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Some Issues Arising from Recent Maritime Cases

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A couple of recent decisions in the Maritime area may be of general interest to vessel owners and operators.

Protect your vessel from other people's creditors

The risks of allowing another party to take possession of your vessel were highlighted in a recent High Court dispute on which the writer and other members of his firm acted for a vessel owner (Mt Maunganui Seafoods v Collins AD 18/SD01 Auckland Registry, 13/9/2001, Priestley J). This case in particular highlighted the risk that the vessel can be seized from the owners and used to pay debts that were incurred by the party that had possession.

The owners of the vessel had entered into a written agreement for sale and purchase with a purchaser, a Mr Collins ("C"). C was to pay the purchase price by instalments. He could take possession immediately but would not acquire ownership until the vessel was paid for in full. Various problems arose, and eventually the vessel owners terminated the agreement by serving written notice. The owners went to the vessel's berth with the intention of re-taking possession of the vessel, but a stand-off developed when C refused to leave the vessel. The Police were called, but were reluctant to become involved. Eventually, the owners agreed that C could remain on the vessel in the interim, but only on a caretaker basis. The vessel had been flooded and required pumping out and other work. They also agreed that C would sail the vessel to Auckland when required by the owners.

Shortly thereafter, the vessel was arrested by creditors who were owed money by C for goods that had apparently been supplied to the vessel at his request. The vessel owners objected to the arrest, and the matter went to trial. A creditor is only entitled to arrest a vessel if, at the time when the arrest action is brought, the vessel is beneficially owned or is on demise charter to the party who owes the creditor the money personally. The owners argued that at the time of the arrest C had no interest in the vessel, and therefore the vessel could not be arrested to pay for the debts owed by C.

The Judge decided that the agreement for sale and purchase could amount to a demise charter, and the issue was whether this demise charter had been brought to an end before the vessel was arrested. The Judge accepted that the agreement for sale and purchase had been terminated by the service of the termination letter, but did not accept that this necessarily brought the demise charter to an end. Instead, he found that the vessel owners needed to bring the demise charter to an end by re-taking possession of the vessel. Even if actual repossