [2002] 4 SLR 978 and see, in particular, the helpful judgment of G P Selvam JC (as he then was) in *The Opal 3* [1992] 2 SLR 585 esp at 590.

21. I do not repeat here the discussion in the 2000 paper about the circumstances in which, in legal systems derived from English law, the corporate form can be laid to one side. It is sufficient for this paper to appreciate that the courts are not powerless to deal with questions of fraud, including fraud on creditors in the context of insolvency, sham and circumstances of true agency (going beyond a mere total ownership of shares of a subsidiary)[113]. Further, in any particular jurisdiction there

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[113] I do not repeat the discussion in the 2000 paper but reference may be made, at least, to the following cases and sources: *Gilford Motor Company Limited v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832; *ICT Pty Ltd v Seacontainers* (1995) 39 NSWLR 640, 654-57; *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267; 272-74; *Re FG (Films) Ltd* [1953] 1 WLR 483; *Firestone Tyre and Rubber Co Ltd v Lewellin* [1957] 1 WLR 464; *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116, *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852; *Canada Rice Mills v R* [1939] 3 All ER 991; *Adams v Cape Industries PLC* [1990] 2 AC 433, ff 532-7, *Hotel Terrigal v Latec Investments* [1969] 1 NSWLR 676, *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679, *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254; *State Bank of Victoria v Parry* (1990) 2 ACSR 15, 32; *Woolfson v Strathclyde Regional Council* [1978] SC 90 (HL); *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 1997 *Cambridge Law Journal* 284, *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72; [1990] 2 AC 418, *Polly Peck International* [1996] 2 All ER 433; *Adams v Cape Industries PLC* [1990] Ch 433, 476-7 (Scott J) and 532-7 (CA), Roskill LJ in *The Albazero* [1977] AC 774, 807; *Bank of Tokyo Ltd v Karoon* [1987] AC 45, 53, 64, *James Hardie & Co Pty Ltd vHall as Administrator of Estate of Putt* (1998) 43 NSWLR 554, 102 *LQR* 415; *Multinational Gas and Petrochemical Co v Multianational Gas and Petrochemical Services Ltd* [1983] Ch 258; 1977 *CLJ* 12; 93 *LQR* 170; 40 *MLR* 339; 50 MLR 545 *Tunstall v Steigmann* [1962] 2 QB 593, *Ford and Carter v Midland Bank* (1974) 129 NLJ 543, 544. Also, whilst I do not repeat at length what is in the 2000 paper, the following important, though not exhaustive, principles must be borne in mind:

(a) One cannot say that a company is a sham if it has been set up. Whilst a company is a legal fiction: *Sutton's Hospital Case* (1612) 10 Co Rep 1(a) 32 per Coke J and *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 171 per Brennan J, it is a fiction which has been recognised by legislatures and courts: *Saloman's Case.* Once acts are taken to register and set up a company, which are real acts involving public authorities, the company itself cannot be labelled a 'sham': *Peate v FCT* (1964) 111 CLR 443, 480.

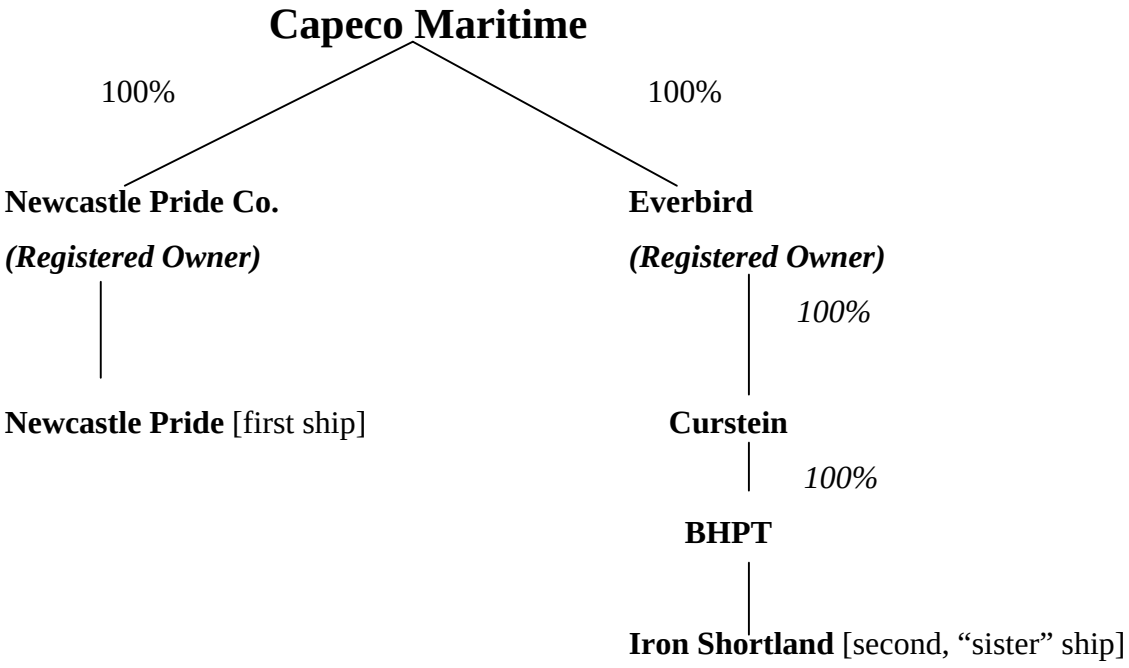
(b) A transaction may be a 'sham' – that is, something that is intended to be mistaken for something else or that is not really what it purports to be: *Sharrment Pty Ltd v Official Trustee* (1988) 18 FCR 449, 453-8; *Re State Public Services Federation* (1993) 178 CLR 249. A sham will often be part of some fraud to disguise the reality of what is occurring from those whom it is hoped will not perceive the reality. This was how Lord Keith in *Woolfson v Strathclyde Regional Council* 1978 SLT 159, 161 based lifting the veil: 'special circumstances indicating that it is a mere façade concealing the true facts'.

(c) Sometimes, a corporate form will be used to avoid an existing legal liability or duty. In these circumstances, courts have said that they will look behind the corporate entity: *Gilford Motor Co v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832. In *Gilford* a corporate form was used in an attempt to circumvent a restraint of trade clause. However, there is no legal principle that the incorporation and use of a company to avoid a liability will, of itself, entitle the court to disregard the company set up: *ICT Pty Ltd v Seacontainers* (1995) 39 NSWLR 640, 654-57 (NSW Court of Appeal). See also *Pioneer Concrete v Yelnah Pty Limited* (1986) 5 NSWLR 254 (Young J).

may be subtle, but important differences as to how similar terminology such "sham", "fraud" and the like is used and what it means.

22. The essence of the phrase "beneficial ownership" in the second limb is equitable ownership, involving the right to sell (and pass ownership rights). It is a question of title, not economic utilisation. It is a question of legal analysis of proprietary rights, not a practical analysis of substantive economic domain.

23. The same approach has governed the interpretation of the phrase "the owner" in the Australian Act. Sheppard J in *The Iron Shortland* (1995) 59 FCR 535 discussed the meaning of the phrase "the owner" in the Australian Act at some length. I dealt with his Honour's reasons in detail in 2000, and I will not repeat what I said, save what is essential. There was a sister ship arrest under s 19. The ownership structure was as follows:



24. Sheppard J rejected the submission that "owner" was limited to registered owner and said at 547:

(d) The finding of a principled basis for ignoring or putting to one side the separate corporate form or its consequences still lacks a clear foundation in our jurisprudence: Ford *Principles of Corporations Law*, 9th Edition, p 129. This was illustrated by the discussion by the Court of Appeal in New South Wales in *ICT v Seacontainers* at 654-57. Whilst themselves eschewing the use of epithets such as 'sham' or 'device' their Honours said that nothing they said should be taken as a sanction against 'colourable evasion' of contractual liabilities.

> *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. Because the judges who decided "Shin Kobe Maru" were dealing with a case directly concerned with the ownership of a vessel and thus with a proprietary, rather than a general, maritime claim, there is a danger in taking too much from the dicta about the meaning of ownership in s 4(2) and applying them to cases under s 4(3), particularly bearing in mind the terms of both ss 17 and 19. But at least the judgments show that the concept of "owner" and "ownership" in the Act may have a meaning which involves or includes beneficial ownership. There is thus nothing which runs counter to ordinary concepts of admiralty law or jurisdiction which should lead me to reject the plaintiff's submission.*

25. There were two chains of corporate ownership, both wholly owned by the ultimate parent, Capeco Maritime. Sheppard J examined the existing case law and analysed the facts by reference to what actually was the position aside from formal ownership of shares. It should be recalled that Sheppard J found that the *Newcastle Pride* was beneficially owned by Capeco Maritime. His Honour referred especially to the terms of the ship management agreement and insurance certificate, the latter of which named the Newcastle Pride Co (the registered owner) as merely the disponent owner. In respect of the *Iron Shortland*, there was simply no evidence which gainsaid the strict legal position. It was plain from what his Honour said at 558 that the evidence required to disturb the structure of the strict legal relationship based on corporate form would not have been great:

> *If there had been any evidence at all of beneficial ownership by Capeco Maritime I would not have hesitated to find the issue of ownership favourably to the plaintiff. For reasons earlier mentioned, I would have had every confidence in doing so because of the absence from the case of both Capeco Maritime and Everbird. But, regrettable though it may be from the plaintiff's point of view, I do not regard any of the material as establishing or tending to establish beneficial ownership by Capeco Maritime. Accordingly, the evidence does not establish that Capeco Maritime was the owner of the Iron Shortland at the time the proceedings were instituted and the motion to set aside the arrest warrant taken by BHPT must succeed.*

26. As I said in a footnote in the 2000 paper, one lesson from *The Iron Shortland* is that it is worth proving notification of the issues in the contested arrest proceeding to the party who is said to be the owner, if the absence of that person is to be relied on in the drawing of inferences. In *The Iron Shortland* there was no evidence that Capeco Maritime or Everbird had been told of the proceedings.

27. Thus, from Sheppard J's judgment, it could perhaps be said that whilst existing corporate form was to be respected, not a great deal of evidence of the reality of the ownership and dealing with a ship would be required to contradict the bare legal forms of 100% owned subsidiary relationships, in particular in circumstances where those able to give evidence as to the relationships involved do not give evidence.

28. Recently , the Full Federal Court in *Kent v The Vessel Maria Luisa* [2003] FCAFC 93, examined what might be said to be the outer limits of the recognition of the separateness of legal form.

The Maria Luisa

29. The plaintiff was a diver who worked in the tuna farming industry off Port Lincoln in South Australia. He worked from two ships, the *Monika* and the *Boston Bay*. He became severely disabled as a consequence of his diving work. The relevant person at the time of the accrual of the causes of action for claims under pars 4(3)(c) and (d) of the Australian Act (to which I will refer as AFE) was the demise charterer of both these vessels.

30. By writ *in rem* filed on 24 April 2001, the plaintiff commenced proceedings against the *Maria Luisa* under s 19 of the Australian Act as a surrogate ship. AFE was alleged to be the owner of the *Maria Luisa* at the time of the commencement of the proceedings. Another company, Everdene Pty Limited (Everdene), was the registered owner. Everdene was a wholly owned subsidiary of AFE.

31. AFE moved to have the service set aside and proceedings dismissed "for want of jurisdiction". It was not in dispute that the question of "jurisdiction" should be determined as a preliminary matter. Nevertheless, discovery was sought and, to a significant degree, obtained. It should be noted that the relevant companies against which discovery was sought were resident in Australia. Not only was discovery sought and obtained, but the plaintiff had over one year to complete preparation of the question of ownership. (The ship, in the meantime, was released, as the price of this extended preparation.)

32. At the hearing on "jurisdiction", the question of ownership was decided against the plaintiff.

33. The plaintiff first sought to call in aid the proposition that AFE as a demise charterer (and so the so-called owner "*pro hac vice*") was the owner. Reliance was placed on *Sandeman v Scurr* [1866] 2 QB 86, Brandon J in *The Andrea Ursula* and Slicer J in *Swards v The Owners of the Ship Pyungwha 36*. This was rejected by Beaumont J ([2002] FCA 1207), applying the cases referred to at [15] above. (This argument was not pressed on appeal.) Beaumont J approached the matter on the basis of the following propositions:

- *In the absence of other evidence, the registered owner will also be taken to be the beneficial owner (see "Iron Shortland" at 749).*

- *Although reference is made in "Iron Shortland" to "real" or "true" owner, it is clear from the context that Sheppard J intended these expressions to be synonymous with the (technically correct) description "beneficial", that is, owner in equity.*

- *The fact that Everdene is a wholly-owned subsidiary of AFE cannot, of itself, establish in AFE beneficial ownership of any asset owned by Everdene (see "Iron Shortland" at 744, 748). In the absence of sham (not alleged) or fraud (not seriously suggested), the Court cannot "lift" the "corporate veil" here.*

- *A person is not a "beneficial owner" merely by being in possession as operator and manager, or under a demise charter. Thus, in I Congreso del Partido [1978] 1 QB 500, Goff J (as he then was) (after noting (at 538) that Brandon J in The "Andrea Ursula" had not had the benefit of full argument, said (at 538):*

> *"I start with the statute, and the words with which I am particularly concerned, and which I have to construe in the context of the statute, are 'beneficially owned as respects all the shares therein.' In my judgment, the natural and ordinary meaning of these words is that they refer only to such ownership as is vested in a person who, whether or not he is the legal owner of the vessel, is in any case the equitable owner, in other words, the first of the two meanings of which Brandon J. thought the words to be capable. Furthermore, on the natural and ordinary meaning of the words, I do not consider them apt to apply to the case of a demise charterer or indeed any other person who has only possession of the ship, however full and complete such possession may be, and however much control over the ship he may have."*

34. By the time the matter came on for hearing before Beaumont J, it was evident from pre-trial discovery (the availability of which is discussed below) that AFE was demise charterer, that the wholly owned subsidiary (Evergreen) was the registered owner and was also the trustee of a unit trust, all the units of which were held by

AFE. Beaumont J concluded that this was inadequate to confer on AFE equitable or beneficial ownership, saying at [38]:

> *AFE's rights under the trust deed constituting the Trust do not confer upon it equitable ownership in the Trust's individual assets (see e.g. 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).*

35. By majority, the Full Court (Tamberlin and Hely JJ, Moore J dissenting) dismissed the appeal. The analyses given in the judgments (the joint judgment of the majority and that of Moore J) were extensive The majority, whilst recognising that Australia had not implemented the 1952 Arrest Convention, saw the 1952 Arrest Convention as helpful background to the passing of the Australian Act. The majority saw the terms of Article 3 of the 1952 Convention[114] as reflective of a compromise between

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[114] **Article 3 of the 1952 Convention:**

(5) Subject to the provisions of paragraph 4 of this Article and of Article 10, 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 be ready to sail but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1(1)(o), (p) or (q).

(6) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(7) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant and, if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is good cause for maintaining that arrest.

(8) 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.

Article 3 of the 1999 Convention:

4. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
   (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
   (b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
   (c) the claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or
   (d) the claim relates to the ownership or possession of the ship; or
   (e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

5. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

the attitudes of the civil law and the common law over seizure of a debtor's property. This compromise is described by Berlingieri on *Arrest of Ships* (3rd Ed, 2000) pp 105-106 as follows:

> *The "compromise" consisted of reducing the unlimited right of arrest of ships only to specified claims and at the same time of extending the right of arrest to other ships in the same ownership.*

36. No attempt was made to reargue *The Iron Shortland* and the majority noted that it was common ground that "owner" extended beyond registered owner in the way described by Sheppard J.

37. It should also be noted, for the purpose of later discussion, that counsel for the appellant accepted that whether or not AFE was the owner of the *Maria Luisa* at the relevant time was to be decided on a final basis on the balance of probabilities, and not merely by reference to the existence of an arguable case in that regard.

38. The majority reasoned as follows. It was a fundamental principle of company law that a shareholder, even a 100% sole shareholder, had no property, legal or equitable, in the assets of the subsidiary. Thus, on ordinary legal principles, a wholly owned parent/subsidiary relationship, alone, was not a foundation for a conclusion that the "controlling" parent *owned* the subsidiary's property, the ship. This was recognised as no accident of statutory drafting. The ALRC Report recommended against a special provision to "lift the corporate veil" in respect of one ship companies. The existence of the unit trust in this case made no difference to this conclusion drawn here by the majority. The subsidiary was also a trustee of the trust in which the parent (AFE) owned all the units. The majority accepted that AFE had a proprietary interest in all the property the subject of the trust, but held that under the terms of that trust a unit-holder had no specific interest in or right to call for the transfer, of any particular property. As the sole unit-holder with the power to require the subsidiary (the trustee) to accelerate the vesting day of the property, AFE

(a) owner of the ship in respect of which the maritime claim arose; or
(b) demise charterer, time charterer or voyage charterer of that ship.
This provision does not apply to claims in respect of ownership or possession of a ship.

6. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgement in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

was in a position to vary the present terms of the trust and call in the property. There was no evidence, however, that it had done so.

39. Various decisions dealing with the rights of unit-holders in such trusts were discussed; and the majority concluded that existence of proprietary rights should not be equated with ownership, the latter concept involving the (present) right to sell, dispose of or alienate the ship: *The Permina 3001* [1979] 1 Lloyd's Rep 327, 329; *The Ohm Mariana* [1993] 2 SLR 698 and *The Iron Shortland.* Ownership carried with it the notions of legal dominance, ultimate present legal control and ultimate present title and was greater than an equitable interest or even the power or capacity to bring each and all of these about. Ownership was to be judged in the full and presently existing sense.

40. Ultimately, clause 2(c) of the trust deed, unvaried as it was, meant that AFE, subject to one matter, had the sole capacity to control the legal disposition and economic utilisation of the ship, by its control of the subsidiary and by its position as the only interested unitholder. Clauses 2(a) and (c) of the trust deed were in the following terms:

> *2(a) The beneficial interest in the Trust Fund as originally constituted and as existing from time to time shall be held by the Unit-holders for the time being in proportion to the units registered in their respective names and all units shall at any given time be of equal value.*
>
> …
>
> *2(c) Each unit shall entitle the registered holder thereof equally with the registered holders of all other units to the beneficial interest in the Trust Fund* ***as an entirety but*** *subject thereto shall not entitle the Unit-holders to any particular security or investment comprised in the Trust Fund or any part thereof and (save as provided in Clause 10 hereof)* ***no Unit-holder shall be entitled to the transfer to him of any property comprised in the Trust Fund****." (emphasised in the judgment)*

41. The only qualification to the above proposition was the possibility that the subsidiary had a trustee's right of indemnity or exoneration from the trust assets for debts incurred in the administration of the trust. Such a right of indemnity or exoneration, if on the facts it exists, creates a beneficial interest in the trust assets (and so a beneficial interest not held by AFE): *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226, 246-87, and *Collie v Merlaw Nominees Pty Ltd (In liq)* (2001) 37 ACSR

361. Whilst this had not been an issue before the primary judge, the majority said that, nevertheless, it was for the arrestor to negative such a possibility. The majority concluded at [71] to [74] as follows:

> *[71] On the relevant date, AFE had a contingent defeasible interest in the specific assets of the trust, including the ship. The interest was contingent on AFE being a beneficiary of the trust as at the vesting date, and was defeasible in relation to particular assets of the trust if they were disposed of by the trustee in the course of administration of the trust prior to the vesting day. However, from a practical and commercial point of view, AFE was in a position to take steps, which if taken prior to the relevant date, would have resulted in AFE becoming the owner of the ship at the relevant date, subject to the qualification referred to above. But the steps necessary to achieve that result were never taken. The issue, then, is whether AFE was the owner of the ship at the relevant date, because it had the ability to become the owner of the ship by taking particular steps which lay within its power to take, although those steps were never taken.*
>
> *[72] A sole shareholder in a company has the ability to become the owner of the company's assets (subject to the position of creditors) by liquidating the company, and distributing its assets in specie. But the company's property has never been regarded as the property of its members, or even of its sole member, by reason only of the existence of the practical power which the member has in that respect. AFE had the practical ability to collapse the trust as at the relevant date, and had it done so, AFE and not Everdene would have been the owner of the ship at the relevant date (subject to the qualification previously referred to). But "owner" in s 19(b) of the Act is concerned with title to, or proprietorship of the ship at a particular point in time. Such capabilities as AFE had in relation to the ship at the relevant date lack the directness and immediacy necessary to confer on AFE title to or ownership of the ship as at that date. The existence of a power in AFE to cause Everdene to terminate the trust does not have any impact prior to the exercise of the power upon Everdene's ownership of the ship. It simply means that ownership existing at a point in time could be displaced thereafter by unilateral action.*
>
> *[73] Once it is accepted that the trust deed is not a sham and that if AFE is to be held to be the **owner** of the ship it can only acquire that status by virtue of the provisions of the trust deed then the question whether AFE was the **owner** of the ship at the relevant date depends on the proper construction of the Act, and the legal effect of the deed. In this case it does not depend upon any inference which might be drawn from surrounding circumstances as to "indicia" of ownership: cf "The Iron Shortland" at 554. The proposition that it could be inferred from*

surrounding circumstances that AFE was the owner of the ship was a submission on which the appellant relied at first instance but which was rejected by the primary judge and no appeal is taken from that part of his Honour's decision.

[74] 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 a 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.

42. Moore J approached the matter more broadly. After examining the history of the respective phrases in the United Kingdom legislation, positing the approach of Brandon J in *The Andrea Ursula* in contradistinction to that of Goff J in *I Congreso del Partido,* and considering the history and purpose of the legislation as beneficial, his Honour sought to apply *The Iron Shortland*. In so doing, Moore J saw as important the approach to the fact finding of Sheppard J in relation to the *Newcastle Pride,* which Moore J said:

> *… appears to have involved a fairly practical assessment of the issue of ownership and did not involve an analysis, within the framework of the law of property or equitable principles, of the legal relationship between Everbird and Capeco concerning the ship and any interest either might have in it.*

Though, it should be noted, the majority recognised the potential for surrounding circumstances to affect strict legality – see [73] of their reasons set out at [40] above. No appeal was taken from the conclusion of Beaumont J that the surrounding facts did not gainsay the conclusion that he otherwise drew from the strict terms of the legal relationship. With respect, Sheppard J's conclusions about the evidence concerning the *Newcastle Pride* might be seen not so much as a departure from a proprietary or equitable analysis, but as a willingness to conclude that, on the evidence, the legal form did not reflect the true proprietary rights. If it had, the owner would not have been described merely as "disponent owner": cf Sullivan *Marine Encyclopaedic Dictionary* (3rd Ed 1992) and *O/Y Wasa Steamship Co Ltd and NV Stoomschip "Hannah" v Newspaper Pulpswood & Wood Export Limited* (1949) 82 LI L Rep 936.

43. Moore J rejected a fixed or universal meaning of the word "ownership". His Honour rejected the necessity for immediate legal dominion. He looked at the totality of the bundle of rights held by AFE and characterised them as "ownership", saying at [29] and [30]:

> *[29] It may be accepted that cl 2(c) of the trust deed says that no unit holder shall be entitled to have transferred to him any property "comprised in the Trust Fund" though the operation of that clause has to be considered in the context where AFE is the only unit holder. AFE's position as sole unit holder is significant because cl 12(a) enables the transfer of trust property (described as "assets of the Trust Fund") at any time AFE might decide. That flows from the definition of "the Vesting Day" in the trust deed and the fact that AFE is the sole shareholder in the trustee, Everdene. As the sole shareholder, AFE controls Everdene. The vesting day is defined as including a day specified by Everdene and consented to by unit holders, that is AFE. Through its control of Everdene, AFE can determine a vesting day of its choosing and bring to an end the trust. Also through its control of Everdene, AFE can exercise the discretionary power conferred by cl 12(a) on Everdene to transfer property to itself (rather than selling the trust property and distributing the net proceeds) as a unit holder (having, as unit holder, requested the transfer) subject to the prior satisfaction of any liabilities of the trust. From the only accounts of the trust in evidence, the only liability of the trust which might defeat such a transfer is a debt owing to AFE. If AFE wished to bring an end to the trust for the purpose of assuming unqualified ownership of the "Maria Luisa", it could forgive the debt. It should also be noted that AFE was, at relevant times, also the demise charterer of the "Maria Luisa" and, as such, entitled to immediate possession and control of the ship. AFE is able, because of those various rights and interests, to maintain possession and control of the "Maria Luisa" against the rest of the world and alienate the ship.*
>
> *[30] Does the aggregation of these rights and interests of AFE render it the "owner" of the "Maria Luisa" for the purposes of par 19(a) (sic 19(b)), rather than Everdene? In my opinion there is a rational and practical basis for treating AFE, and not Everdene, as the owner of the "Maria Luisa" even accepting that AFE would not have an immediate right in equity to relief commensurate with beneficial ownership because of the terms of the trust.* ***It is not based on an approach involving "piercing of the corporate veil" or an assumption that the trust was a sham. Rather, having regard to the circumstances just referred to, 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 par 19(b) of the Act and that the Court has jurisdiction to determine this proceeding.*
> [emphasis added]

44. An application for special leave to appeal to the High Court has been filed, but not heard.

the comparative position

45. One can see that the law in Australia (unless the High Court says otherwise) is clearly based on strict principles of property rights. "Piercing the corporate veil" is permitted, but only in circumstances where the law will otherwise countenance it. A broad, practical perspective on ownership, based on capacity to bring about future total legal dominion, existing and complete present economic dominion and possession will be insufficient to found a conclusion of ownership on the approach of the majority in the *Maria Luisa*, without the necessary full proprietary rights of ownership, legal or equitable, and present and full legal entitlement to sell.

46. Berlingieri on *Arrest of Ships* (3rd Ed) deals with the question of sister ship arrest and piercing the corporate veil in the context of both the 1952 and 1999 Conventions: see in connection with the 1952 Convention, and generally, Book I ch 5 section 22 pp 114-129 [I.449]-[I.498] and in connection with the 1999 convention Book II ch 4 section 9 pp 322-24 [II.134]-[II.138]. Berlingieri contains a valuable comparative discussion of the problems of legal form and commercial substance in various jurisdictions.

47. Terminology is important. The words "owner" and "beneficial owner" recur in legislation of various countries. This is to be expected in the light of article 3 in both the 1952 and the 1999 Conventions. Also, one must be careful of metaphors such as "lifting", or "piercing", the "corporate veil". Moore J in *The Maria Luisa* quoted Cardozo J in *Berkey v Third Avenue Railway Co* (1926) 244 N.Y. 84 who spoke of enveloping issues "in the mists of metaphor". There is no doubt that the strictest type of property analysis (as shown by the majority in *The Maria Luisa)* is conformable with "lifting the corporate veil". On established principles of company law, this "lifting" or "piercing" can be done in circumstances of fraud, including fraud against creditors, true agency and nominee arrangements. I will not repeat what I wrote in 2000 about this. Thus, to say that in country X or Y the "piercing of the corporate veil" is permitted does not necessarily inform one about how the

courts in that country approach the question of ownership or about the strictness with which courts in that country will view the corporate form, if legitimately put in place in advance of a difficulty, perhaps even with the aim, or with one aim, of quarantining individual vessels in an overall managed fleet. The first question to be asked is the nature of the legal analysis used in any jurisdiction (and the rigour of any analysis employed) to characterise ownership itself or to identify the criteria on the basis of which steps can be taken against another ship related in some way to the first ship. Once that is appreciated, a better context is set for understanding when corporate form will be set to one side. If one must use the metaphor, it is perhaps better to ask *in what circumstances* the corporate "veil" will be "lifted", rather than *whether* it will be "lifted".

48. The above point made, however, the two enquiries (what is the nature of ownership and whether the corporate veil will be lifted) often overlap. For instance, the notion of what is "fraud" or "fiction" may be viewed differently by different national courts. For instance, the factors set out by Berlingieri at ftn 81 on p 116 taken from the judgment of the Belgian Cour d'Appel in *King Navigation Ltd v Bulknedlloyd Holdings BV (The Alpha Sun)*[115] were sufficient to meet concepts of "simulation, abuse of law and fraud" in Belgium. In Australia, they might, perhaps, merely be indicia of common control of separate companies in a group.

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[115] Footnote 81 on p 116 of Berlingieri (3rd Ed) states (with translation courtesy of Mr Wim Fransen) the following:

> Considering that from the documents disclosed by parties it appears that Lloyd's Register of Shipping mentions the vessels "Alpha Star", "Alpha Sun", "Alpha Storm", and "Alpha Sky" under 'Le Timon Transport' established at 2 Akti Miaouli and Pavieroustreet in Piraeus (Greece), although for each of these vessels a separate company in Monrovia is mentioned; that these companies are all established at the same address in Monrovia; that also the place of business of Plaintiffs in the appeal is established at the same address with an Agent; that the addresses 97 Akti Miaouli and 2 Pavieroustreet do refer to the same building; that Le Timon Transport is the policy holder for both vessels (cfr. Skuld, List of vessels, 31st December 1993, p.3); that the registration of the vessel and the deed of sale of the vessel are disclosed; that Defendants in the appeal give proof with regard to two other vessels out of the same group, "Alpha Storm" and "Alpha Sky" that Le Timon Transport is known as the Owner of these two vessels (cfr. report Dinamar "Secondhand Sales"); that from World Shipowning Groups (1993) it appears that Le Timon Transport is known as "Group Fleet: 4 vessels" be it with the mention of various "one ship companies" for the respective vessels; that more specifically the Board of directors of Lone Eagle Shipping and King Navigation Ltd are in the hands of the same persons; that the Board of directors of Lone Eagle Shipping is managed by P. Skamalou and M. Psalti and the Board of directors of King Navigation by G. Giousepis and M. Psalti and that both companies have the same representative, i.e. P. Skamalou; that the lawyer Harris represents both ms. "Alpha Sun" and ms. "Alpha Star" (telefax of 21st January 1994); that vessels of the same group are "cross collateralised", i.e. one ship is used as collateral for debts of the other ship; that as a matter of fact proof is given that when buying "Alpha Sky", the "Alpha Star" was offered as collateral to the Royal Bank of Scotland, mortgagee; that no proof is given that the various "single ship companies" in reality have a separate life from a financial and administrative viewpoint

49. In France, the notion of "fictitiousness" of the company structure, may well require a careful analysis of corporate history and the issue of the controlling mind.[116] The notion of "*communaute d' intérêts*" was discussed in *The Brave Mother* [1991] DMF 315 cited in English translation by Berlingieri at 121-122 as follows:

> *In several judgments the provisions of Article 3(1) and (2) of the Arrest Convention have been taken into consideration by the French Courts who expressed the view that the arrest of a ship owned by a different company was not, when the two companies were linked by a "communauté d' intérêts" or when their fictitious nature was proved, in conflict with the Convention.*
>
> *The Cour de Cassation in its judgment of 12 February 1991 in Brave Mother Shipping Ltd v Maritime Transports Overseas GmbH – The "Brave Mother' (1991) DMF 315, at p 316. Previously the same view had been expressed, albeit in a more concise form, by the Cour d' Appel of Rennes in its judgment of 21 June 1989, Maritime Transport Overseas GmbH v Brave Themis Navigation – The "Brave Mother", [1989] DMF 649 at p 654.) held:*
>
> > *But whereas, if Art 3 of the Convention states that, when all parts of the vessel belong to the same person or persons, the ships are deemed to be in the same ownership, this provision does not exclude that evidence be given that a ship belongs to the same person or persons even though the parts do not wholly belong to him or them that having found that the two ships in respect of which the dispute has arisen, even if registered as belonging to distinct legal entities, were owned by companies whose assets were united through the members of the same family and by a communauté d' intérêts, the Court of Appeal, without making the finding considered in the appeal, has legally justified its decision and from this follows that the appeal is not founded.*

50. South Africa has, of course, departed from "ownership" as the fundamental qualifying element; it has preferred to employ the notion of "control" which is defined in s 3(7)(a) of the *Admiralty Jurisdiction Regulation Act* 105 of 1983 as:

> *(7)(a) For the purposes of subsection (6) an associated ship means a ship, other than the ship in respect of which the maritime claim arose:*
>
> (i) *owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or*
>
> (ii) *owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or*
>
> (iii) *owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned, or controlled by the company which owned the ship concerned, when the maritime claim arose.*

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116 Berlingieri pp 119-122

See generally *The Heavy Metal* 1999 (3) SA 1083 (Supreme Court of Appeal).

51. The United States position does not admit of ready summary[117]. An examination of some of the judgments of the more influential American Courts reveals an underlying conformity of concepts to those employed in Australia and England. The basic rule appears to be that the corporate veil will be lifted where form has been used to bring about fraud: *Itel Containers Int'l v Atlanttrafik Export Services* 909 F 2d 698 (1990), though this appears to have been extended to the notion of the "alter ego". Whilst the concepts are the same there appears a greater willingness to employ the notion of agency through total domination.

52. In *Itel Containers Int'l,* the United States Court of Appeals Second Circuit said, having dealt with an argument on agency, at 703-704:

> *…Though New York law allows the corporate veil to be pierced either when there is fraud or when the corporation has been used as an alter ego, we find no basis for reversal.*
>
> *In Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir.1979), we noted that [b]ecause New York courts disregard corporate form reluctantly, they do so only when the form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation,… and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego.*
>
> *Similarly, in Kirno Hill Corp. v. Holt, 618 F.2d 982, 985 (2d Cir.1980), we stated:*
>
> > *The prerequisites for piercing a corporate veil are ... clear ...: [the defendant] must have used [the corporation] to perpetrate a fraud or have so dominated and disregarded [the corporation's] corporate form that [the corporation] primarily transacted [the defendant's] personal business rather than its own corporate business.*
>
> *See also Walter E. Heller & Co. v. Video Innovations, Inc., 730 F.2d 50, 53 (2d Cir.1984) (listing perpetration of fraud as one of the criteria jury could consider in determining whether to pierce the corporate veil). Mere use of the corporate form to avoid liability is insufficient to warrant piercing the veil. See Gartner v. Snyder, 607 F.2d at 586.*

53. In *Wm Passalacqua Builders Inc v Resnick Developers South Inc* 933 F 2d 131 (1991), the United States Court of Appeals, Second Circuit, dealt with the matter at

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[117] See generally Thompson "Piercing the corporate veil: an empirical study" 76 *Cornell Law R* 1036; Berlingieri (3rd Ed) pp 128-29; Blumberg *The Law of Corporate Groups;* Barber *"Piercing the Corporate Veil"* .(1981) 17 *Williamette Law Re*v 371

length. An extensive citation from the opinion of the Court is helpful since it provides detailed guidance on the approach of a major world commercial jurisdiction and an insight into possible direction for change, statutory or otherwise. At 137-139, the following was said:

> *…We must analyze the requirements for disregarding the corporate form under New York law, and then determine whether the district court correctly applied those requirements to the facts of this case.*
>
> *New York's view on this subject begins with Berkey v. Third Avenue Ry. Co., 244 N.Y. 84, 155 N.E. 58 (1926), where Judge Cardozo said:*
>
> > *Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent.... The logical consistency of a juridical conception will indeed be sacrificed at times when the sacrifice is essential to the end that some accepted public policy may be defended or upheld. This is so, ... where the attempted separation between parent and subsidiary will work a fraud upon the law.*
>
> *Id. at 95, 155 N.E. 58.*
>
> *Ten years later Lowendahl v. Baltimore & Ohio R.R. Co., 247 A.D. 144, 287 N.Y.S. 62 (1st Dept.), aff'd, 272 N.Y. 360, 6 N.E.2d 56 (1936), set forth the New York rule for corporate disregard. Lowendahl took Berkey's proposition as a starting point, and proceeded to explain that to pierce the corporate veil, the parent corporation must at the time of the transaction complained of: (1) have exercised such control that the subsidiary "has become a mere instrumentality" of the parent, which is the real actor; (2) such control has been used to commit fraud or other wrong; and (3) the fraud or wrong results in an unjust loss or injury to plaintiff.* Id. 247 A.D. at 157, 287 N.Y.S. 62. *The doctrine, it was said, is invoked "to prevent fraud or to achieve equity." International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 292, 79 N.E.2d 249 (1948). Professor Blumberg believes--and we agree--that the three-factor rule in New York and the alter ego theory sued on in this case are indistinguishable, do not lead to different results, and should be treated as interchangeable. See Blumberg, The Law of Corporate Groups § 6.-03 at 120.*
>
> *[4] Under New York law it has been further held that when a corporation is used by an individual to accomplish his own and not the corporation's business, such a controlling shareholder may be held liable for the corporation's commercial dealings as well as for its negligent acts. See Walkovszky v. Carlton, 18 N.Y.2d 414, 417, 276 N.Y.S.2d 585, 223 N.E.2d 6 (1966). Where there is proof that defendants were doing business in their individual capacities to suit their own ends--shuttling their own funds in and out without regard to the corporation's form--this sort of activity exceeds the limits of the privilege of doing business in a corporate form and warrants the imposition of liability on individual stockholders. Id. at 420, 276 N.Y.S.2d 585, 223 N.E.2d 6. The critical question is whether the corporation is a "shell" being used by the individual shareowners to advance their own "purely personal rather than corporate ends."* Port *Chester Elec. Constr. Corp. v. Atlas, 40 N.Y.2d 652, 656-57, 389 N.Y.S.2d 327, 357 N.E.2d 983 (1976) (quoting Walkovszky, 18 N.Y.2d at 418, 276 N.Y.S.2d*

585, 223 N.E.2d 6).

We capsulized this view of New York law in American Protein, 844 F.2d 56 (2d Cir.1988), where we observed that control, whether of the subsidiaries by the parent or the corporation by its stockholders, is the key; the control must be used to commit a fraud or other wrong that causes plaintiff's loss. Id. at 60. See Electronic Switching Indus., Inc. v. Faradyne Elec. Corp., 833 F.2d 418, 424 (2d Cir. 1987) (absent a showing that "control and domination was used to commit wrong, fraud, or the breach of a legal duty, or a dishonest and unjust act" New York law will not allow a piercing of the corporate veil); Gorrill v. Icelandair/Flugleidir, 761 F.2d 847, 853 (2d Cir. 1985) (same as American Protein).

[5] Liability therefore may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties. See Itel Containers Int'l Corp. v. Atlanttrafik Exp. Serv. Ltd., 909 F.2d 698, 703 (2d Cir. 1990) ("New York law allows the corporate veil to be pierced either when there is fraud or when the corporation has been used as an alter ego.") (emphasis in original); Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir.1979) ("Because New York courts disregard corporate form reluctantly, they do so only when the form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation ..., and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego."); cf. Kirno Hill Corp. v. Holt, 618 F.2d 982, 985 (2d Cir.1980) (in federal maritime law "The prerequisites for piercing a corporate veil are ... clear ...: [the defendant] must have used [the corporation] to perpetrate a fraud or have so dominated and disregarded [the corporation's] …corporate form that [the corporation] primarily transacted [the defendant's] personal business rather than its own corporate business.")

… triers of fact are entitled to consider factors that would tend to show that defendant was a dominated corporation, such as: (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own. See generally, Barber, Piercing the Corporate Veil, 17 Willamette L.Rev. 371, 398 (1981); Director's Guild of America v. Garrison Prod., 733 F.Supp. 755, 760-61 (S.D.N.Y. 1990); United States Barite Corp. v. M.V. Haris, 534 F.Supp. 328, 330 (S.D.N.Y.1982).

[7] Applying these--or any other pertinent factors--to the infinite variety of situations that might warrant disregarding the corporate form is not an easy task

because disregarding corporate separateness is a remedy that "differs with the circumstances of each case." American Protein, 844 F.2d at 60. The jury must decide whether--considering the totality of the evidence, see William Wrigley, Jr. Co. v. Waters, 890 F.2d 594, 601 (2d Cir. 1989)--the policy behind the presumption of corporate independence and limited shareholder liability--encouragement of business development--is outweighed by the policy justifying disregarding the corporate form--the need to protect those who deal with the corporation. Blumberg, The Law of Corporate Groups § 6.01, at 108 ("The particular objectives and policies of the area under consideration should control.").

54. In *Morris v New York Dept of Taxation and Finance* 82 NY 2d 135 (1993), the Court of Appeals of New York approached the matter similarly:

The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners (see, Bartle v Home Owners Coop., 309 NY 103, 106; Rapid Tr. Subway Constr. Co. v City of New York, 259 NY 472, 487-488; Presser, Piercing the Corporate Veil § 1.01, at 1-4--1-5).

The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation (see, e.g., Billy v Consolidated Mach. Tool Corp., 51 NY2d 152; Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652; Walkovszky v Carlton, supra; Bartle v Home Owners Coop., supra). The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed (see, 1 Fletcher, Cyclopedia of Private Corporations § 41, at 603 [perm ed]). Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners (see, id., at 602-603).

Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised (see, Presser, Piercing the Corporate Veil § 2.33 [1], at 2-291--2-293). Generally, however, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (see, Matter of Guptill Holding Corp. v State of New York, 33 AD 2d 362, 364-365, affd 31 NY2d 897; Lowendahl v Baltimore & Ohio R. R. Co., 247 App Div 144, 157, affd 272 NY 360; American Protein Corp. v AB Volvo, 844 F2d 56, 60 [2d Cir 1988] [analyzing New York law and citing Lowendahl (supra)]; International Aircraft Trading Co. v Manufacturers Trust Co., 297 NY 285, 292; see generally, Presser, Piercing the Corporate Veil § 2.33 [3], at 2-304--2-313).

While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device

to further their personal rather than the corporate business (see, Walkovszky, supra, at 417), such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required (see, Guptill, supra, at 365; Lowendahl, supra, at 157; Passalacqua Bldrs. v Resnick Developers S., 933 F2d 131, 138 [2d Cir 1991] [applying New York law]; see generally, 18 Am Jur 2d, Corporations, § 51). The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (see, Guptill, supra, at 365; National Labor Relations Bd. v Greater Kan. City Roofing, 2 F3d 1047, 1052-1053).

55. This is not the place for any detailed analysis of American law or the undertaking of a full comparative law investigation. It can be seen, however, that similar notions are often identified as regards underlying principles: but it is the rigour, or flexibility, of their application which needs to be understood in respect of any particular jurisdiction. This is especially so since the concepts involved are flexible and, to a degree, judgmentally elusive.

private international law

56. A conflicts question arises in the assessment as to who is the "owner" (or indeed charterer etc.): By whose law is this to be governed?

57. In *The Nazym Khikmet* [1996] 2 Lloyd's Rep 362 it was common ground before Clarke J that the question of the beneficial ownership of a Ukrainian vessel (the *Zorinsk*, the alleged sister ship of the *Nazym Khikmet)* was to be judged by whether, and the extent to which, the relevant person (BLASCO) had rights which could be characterised as ownership in English law. Clarke J then turned to Russian and Ukrainian fact and law (such law, of course, also being a factual question) to ascertain the rights enjoyed by BLASCO. He concluded that important ownership rights were retained by the State and that BLASCO was not the beneficial owner. Clarke J was upheld on appeal. Importantly, careful consideration was given to foreign law in the ascertainment of the rights of the parties. The characterisation of these rights as ownership or not within the terms of the statute of the forum was a matter for the *lex fori*, and so English law.

58. The same approach was taken by GP Selvam J in *The Kapitan Temkin* [1998] 3 SLR 256, 257 and by the New Zealand Court of Appeal in *Vostok Shipping Co Ltd v*

Confederation Ltd [2001] 1 NZLR 37, 45-6. See also *The Ivanovo* [2002] 4 SLR 978.

59. It might, however, be difficult, in any particular case, to identify the limits or points of intersection between the identification of the component rights under foreign law ascertained by reference to local conflicts principles, including *renvoi*, and the characterisation of those rights as ownership or not, by the *lex fori*. See for example *Vostok Shipping* at 45.

the question of change

60. Whether or not Parliaments should give the phrases "the owner" or "beneficial owner" a wider content than that which the courts have given them, is a matter of policy for the legislature.

61. Fundamental policy questions (involving considerations affecting, as well as other matters, transport, agricultural, industrial and service industry considerations) underlie any change to the present approach based on a strict proprietary analysis. If the law in this area is to recognise the full rigour of the corporate form and the precision of analysis separating and distinguishing economic dominion, equitable interest and power of control, on the one hand, from full legal or equitable ownership, on the other, a properly advised shipowner who is not careless in its administration of a fleet will always be able to avoid sister ship arrest, and, perhaps, any form of arrest for, at least, *in personam* claims. A question perhaps arises as to whether the best balance between the various competing interests is currently struck.

62. If the law is to replace notions of proprietary *titular* interest with something broader, a satisfactory surrogate for ownership will be required, at least in regard to sister ship arrest. Control is one concept; but it should not be forgotten that control and true economic dominion are not necessarily the same. In ss 17, 18 and 19 the ship is being sought to be made responsible for someone's liability. That calls for some real equivalence between the liability of the relevant person (if the concept of a relevant person is to be retained – as it must be, in at least sister ship arrest) and the asset. The legislature has countenanced some divergence between ultimate ownership and control in demise charterer arrest. In circumstances of sole practical control and sole

economic equivalence, it may be that the corporate form should be seen as something of less than crucial importance in the analysis of responsibility in this area of commercial life, if only for the everyday practical reasons referred to by Brandon J in *The Andrea Ursula*. If the notion of "beneficial ownership" had come to be assessed or defined by reference to the considerations expressed by Brandon J in *The Andrea Ursula*, the present fixation upon precise legal questions of title might have been avoided and the jurisprudence might have developed along lines more in accordance with the practical common sense expectations of commercial parties in the industry.

63. In this respect, it is worth recalling that in the deliberations leading up to the 1999 Convention the submission of the Government of the United Kingdom sought a much wider "associated" ship arrest, based on control. The submission contained the following comments and drafting:[118]

> *9. The Government of the United Kingdom proposes an amendment to article 3 of the draft convention on the arrest of ships. Like the proposal made by the International Maritime Committee (CMI), the proposed amendment would clarify that national law would determine whether a claimant may arrest a ship other than the particular ship in respect of which the maritime claim arises. It goes further than the CMI proposal, however, by providing explicitly for the arrest of "associated" ships (associated ships are ships that are in common control). We also discuss the definition of control, and whether the convention ought to contain any guidance.*
>
> *Background*
>
> *10. The 1952 Convention on Arrest of Ships seeks to strike an equitable balance between the interests of shipowners and those of claimants. Article 3(1) of the 1952 Convention provides for the arrest of "sister" ships. A claimant may arrest either the particular ship in respect of which a maritime claim arises, or any other ship owned by the person who is, at the time when the maritime claim arises, the owner of the particular ship. Article 3(2) of the 1952 Convention provides that ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.*
>
> *11. 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 which the maritime claim arises. The balance that the 1952 Convention sought to strike has tilted in favour of the shipowner.*
>
> *12. The Government of the United Kingdom understands that article 3(2) of the draft convention addresses this problem by implicitly allowing States to*

[118] Berlingieri pp 478-9. The change in British interests in 75 years is illuminating.

specify which ships are in common owner-ship under national law. We agree with the CMI that it would be better to make this explicit. Our preference, however, would be to go further. We believe that article 3(2) should provide explicitly for the arrest of associated ships.

Proposal

13. *As currently drafted, the new convention would provide for the arrest both of the particular ship in respect of which the claim arises, and of other ships owned by the person liable for the claim. We wonder, however, whether this approach would provide sufficient flexibility.*

14. *The use of the concept of ownership might limit the scope of the provision. In the same way that the single-ship company proliferated after 1952, future developments in the shipping industry might reduce the usefulness of the concept of common ownership.*

15. *We therefore propose that the provision provide explicitly for the arrest of "associated" ships. We propose further that it use the concept of control as the criterion for establishing an association. We believe that this would provide greater scope for national law to keep pace with developments that might otherwise prevent attempts to pierce the corporate veil.*

16. *The following amendments to article 3 would give effect to these proposals:*

(1) …

(2) Arrest is also permissible of any ship or ships controlled by the person who:

(a) is allegedly liable for the maritime claim; or

(b) controls the company that is allegedly liable for the maritime claim, and who was when the claim arose:

(i) the person who controlled the ship in respect of which the maritime claim arose [; or

(ii) the demise charterer, time charterer or voyage charterer of that ship [, or any part of it]].

(3) For the purposes of this article, a person controls a ship if that person owns the ship or controls the company that owns it. The national law of the State in which the arrest is applied for shall determine whether, for these purposes, a person owns a ship or controls a company that owns a ship.

(4) Paragraph (2) shall not apply to claims in respect of ownership or possession of a ship.

(5) Notwithstanding the provisions of paragraph (1), the arrest of a ship which is not controlled by the person allegedly liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

…

procedural disposition

64. A number of issues as to the state of the law, its practical application and possible change, statutory or otherwise arise: (a) the question of "jurisdiction" and "jurisdictional facts", and what these words mean; (b) the procedural approach to the disposition of such issues; and (c) the broader question of the relationship between the substantive provisions for arrest and procedural disposition in achieving a balance in arrest cases.

65. The word "jurisdiction" is said to be generic. It is generally taken to mean authority to adjudicate: see for example *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [2].

66. In Australia, the word and the concepts therein can be of great importance constitutionally. For instance federal courts, including the Federal Court, can only be conferred with jurisdiction over matters contemplated by ss 75 and 76 of the Constitution, which, of course, include s 76(iii):

> …*of Admiralty and maritime jurisdiction*

67. The Australian Act is based primarily upon s 76(iii)[119]. Section 14 provides that:

> …*a proceeding shall not be commenced as an action in rem against a ship or other property except as provided by this Act.*

Set out in ss 15, 16, 17, 18 and 19 are the matters "provided by this Act".

68. It is worth reminding oneself of the "jurisdictional" context. The action is against the ship. Part of the underlying debate about the nature of Admiralty jurisdiction, of the action *in rem* and of the maritime lien is reflected by the distinction made between the "personification" theory (the ship as a responsible legal thing) and the procedural theory[120]. The former had much greater influence in the United States than in England, where the procedural theory has dominated since the late nineteenth century.

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[119] As to the constitutional basis for the Australian Act see Cremean (2nd) *Admiralty Jurisdiction* pp 8-11; White *Australian Maritime Law* (2nd) pp 1- 25.

[120] See Davies "In Defence of Unpopular Virtues: Personification and Ratification" (2000-2001) 75 *Tul.L.R.* 337; see the note entitled "Personification of Vessels" (1963-1964) 77 *Harv L.R.* 1122 on *Reed v The Yaka* 373 US 410 (1963).

69. The action *in rem* grew up as the legal process peculiar to the Admiralty Court. It was not the only way of proceeding in Admiralty. One could also proceed *in personam*, but one needed to find the defendant within the jurisdiction or amenable to *ex juris* ("long arm") service.

70. The action *in rem* is a proceedings against the *res* – against the ship or other property. The owner may never appear. In *The Mecca* (1881) 6 P.D. 106, 112 Sir George Jessel MR said:

> *You may in England and in most countries proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action in rem, and it is perfectly well understood that the judgment is against the ship.*

71. In the cases in the United States, which reflect the personification theory, the ship, as the offending object, was liable, irrespective of the liability of the owners: eg *The Little Charles* 26 Fed Cas 9/9 (1819); *The Palmiyra* 25 U.S. 1 (1827); *The Nestor* 18 Fed Cas 9 (1831); *The Brig Malek Adhel* 43 U.S. 210 (1844); *The Young Mechanic* 30 Fed Cas 873 (1855). However, in most cases, salvage aside, the action *in rem* is rooted in the personal liability of the owner. The action *in personam* and the action *in rem* can be seen to be related, though distinct. The action is against the *res*; it is dependant on the *res* being within the jurisdiction; the presence, service and amenability to service of the owner are irrelevant, but because of the drastic consequences of arrest there is a powerful coercive force on the owner to appear. Thus, the *in rem* action is a means of obtaining jurisdiction over and proceeding against the *res*, and a means of persuading or coercing the owner to appear personally to defend its interest, thereby enabling the *in personam* claim to be pursued within the jurisdiction or leading to security being put up for the *in personam* claim, wherever it may be pursued.

72. In the above sense, the action *in rem* can be seen as a procedural device to coerce the *res* owner into entering an appearance and providing security. This procedural analysis has prevailed in England since the decision of Sir Francis Jeune in *The Dictator* [1892] P 304 which departed from the personification theory reflected in *The Bold Buccleugh.* The procedural analysis reached its apogee in *The Indian Grace (No 2)* [1998] AC 878.

73. The importance of the distinction between personification and procedure was, first, whether the appearing owners could have judgment entered for more than the value of the *res*. The procedural theory, seeing the *in rem* action as a mechanism for procuring presence and security answered yes, if the owner appeared.

74. Another point of importance is the relationship of the theories to the law of *res judicata*. Notwithstanding the strength of the procedural theory in England, a distinction was recognised between the two actions. It had been clearly held that an *in rem* action does not merge into an adjudication on a cause of action *in personam:* Thomas *Maritime Liens* [63] p 39. Now, however, the sweeping away of past authority by the House of Lords in *The Indian Grace (No 2)* [1998] AC 878, where the procedural theory appears triumphant to its logical conclusion, makes it necessary to re-evaluate earlier accepted propositions as to the continued distinction of the two actions. As to *The Indian Grace*, see [1998] *LM&CLQ* 27 and 33.

75. Also, the procedural theory does not fully answer the undoubted fact that the right to arrest *in rem* can arise from the existence of a lien attaching irrespective of the fault of the owner, eg salvage; and that the right can run against *bona fide* purchasers without notice if based on a lien.

76. The difference between the two actions leads to the procedural rule that the claimant cannot conjoin the *in rem* and *in personam* claims in the one writ. Separate writs are required. This separateness is most apparent when someone who is not the "relevant person" appears to defend on behalf of the ship, eg a mortgagee. There may be no *in personam* claims against that person. Thus, though someone may appear to defend the *in rem* action, it remains that – an *in rem* claim.

77. If the owner does not appear, and no other party appears to defend the *res* the court will without more make an order for sale.

78. If the owner does appear, the proceedings in question continue as a proceeding *in rem* and also as a proceeding *in personam*: *The Dictator* [1892] P 304; *The Gemma* [1899] 285, 291-92; *The Beldis* [1936] P 51,75-6; and see the cases at pp 102-3 ftnt 12 of Davies and Dickey *Maritime Law* (2nd).

79. This is the conceptual framework in which the authority granted to arrest a vessel appears. The practical context in which many vessels will be arrested is the plying of international or national trade and commerce. An arrest will almost always cause, or threaten to cause, significant disruption, not only to those interested in the ship, but to those directly interested in its voyage, and indeed others. In these circumstances, despatch of handling issues concerning the entitlement to arrest is, or may be in any given case, very important.

80. A challenge to "jurisdiction" is often made. But what is "jurisdiction" in this context? In *The Vasso* [1984] 1 QB 477 at 488 the Court of Appeal said:

> …*We are ourselves unable to conceive of a case where the jurisdiction of the court depends upon the purpose of the plaintiff in invoking the court's jurisdiction. Generally speaking, the word "jurisdiction" simply expresses a power of the court – in cases such as the present, the power of the court to "hear and determine," that is, to adjudicate upon, certain types of claim. These types of claim are set out in the lettered sub-paragraphs of what used to be section 1(1) of the Administration of Justice Act 1956 (now section 20(2) of the Supreme Court Act 1981); and, as appears from section 3(4) of the Act of 1956 (now section 21(4) of the Act of 1981); that jurisdiction may be invoked by an action in rem in the case of some, though not all, of those types of action in rem, the court mast have the power to arrest; the provisions regulating the invocation and exercise of that power are to be found in RSC, Ord 75 r 5 et seq, in particular rule 5 (concerned with the warrant of arrest) and rule 13 (concerned with release of property under arrest).* …

81. In *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391 Dixon J made clear that ordinarily limitations relevant to the jurisdiction of a superior court will be regarded as going to the exercise of jurisdiction, rather than its existence, unless a contrary intention is clearly expressed. Thus, generally, the non-colourable assertion of the elements of a cause of action, in respect of the resolution of which a Court has been given authority to hear, is sufficient for the existence of jurisdiction. For instance, if it is alleged that the respondent has engaged in misleading or deceptive conduct and the case fails, because the court finds there was no such conduct, that does not mean the court lacked jurisdiction to hear the case, rather the issue of misleading or deceptive conduct went to the exercise of jurisdiction, not its existence. In one sense, this is how the "claim" of the "relevant person" is approached: the assertion of the claim, and the conclusion that the "relevant person" would be liable if the claim be made out[121].

[121] As to the difficulty of statutory construction as to whether a pre-condition is to be regarded as conditioning the existence of jurisdiction rather than as concerned with its exercise: see *R v Gray; Ex*

82. The purely factual questions contained within the matters "provided by" the Australian Act (*vide* s 14) have been treated differently. The non-colourable assertion of the relevant elements of ss 17, 18 and 19 – charterer, owner etc is not sufficient to justify the claim proceeding against the *res* – to justify the jurisdiction to have the *res* meet the claim. The position in Australia appears to be as set out by the High Court in *The Shin Kobe Maru* (1994) 181 CLR 404, 426 that:

> *Where jurisdiction depends on particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. And, of course, they must be established on the balance of probabilities in the light of all the evidence advanced in the proceedings held to determine whether there is jurisdiction.*

83. In so finding, the High Court followed the approach of *The Aventicum* and *I Congreso del Partido.* On the other hand, Gummow J, at first instance, noted that Slynn J in *The Aventicum* had not been referred to the decision of *The St Elefterio* [1957] P 179 in which Willmer J had refused to allow the hearing to decide whether there was a right to proceed *in rem* to degenerate into a full trial of the action. Gummow J used the cases on service *ex juris*[122] and *forum non conveniens* [123] as a basis for concluding that what had to be shown was a strong prima facie case on the elements of the section. This was the approach of Gummow J in respect of both par 4(2)(a) and (b). It is plain that pars 4(2)(a)(i) and (ii) only concerned *claims* relating to certain matters. Par 4(2)(b) on the other hand concerned a claim *between co-owners,* and so, arguably, contains the kind of facts or circumstances referred to by the High Court in *The Shin Kobe Maru.*

84. The High Court drew a distinction between pars 4(2)(a) and (b). It said at 426-27:

> *In this case, Empire asserts jurisdiction on two bases. So far as jurisdiction is asserted by reason of s.4(2)(a), it does not depend on factual precondition but, rather, on the claim having the legal character required by that paragraph, namely, "a claim relating to … possession of [or] … title to, or ownership of, a*

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parte Marsh (1985) 157 CLR 351 where a statutory majority (Gibbs CJ at 371-72, Wilson J at 378-79 and Brennan J at 381-82 decided that a provision that if there has been a claim by a member of a union of an "irregularity" in connection with a union election he may apply for an inquiry by the court, required the pre-existence of such a claim. The minority (Mason J 377, Deane J 391-92 and Dawson J 394-95) said the question was one within jurisdiction and the prohibition would not lie. See also Sir Anthony Mason in the *The Tian Sheng No 8* [2002] 2 Lloyd's Rep 430, 443.

[122] Such as *Contender 1 v Lep International Pty Ltd* (1988) 63 ALJR 26 and *Vikovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869, 883

[123] Such as *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538

ship". The question is somewhat different with s 4(2)(b) in that ownership is a question of mixed fact and law and there may well be cases where facts must be established before a claim can be characterized, in terms of that paragraph, as "a claim between co-owners". However, the issue in this case, so far as s 4(2)(b) is concerned, seems not to be whether Empire has established facts proving co-ownership, but whether the facts give rise to a relationship which is recognized in law as co-ownership. These issues were not fully developed in argument and, as earlier indicated, it is not necessary to determine whether s 4(2)(b) applies in this case. That being so, it is convenient to consider this aspect of Y.S.L.'s argument solely by reference to s 4(2)(a).

The question of whether Empire's claim bears the legal character of a proprietary maritime claim as defined in s 4(2)(a) of the Act does not depend on findings of fat and, thus, cannot involve any consideration of the balance of probabilities. That being so, there is no basis for the application of the principle in the "Aventicum" in relation to Empire's claim that there is jurisdiction by reason of s 4(2)(a).

85. After *The Shin Kobe* Maru, in *The Iran Amanat*, the primary judge sought to apply the passage from the High Court's judgment in *The Shin Kobe Maru* set out at [81] above to the question whether there was a claim on which the relevant person would be liable. That is, he examined the merits of the claim. He found against the arrestor and ordered the release of the ship. The Full Court considered that the primary judge had asked himself the wrong question and the High Court agreed. Without qualifying the passage concerning jurisdictional facts to which I have referred, the High Court made it plain that all that was necessary was to assess whether there was a relevant person who would be liable on the claim in a proceeding commenced as an action *in personam*. Thus, as I have said, if one wishes to view the matter in terms of jurisdictional facts or jurisdictional circumstances, the existence of someone who would be liable on a claim (if it were made good) is all that is required. That is different, however, from factual circumstances not dependant upon an hypothesis of success or the existence of an asserted claim, but where individual facts are seen to be pre-requisites.

86. Thus, in *Lloyd Werft Bremerhaven GmbH v Owners of Ship Zoya Kosmodemyanskaya* (1997) 79 FCR 71 (*"The Zoya K")* the Full Court of the Federal Court applied the dictum in *The Shin Kobe Maru* and *The Aventicum* and concluded that the hearing in which ownership of the vessel was challenged was one going to jurisdiction by way of a preliminary question, and in the nature of a final hearing.

87. For a number of years it appeared that the approach in New Zealand as to these jurisdictional facts was different and that the defendant bore the burden of establishing that the plaintiff had no arguable case for arrest in what was, in effect, an interlocutory hearing: *Marine Expeditions Inc v The Ship Akademik Shokalskiy* [1995] 2 NZLR 743 and *The Fua Kavenga* [1987] 1 NZLR 550. Notwithstanding that the Court of Appeal in *Baltic Shipping Co v Pegasus Lines SA (Samarkand)* [1996] 3 NZLR 641 at 648 appeared to approve the views of the High Court in *The Shin Kobe Maru,* the more liberal approach appeared to live on, in particular in relation to onus: *Sovrybflot v The Ship Efim Gorbenko* [1996] 2 NZLR 727, *Mobil Oil NZ v The Ship Rangiora* [2000] 1 Lloyds Rep 36, and *Vostok Shipping v The Ship Kapitan Lomaeo,* Laurenson J 10 September 1998. However, the Court of Appeal in *Vostok Shipping v Confederation Limited* [2000] 1 NZLR 37 brought New Zealand into line with Australia and England.

88. When jurisdiction is challenged, the authorities say that it is to be determined on the motion to set aside the writ and not as an issue in the proceedings. The onus to justify jurisdiction remains upon the party asserting arrest: *I Congreso del Partido* at 535-36; *The Nyzam Khikmet* at 363; *The St Merriel* [1962] 1 Lloyd's Rep 63; *The Andrea Ursula*; *The Aventicum; The Maritime Trader, The Saudi Prince* and *Vostok Shipping* [2001] 1 NZLR 37.

89. This approach of dealing with the question of "jurisdiction" at an early stage is followed in Hong Kong: *Wo Fung Paper Making Factory v Sappi Kraft (Pty) Ltd* [1998] 2 HKLR 346, 352 and *The Tian Sheng No 8* [2002] 2 Lloyd's Rep 430, 443; and in Singapore *The Andres Bonifacio* [1993] 3 SLR 521, 524, though cf *The Kapitan Temkin* [1998] 3 SLR 254, 257.

90. If I may respectfully say so, the position is well summarised by Sir Anthony Mason sitting in the Hong Kong Court of Final Appeal in *The Tian Sheng No 8* at 443:

…Indeed in the case of jurisdictional objections, there are powerful reasons for thinking that they should be resolved, as far as possible, at an early stage of an action. It is not right that a Court should be venturing upon the merits or substance of an action without determining at the threshold of jurisdiction to proceed. The prospect of a defendant raising a jurisdictional objection at a very late stage of an action, perhaps after a lengthy hearing and just before the delivery of judgment, is one not readily to be contemplated. Accordingly, in the absence of any compelling contrary consideration, there are strong grounds for holding that the rule making power extends to prescribing a time and method by which a jurisdictional objection

is to be taken, at least an objection to the type raised here, in default of which jurisdiction will be exercised.

91. It should, of course, be remembered that in Australia the "jurisdiction" being dealt with here is not constitutional. There would be ample constitutional authority for a court or Parliament to decide upon a wider or more flexible approach to jurisdiction, that is the circumstances in which the action *in rem* may proceed. Rather, the approach is an example of the statute being construed as requiring the primary facts going to the existence of the court's authority over a subject of litigation to exist and be proved at an early stage, if challenged.

92. No attention, as yet, has been given, to the effect, if any, which s 76(ii) of the Constitution,[124] subs 39(2) and par 39B(1A)(c) of the *Judiciary Act 1903* may have on this debate.

93. It may be too late to doubt the clarity of what was said in *The Shin Kobe Maru* and to heed Gummow J's interpretation at first instance in that case (32 FCR at 83) of the plea of Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller* (1983) 152 CLR 570 that questions as to the existence of jurisdiction should be amenable to summary disposition (at 610). Nevertheless, a number of matters are, perhaps, worthy of consideration. One of the reasons given by Goff J in *I Congreso del Partido* for the necessity to deal with the issue early and promptly, with which Slynn J agreed in *The Aventicum,* was that the matter had to be dealt with before the entry of an unconditional appearance. Once an unconditional appearance was entered, the defendant was taken to have waived the right to raise any defence involving the irregularity of the writ.

94. In Australia, on the other hand, in *The Zoya K*, the Full Court held that the unconditional appearance filed at the time of seeking to set aside the arrest for lack of jurisdiction did not prevent the attack on jurisdiction.[125]

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[124] s 76(ii) of the Commonwealth of Australia Constitution

S 76

The Parliament may make laws conferring original jurisdiction … in any matter:

…

(ii) arising under any laws made by the Parliament

…

[125] *The Zoya K* (1997) 79 FCR 71 at 80; and see also *The Socofl Stream* (1999) 95 FCR 403.

95. The need for a speedy resolution of the question of jurisdiction does not so much perhaps arise from the terms of the relevant legislation; rather, it arises from the practical commercial circumstances of urgency which surround most arrests and so the context in which one reads the terms of the legislation. The appropriateness for an anterior hearing does not deny the capacity for some preparation of the issues for that anterior hearing: *Vostok Shipping* at 44.

96. A question might arise as to whether the court should allow compulsory interlocutory processes such as discovery or interrogatories in aid of the resolution of this issue. McGechan J in *Baltic Shipping Co Limited v Pegasus Lines SA* [1996] 3 NZLR 641 at 656 was of the view that such procedures were available, but cf *Advanced Cardiovascular Systems Inc v Universal Specialities Limited* [1997] 1 NZLR 186, 189 and *The Ship Om* Laurenson J, 26 October 2000. This issue raises most sharply the question: Are these jurisdictional facts in the true sense, such that they need to be decided to discern whether there is any authority to adjudicate? Or, are they facts which go to the exercise of jurisdiction, but which, because of their context, should be dealt with at an early stage?

97. The Federal Court dealt with a cognate area recently in *Bray v F. Hoffmann - La Roche Ltd* (2002) 118 FCR 1 (Merkel J) and [2003] FCAFC 153 (Full Court). There, the Federal Court's jurisdiction to grant leave to serve originating process outside the Commonwealth pursuant to O 8 r 2(2) of the *Federal Court Rules* had purportedly been enlivened by the Court's satisfaction that it had jurisdiction to deal with a claim under s 45 of the *Trade Practices Act 1974*. The foreign vitamin companies who were respondents to the proceedings submitted that the Court had no jurisdiction under s 45 of the *Trade Practices Act*, and should deal with the jurisdictional point on a final basis, forthwith – at the hearing of their motions to set aside the originating processes. Merkel J referred[126] to the judgment of the Full Court in *The Zoya K*, and accepted that he had to deal with the jurisdictional point as a final hearing of the point.[127] The applicant objected that she had prepared her

[126] *Bray v Hoffmann-La Roche Ltd* (2002) 118 FCR 1 at 50-51

[127] The *Zoya K* at 80, 93

evidence as for proceedings on an interlocutory basis[128]. His Honour held that, to the extent that he had discretion as to when to hear the jurisdictional issues, it was inappropriate to hear them forthwith.[129] He later held that the court is not under a duty to determine a jurisdictional point as soon as the point is raised.[130]

98. The Full Court, did not have to decide whether Merkel J had been right regarding whether he had to deal with the jurisdiction point forthwith. The Court unanimously rejected the submission that the Court's jurisdiction depended on the factual question of whether the appellants were carrying on business in Australia.[131] However, Finkelstein J said that, if a jurisdictional point had been raised, then Merkel J would **not** have been entitled:[132]

> *…to put off his determination of that issue unless, in the meantime, all steps in the proceeding were deferred pending the resolution of the jurisdictional issue. It is the duty of every statutory court to be satisfied that it has jurisdiction to deal with each matter that is brought before it. In most cases the existence of jurisdiction will be obvious and the matter will proceed without the need for a specific inquiry. If a query about jurisdiction is raised, or if it is identified by the court, the court must satisfy itself that it has jurisdiction before it proceeds any further with the matter.*

99. His Honour then referred to *The Queen v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League*,[133] and *Ex parte Transport Workers Union of Australia (New South Wales); Re Gallagher.*[134] His Honour quoted Lord Diplock's definition of "jurisdiction" from *Rediffusion (Hong Kong) v Attorney-General of Hong Kong*, as:[135]

> *…the right of the court to enter upon the inquiry as to whether or not a cause of action exists in the plaintiff and, if a cause of action does exist, to grant or, if the relief is discretionary, to withhold the relief applied for. Conversely, lack of*

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[128] *Bray v F Hoffmann-La Roche* Ltd (2002) 118 FCR 1 at 50

[129] *Bray v F Hoffmann-La Roche* Ltd (2002) 118 FCR 1 at 51

[130] *Bray v F Hoffmann-La Roche* Ltd (2002) 118 FCR 1 at 54

[131] *Bray v F Hoffmann-La Roche* Ltd [2003] FCAFC 153 at [30] per Carr J, at [165] per Branson J and at [238] per Finkelstein J

[132]. *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153 at [239]

[133] (1979) 143 CLR 190 at 215 per Gibbs J.

[134] (1964) 82 WN (Part 2) (NSW) 58 at 67.

[135] [1970] AC 1136 at 1151.

jurisdiction is absence of any right in the court to enter upon such an inquiry at all.

100. Finkelstein J then said that:[136]

> *…until the court's jurisdiction has been established, the court cannot know whether it has the "right" to enter upon the inquiry. It is only when the right is established that the case can proceed*

101. A number of matters can be said about the approach of Finkelstein J. Gibbs J in *The Queen v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League*[137] was not dealing with the question of the time at which the Court must deal with the question of whether it has jurisdiction. In that case, the prosecutors (respondents in the Federal Court) had sought prohibition against the Judges of that Court, claiming they (the prosecutors) were not "trading corporations" within the meaning of s 51(xx) of the *Commonwealth Constitution*, and therefore outside the reach of s 45 of the *Trade Practices Act*. Gibbs J said:

> *…it does not follow that the Federal Court would have had no power to decide whether the prosecutors were trading corporations. If the proceedings in the Federal Court had not been interrupted by the present application for prohibition, that Court would have been obliged to decide that question for the purpose of determining whether it had jurisdiction. When the question is raised before a court of limited jurisdiction whether a condition of its jurisdiction has been satisfied, that court is not obliged immediately to refrain from proceeding further. It can and should decide whether the condition is satisfied and whether it has jurisdiction to proceed, but its decision is not conclusive.*

102. This would indicate the ability of the Court to deal with the matter within jurisdiction, and if error were made the appeal process would remedy the matter. Gibbs J then quoted with approval the remarks of Devlin J in *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Zerek*,[138] who said that:

> *[w]hen, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to their jurisdiction, the tribunal have to make up their minds whether they will act or not, and for that purpose to arrive at some decision on whether they have jurisdiction or not. If their jurisdiction depends upon the existence of a state of facts, they must inform themselves about them, and if the facts are in dispute reach some conclusion on the merits of the dispute. If they reach a wrong conclusion, the rights of the parties against each other are not affected. For, if the tribunal wrongly assume jurisdiction, the party who*

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[136] *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153 at [239].

[137] (1979) 143 CLR 190 at 215.

[138] [1951] 2 KB 1 at 10.

apparently obtains an order from it in reality takes nothing. The whole proceeding is, in the phrase used in the old reports, coram non judice.

103. It may, with respect, be questioned whether there is anything in these passages to suggest that there is a requirement for the Court, as a temporal matter, to deal with the jurisdictional point before proceeding to hear the substantive part of the matter

104. In the other case cited by Finkelstein J, *Ex parte Transport Workers Union of Australia (New South Wales); Re Gallagher*,[139] it may be questioned whether there is anything said about the time at which a tribunal must deal with a challenge to its jurisdiction. On the page cited by his Honour,[140] Walsh J, with whom Herron CJ and Moffitt J agreed, said, of a non-court tribunal exercising its statutory power, that:

[i]t is no doubt true that a proper exercise of its jurisdiction required that the tribunal should, upon an application by the [applicant], determine whether it was a competent applicant,

and then went on to explain that the error purportedly made in that case was not jurisdictional. Walsh J did not say anything about whether a tribunal had to determine the point forthwith, before taking any other action.

105. In *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League*,[141] Barwick CJ explicitly disapproved the suggestion that the High Court should necessarily restrain the Federal Court on the ground of lack of jurisdiction before the Federal Court has finished hearing the matter.[142] This does not directly address the question of the obligations of a court of limited jurisdiction facing a challenge to its own jurisdiction, but might suggest that the Federal Court itself can decide whether it has jurisdiction on a final basis concurrently with the substantive merits of the case. Wilson, Dawson, Toohey, and Gaudron JJ took a similar approach to that of Barwick CJ in *Contender 1 Ltd v LEP*

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[139] (1964) 82 WN (Part 2) (NSW) 58.

[140] *Ex parte Transport Workers Union of Australia (New South Wales); Re Gallagher* (1964) 82 WN (Part 2) (NSW) 58 at 67.

[141] (1979) 143 CLR 190.

[142] *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League* (1979) 143 CLR 190 at 206.

International Pty Ltd,[143] in approving the refusal of the New South Wales Court of Appeal to grant leave to appeal an interlocutory judgment of Clarke J, *LEP International Pty Ltd v Atlanttrafic Express Service Inc*,[144] on the ground that there was no injustice in allowing "complex questions of disputed fact to go to trial", notwithstanding that the Court's jurisdiction depended on these facts under the Supreme Court Rules allowing service of an originating process outside the jurisdiction.[145]

106. The foreign vitamin companies in *Bray v F Hoffmann-La Roche Ltd*[146]did not dispute that the applicant would have been entitled to use the coercive mechanisms available under the Court Act and Rules (such as discovery), in order to assist her in proving any jurisdictional fact.[147] Finkelstein J, however, explicitly declined to determine whether this concession was proper in the absence of full argument. If the concession were correct, however, how is using the Court's processes such as discovery more tolerable in the absence of jurisdiction than the Court sitting and hearing argument about jurisdictional and non-jurisdictional issues concurrently?

107. In *Khatri v Price*,[148] Katz J said:

> *Because any Australian court is a court of limited jurisdiction, its 'first duty', when there has been a purported invocation of its jurisdiction, is to satisfy itself that it has the jurisdiction purportedly invoked: Federated Engine-Drivers & Firemen's Association of Australasia v Broken Hill Pty Co Ltd. (In making his well-known statement, Griffith CJ gave, as a reason for the existence of such a 'first' duty, 'if only to avoid putting the parties to unnecessary risk and expense'. That reason appears to imply that the duty is one which must be fulfilled 'first' in the sense that the court concerned must determine the question of its jurisdiction before hearing any evidence or argument on issues which would arise in the proceedings if it did have the jurisdiction purportedly invoked. However, in spite of that reason having been given by Griffith CJ, the duty has not been generally understood to be 'first' in that sense. The duty has been*

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[143] (1988) 82 ALR 394 at 398 per Wilson, Dawson, Toohey, and Gaudron JJ.

[144] (1987) 10 NSWLR 614.

[145] But see the dissenting opinion of Brennan J: *Contender 1 Ltd v LEP International Pty Ltd* (1988) 82 ALR 394 at 399-400.

[146] (2002) 118 FCR 1.

[147] *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153 at [33] per Carr J, and at [241] per Finkelstein J.

[148] (1999) 95 FCR 287 at 289-290.

generally understood instead as permitting the court concerned to exercise a discretion … to postpone determining the question of its jurisdiction until after it has heard the whole case, provided, however, that having done so, it then 'first' determines that question. …).

108. One basis upon which Courts in Australia might found their use of interlocutory procedures to determine this "jurisdictional" issue is their authority to determine "matters arising under a law of the Parliament": s 76(ii) of the Constitution and subs 39(2) and par 39B(1A)(c) of the *Judiciary Act 1903*. The interlocutory processes could be "jurisdictionally" thus founded and used to ascertain whether the pre-requisites of the section were fulfilled. For a discussion on a not unrelated area of the use of the inherent power to found such interlocutory procedures, see Laurenson J in *The Ship Om*, 26 October 2000.

109. None of these considerations gainsays the practical desirability of prompt resolution, even if resolution forthwith is not mandated: see especially Sir Anthony Mason in *The Tian Sheng* at 443 at [89] above.

110. The utility of procedures such as discovery will be limited if the entities, especially the "controlling" company, are not within the jurisdiction: *Sabre Corporation Pty Ltd v Russ Kalvin's Hair Care Co* (1993) 46 FCR 428.

111. In the light of the difficulties which can be faced by a plaintiff, sometimes in the face of evidence which contradicts a register, there may be a case able to be made for clarifying and ameliorating a number of matters:

(b) Introducing a provision enabling the position to be held for a reasonable period of time, in all the circumstances, on the basis of interlocutory evidence.

(c) In aid of this, an express power to support applications for discovery and other pre-trial process on an urgent basis in respect of these "jurisdictional" issues.

(d) A clear rule enabling security to be put up to release the ship and the availability of that security, or the proceeds of sale of the *res*, to abide a final hearing of the claim, including on the "jurisdictional" issues. In such circumstances, the personal liability brought about by appearance might also be conditional on the validity of the arrest in the first place.

(e) Given the difficulty of ascertaining the defendant's own private affairs, in particular within a group of related companies, perhaps located out of reach of interlocutory procedures, if a *prima facie* case is made out by the plaintiff on

"jurisdictional facts", perhaps on evidence sufficient for an interlocutory hearing, the onus might then pass to the party challenging the arrest to prove, on a final basis, facts such that the "relevant person" was not the owner.

112. These kinds of changes may well be controversial, especially if they were combined with a change suggested by the UK Government prior to the 1999 Convention. However, even if a provision based on control and economic dominance or utilisation were to be introduced, its effect, in many cases, would likely be nullified by an inability of the plaintiff to extract documents and evidence for disposition of the matter on a final basis.

The Nature of Arrest and the Duty of Disclosure

113. This issue has obtained some prominence in the current discussions as to widening the requirements for disclosure in the supporting affidavits for arrest. What is an arrest? Is it, or should it be, a true exercise of judicial power, involving a discretion, such as might be wielded *ex parte* by a court of equity against a party within the jurisdiction? Or is it, or should it be, an entitlement to administrative action, at least in the first instance? Before coming to the nature of arrest, I will briefly examine the nature of the duty of disclosure at an *ex parte* hearing.

114. In *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 Mahoney AP, with whom Clarke JA agreed, applying the views of Isaacs J in *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 681-82, expressed the duty of disclosure very strongly. His Honour limited his views to the exercise of "judicial and, I think, quasi-judicial" power.[149] There is a high standard of responsibility: to disclose, *uberrima fides*, everything that is known and that is relevant to the making of the order. Isaacs J in *Thomas A Edison Ltd v Bullock* expressed it as follows:

[149] The question as to what judicial and quasi-judicial power are, is not necessarily a straight forward analysis. The distinction between quasi-judicial and administrative power, has given public lawyers difficulty for many years; see for example Renfree *The Federal Judicial System of Australia* (1984) Ch 1; Joseph and Castan *Federal Constitutional Law* Ch 6; Hanks *Constitutional Law in Australia* (2nd) Ch 13; Griffith CJ in *The Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689 said that a power conferred on a judicial officer, *eo nomine*, to make an order to the prejudice of another, is *prima facie* judicial.

Uberrima fides is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumable have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall.

115. The relevant decision in *Gerrard* was made by a non-judicial officer, who issued a certificate of taxation, while there was, to the knowledge of the solicitor applying for the certificate, an application filed and pending for an extension of time for filing a notice of objection to the bill of costs that had been filed by him. There was a discretion of the non-judicial officer involved.

116. There are many other cases expressing the duty. In the Federal Court, in *Lindholdt v Merritt Madden Printing Pty Ltd*,[150] Weinberg J set aside a bankruptcy notice made by a Registrar, saying:[151]

[n]either of those crucial documents disclosed matters which, on any view, ought properly to have been disclosed to the Registrar.

A party who applies ex parte for an order in the exercise of a judicial, or quasi judicial, power is required to meet a high standard of candour and responsibility in bringing to the attention of the decision-maker all facts material to the determination of the application. This obligation extends to facts which the absent party (if present) would presumably rely upon in defence to the application. The existence of such a duty of candour is not limited to applications to the Court for injunctive or other relief. An order obtained in breach of an ex parte applicant's duty of candour will almost invariably be set aside even if, on a fresh application following full disclosure, the applicant would be entitled to an order on similar terms.

117. Weinberg J then cited[152] *Thomas A Edison Ltd v Bullock*,[153] and *Garrard v Email Furniture Pty Ltd*[154] in support of these principles.

118. In *Re One Twenty Seven Corporation*,[155] Brownie J considered that the duty of disclosure as expressed by Mahoney AP applied in cases where a liquidator seeks *ex*

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[150] [2002] FCA 260

[151] *Lindholdt v Merritt Madden Printing Pty Ltd* [2002] FCA 260 at [44]-[45].

[152] *Lindholdt v Merritt Madden Printing Pty Ltd* [2002] FCA 260 at [46].

[153] (1912) 15 CLR 679 at 681-682 per Isaacs J.

[154] (1993) 32 NSWLR 662 at 676-678 per Mahoney AP, with whom Clarke JA agreed

parte orders for examination. In that case, a liquidator had obtained orders for the examination of a receiver who had compromised litigation on terms the liquidator thought less than commercially acceptable. The liquidator had obtained the order *ex parte*, without disclosing to the Supreme Court of New South Wales that the receiver had obtained directions from the Federal Court that he was justified in compromising the litigation on the relevant terms.

119. Implicit in all these expressions of the concept is the discretionary power of the decision-maker to grant or not grant the order or to do or not do the act. Also, however, the nature of the power and the terms of any statute under which the power is exercised may intrude. For instance, in *Lego Australia Pty Ltd v Paraggio*,[156] the Full Court of the Federal Court rejected the approach in cases such as *R v Curran* [157]and *Karina Fisheries Pty Ltd v Mitson*,[158] in which courts had held that it was appropriate to assess the validity of the warrant obtained *ex parte* on the same basis as setting aside an order obtained *ex parte*. In *Lego Australia Pty Ltd v Paraggio*,[159] Beaumont and Whitlam JJ noted that the question was one of statutory construction, not of the operation of the principles of the general law.[160] Their Honours contrasted the position of an applicant for a search warrant with that of an applicant for *ex parte* relief in "private civil litigation", where "the conduct or misconduct of the party obtaining the relief, rather than the decision-maker, is the relevant consideration". In the case of the issue of a warrant by a magistrate or justice, the principles of administrative law applied, rather than the principles such as those set out in *Garrard v Email Furniture Pty Ltd*.[161] Hill J, expressed himself somewhat differently from Beaumont and Whitlam JJ, but in *Puglisi v Australian Fisheries Management Authority*[162] Hill J made clear that his reasons for judgment in *Lego*

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[155] (1995) 13 ACLC 1,600 1,602-1,603

[156] (1994) 52 FCR 542

[157] [1983] 2 VR 133. See at 150-151 per McGarvie J.

[158] (1990) 26 FCR 473. See at 480-481 *per curiam*

[159] (1994) 52 FCR 542 at 555

[160] *Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542 at 555

[161] (1993) 32 NSWLR 662

[162] (1997) 148 ALR 393

Australia Pty Ltd v Paraggio[163]differed from the joint reasons "only in emphasis rather than principle", and that the joint judgment correctly expressed the law.[164] In *Price v Elder*,[165] the Full Court of the Federal Court, *per curiam*, did not depart from the views of Beaumont and Whitlam JJ expressed in *Lego Australia Pty Ltd v Paraggio*.[166]

120. An important characteristic of the issue of a search warrant is that it has been held to involve the exercise of administrative, not judicial power.[167]

121. Under the 1952 and 1999 Conventions the "arrest" of a ship or other property is viewed as "detention by judicial process". The word is defined in the 1952 and 1999 Conventions as follows:

> ***1952***
> *"Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.*
>
> ***1999***
> *"Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.*

122. Yet the difference between arrest and, for instance, the Mareva injunction is recognised to be in the latter being an exercise of judicial discretion, not lightly undertaken. See the ALRC Report's discussion at [245] to [247].

123. Whether a matter is judicial or administrative in character can depend, in some circumstances, upon the identity and nature of the person in whom the matter is vested, as well as the character of the subject matter. Some tasks can be given both to an administrator and to a judge. Dealt with by the former they will involve the exercise of administrative power, dealt with by the latter they will involve the

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[163] *Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542

[164] *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 at 400

[165] (2000) 97 FCR 218 per Black CJ, Sackville, and Emmett JJ

[166] (1994) 52 FCR 542 at 555

[167] *McArthur v Williams* (1936) 55 CLR 324; *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Ousley v The Queen* (1997) 192 CLR 69

exercise of judicial power. This may well be because of the importance of the manner of dealing with it that informs the characterisation of the power. [168]

124. Arrest is a remedy which has not been viewed as the exercise of a discretionary judicial power in the same way as an *ex parte* injunction in equity. The ALRC Report stated at [245] p 196:

> *Arrest is a legal remedy available as of right; the Mareva injunction is equitable and discretionary.*

125. Under the Australian Rules, the Registrar issues the arrest warrant: Rule 40. The words "may issue" are used.

126. There have been different views expressed by different judges as to the place, if any, of the duty of disclosure in the procedure to arrest a vessel. In *The Owners of the SS Kalibia v Wilson* (1910) 11 CLR 689 the High Court was dealing with s 13 of the *Seamen's Compensation Act 1909* (Cth) which provided that, if it was alleged that the owner of a ship was liable to pay compensation under the Act and the ship was in territorial waters a judge might issue an order directed to an officer of the Department of Trade and Customs to detain the ship until such time as the compensation was paid or secured. The order, however, could issue only:

> *…upon its being shown to* [the Judge] *by any person applying that the owner is probably liable*

Whilst not dealt with in that case, the discretionary power, being predicated on an assessment of the strength of the claim would have called for the duty of disclosure.

127. In *Sea Containers Ltd v Owners of Vessel Seacat 031*, 7 June 1993, Lockhart J dealt with a motion to set aside an arrest warrant which had been issued on the order of another judge. The judge who issued the warrant had not been told of offers made by the defendant which would have undermined the impression given by the evidence put forward on the *ex parte* application that there was a clear breach of contract in not offering the vessel to the plaintiff pursuant to an option agreement. Lockhart J said:

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[168] See generally *R v Spicer; Ex Parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 305; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617; Hanks *Constitutional Law in Australia* (2nd Ed) Ch 13; and *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

In my view that information should have been placed before the Court, as it had a material bearing on the establishment of the cause of action. It was not so placed and the result, in my opinion, is that that alone should, so far as clause 4 is concerned, lead to the discharge of the arrest warrant.

The principles in this area of the law are clearly established and I need only refer to the judgment of Sheen J in The "Stephan J" [1985] 2 Lloyds Law Reports, 344 at 346. There his Lordship was speaking of the duty of a solicitor who swears affidavits in support of [ex parte] applications, to make full disclosure, but the principle is of wider ambit than that. I should say in this case that there is no material upon which I would be prepared to rely to find that the solicitor or solicitors who act for the plaintiff failed in their requisite duty to the Court. But when ex parte applications are made, even in this area of the law, the party who seeks it must put to the court all relevant material that could bear upon a right to ex parte relief.

The principles expressed by Isaacs J, although in a different context, in Thomas A Edison Limited v Bullock (1913) 15 CLR 679 are applicable: in general terms they are not as high a degree of duty as his Honour referred to there, because he was speaking in a different context. Had the material relating to clause 4 that is presently before the Court had been before the Court on 1 June, I would strongly suspect that the arrest warrant would not have issued, at least in relation to this aspect of the matter (clause 4). It remains to see what effect the other two clauses of the agreement and the arguments with respect to them would have in relation to the issue of the arrest warrant.

128. A view similar to that expressed by Sheen J in *The Stephan J* (referred to by Lockhart J above) was expressed by the Court of Appeal in the *Vasso* [1984] 1 QB 477 at 491-28. The Court said (at 492), having referred to the duty of disclosure in the context of injunctions, service *ex juris* and Mareva injunctions:

In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the court.

129. The *Vasso* was applied in *The Nordglimt* [1988] 1 QB 183, *The Mediterranean Carrier* 8, Admiralty Court, London, 18 July 1990, *The Kherson* [1992] 2 Lloyd's Rep 261, and *Sin Hua Enterprise Co Ltd v The Owners of the Motor Ship Harima* [1987] HKLR 770.

130. Sheen J in *The Kherson* [1992] 2 Lloyd's Rep 261, 268-9, put the matter as the follows:

…The importance of full and frank disclosure being made on an ex parte application was emphasised by Lord Justice Robert Goff in The Vasso, [1984] 1 Lloyd's Rep. 235 at p 243. I adapt and adopt a sentence from that judgment.

Accordingly, the Court having in the present case issued the warrant of arrest on the basis of an affidavit which failed to disclose material facts, the appropriate course is to make an unconditional order for the release of the ship from arrest.

131. Then came the decision of the Court of Appeal in *The Varna* [1993] 2 Lloyd's Rep 253. At the time of *The Vasso* the relevant rule (O 75 r 5(1)) was in the following terms:

> *After a writ has been issued in an action in rem* ***a warrant*** *… for the arrest of the property against which the action .. is brought* ***may,*** *subject to the provisions of this Rule,* ***be issued*** *at the instance of the plaintiff …*
> [emphasis added]

132. However, as was pointed out in *The Varna* [1993] 2 Lloyd's Rep 253, Order 75 was in fact changed in important respects in 1986 with effect from 12 January 1987. Rule 5(1) (above) was replaced by the following:

> *In action in rem* ***the plaintiff*** *… **may** after the issue of the writ in the action and subject to the provisions of this rule* ***issue a warrant*** *… for the arrest of the property against which the action is brought…*
> [emphasis added]

At the same time, other changes were made, as described by Scott LJ in *The Varna* at 257:

> *In addition, a new par (6) was introduced. The new par (6) is in these terms:*
> *A warrant of arrest* ***may not be issued as of right*** *in the case of property whose beneficial ownership has, since the issue of the writ, changed as a result of the sale or disposal by any court exercising Admiralty jurisdiction.*
> [emphasis added]
>
> *In addition, references in the previous r 5 to a party applying for the issue of a warrant were altered to references to a party intending to issue the warrant. And, a new par (8) was added in these terms:*
> *Issue of a warrant of arrest takes place upon its being sealed by an officer of the registry or district registry.*
>
> *The present r 5 remains in the form in which it was left by the 1986 amendments.*

133. In *The Varna* these changes were held to transform the issue of a warrant of arrest from a discretionary remedy into a remedy to which the plaintiff had a right if the requirements of O 75 were otherwise met. Scott LJ said at 257:

> *…Be that as it may, the requirement of "full and frank disclosure", a phrase well understood in the context of applications to the Court for discretionary orders of the sort that Lord Justice Robert Goff referred to by way of analogy in The Vasso, has, in my opinion, no real substance except in the context of an application for a discretionary remedy in circumstances in which there is an obligation of disclosure cast upon the applicant.*

134. *The Varna,* in this respect, was approved and applied by the English Court of Appeal in *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep 337, 353.[169]

135. It may be that this approach is inconsistent with the 1952 and 1999 Conventions if these Conventions require a conscious and specific judicial act.[170] Nevertheless, it is fair to say that, to a significant extent, arrest in modern times has become regarded as a pre-emptive security device, available virtually on demand to someone with an arguable claim against a relevant person if the other requirements are said to be present and if the other requirements can be substantiated, if challenged. As Staughton J said in *The Vanessa Ann* [1985] 1 Lloyd's Rep 549, 551:

> *No doubt the ordinary way if the plaintiff has a valid claim within the Admiralty jurisdiction of the High Court, the ship is arrested and, unless security is provided, she is not released. Counsel and the staff of the Admiralty Registrar could not recall a case which had departed from the ordinary practice. But the discretion is still there.*

136. In 1999, in England, the Admiralty Practice Direction 49F par 6(1) was introduced which spoke of the claimant as "entitled to arrest".

137. Since 2002 the new Civil Procedure Rules regulate the position in England. The new wording is not entirely clear as to whether there is an entitlement or a discretion. Rule 61.5, relevantly, is in the following terms:

> *(1) In a claim in rem –*
> *(a) a claimant; and*
> *(b) a judgment creditor*
> ***may apply** to have the property proceeded against arrested.*
>
> …
>
> *(3) A party making an application for arrest must –*
> *(a) request a search to be made in the Register before the warrant is issued to determine whether there is a caution against arrest in force with respect to that property; and*
> *(b) file a declaration in the form set out in the practice direction.*
>
> *(4) A warrant of arrest **may not be issued as of right** in the case of property in respect of which the beneficial ownership, as a result of a sale or disposal by any court in any jurisdiction exercising admiralty jurisdiction in rem, has changed since the claim form was issued.*
> [emphasis added]

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[169] For a helpful discussion of *The Varna* and previous English practice see the note in [1993] *LM&CLQ 458*

[170] See Dockray 110 LQR 382, 384-85

138. The word "entitled" has been changed to "may apply", but rule 61.5(4) is the same as O 75 r 5(6) which was relied on by the Court of Appeal in *The Varna* as supporting its conclusion that arrest was a matter of entitlement, not discretion. The intent is perhaps expressed by PD 61.5(2) which states:

> *…when it receives an application for an arrest that complies with the rules and the practice direction the court **will** issue an arrest warrant.*
> [emphasis added]

139. Thus, *ex parte* disclosure is probably not required in England.[171]

140. At first instance in *The Zoya K* [1997] FCA 379 Tamberlin J found no failure to disclose on any basis and did not need to decide whether the Australian position was still reflected by *The Vasso.* The Full Court did not need to deal with the matter. In *Sun Lucky Co Ltd v Mu Gung Wha* [1999] FCA 220, the allegation of breach of the duty was made at an early stage, but not pressed.

141. The wording of rule 40 in the Australian rules used the phrase "may issue". However, Cremean[172] says at 146-47:

> *…there is no ground for refusing to issue a warrant if the requirements of the Act and Rules have been met.*

142. The relevant form (From 13) provides for an affidavit which only sets out short particulars of the claim.

143. It may be that the rule 40 "may" is a "*Julius v The Bishop of Oxford* must".[173]

144. In New Zealand Rule 776 (7) provides:

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[171] For a helpful discussion of the new CPR 61 see [2002] *LM&CLQ* 520.

[172] Cremean (2nd Ed)

[173] *Julius v Bishop of Oxford* (1880) 5 App Cas 214 at 222-23 (where 'may' can mean 'must'):
They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power and they do not of themselves do more than confer a faculty or a power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.
See generally Pearce and Geddes *Statutory Interpretation in Australia in* (5th Ed) pp 275 ff

(7) Subject to compliance with the preceding provisions of this rule, the Registrar must complete the certificate on the application for a warrant of arrest and must issue a warrant of arrest in form 74.

Thus the New Zealand position appears to be one of entitlement, not discretion.

145. In 1987 the Hong Kong Court of Appeal in *The Harima* [1987] HKLR 770 applied *The Vasso*. It was recognised, however, that the relevant question was what had to be disclosed, bearing in mind the nature of the proceeding *in rem*. There the plaintiff cargo interest sued the shipowner, carrier. The plaintiff knew that the bill of lading was back-dated. It was held that these were not facts relating to the arrest because they did not affect the owner's liability. Whereas in another case, *The Cynthia G*, in 1984, the material not disclosed, which it was held should have been, was that the vessel had been previously arrested and upon that earlier application the plaintiff had led evidence that the vessel was beneficially owned by a person other than named as owner in the second proceedings: see generally for a discussion of *The Cynthia G*, the reasons of Sir Alan Huggins V-P in *The Harima* [1987] HKLR 770, 774.

146. The nature of the *in rem* claim should not be lost sight of at this point. Scott LJ in *The Tolten* [1946] P 135 145-6:

> …*In most actions in rem for damage the ship is released on bail, but cases may occur where the liens or rights in rem against the ship are so heavy as to exceed the ship's value to her owners, who, in such case, will probably not enter an appearance and obtain the ship's release on bail. The lien consists in the substantive right of putting into operation* ***the admiralty court's executive function of arresting and selling the ship,*** *so as to give a clear title to the purchaser, and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities, and subject thereto rateably. I call that function of the court "executive" because, once the lien is admitted, or is established by evidence of the right to compensation for damage suffered through the defendant ship's negligence, there is then no further judicial function for the court to perform, save that in the registry where priorities, quantum and distribution are dealt with. When the court has thus discharged the whole of the secured claims, the balance (if any) of the proceeds will, if there be no limitation of liability to prevent it, go to the unsecured creditors and the final surplus (if any) to the owners. …*
> [emphasis added]

147. The proceeding is against the property, and a weighing of the balance of convenience, as occurs in an exercise of discretionary equitable jurisdiction *ex parte* or an interim application, does not take place. If the claim is known to be hopeless,

or if it is known that the relevant person is not the owner, the arrest would amount to an abuse of process. Apart from such extreme cases, the weighing of the relative merits of the parties' cases and the competing balance of convenience play little part in any decision as to the issue of the arrest warrant. That is perhaps why Lockhart J said in *The Seacat 031* that:

> *…in general terms they are not as high a degree of duty as [Isaacs J referred to in Thomas A Edison]*

148. The notion that the proceeding is against the property , that is, *in rem*, must, of course, now be varied in the light of the House of Lords judgment in *The Indian Grace (No2)*.[174] Nevertheless, the particular history of the action *in rem*, the strong elements or presumption of entitlement, the role of arrest as a method of obtaining jurisdiction against the property for a *claim*, and as a method of encouraging a personal appearance of the relevant person, mark the procedure as quite different from a procedure in equity to protect a party's position requiring a balancing of merits and competing conveniences. These considerations not only set the procedures apart, but they give a different context to the notion of disclosure.

149. In any event, in any rule reform in Australia the question of the entitlement of the party to obtain arrest or the discretion involved, as they affect disclosure, might well be an appropriate subject for clarification. It is also an important basal issue in deciding, for instance, what should go into an affidavit supporting arrest.*

[174] See the helpful note by Francis Rose in [1998] *LM&CLQ 27* and the article by Nigel Teare QC in [1998] *LM & CLQ 33.*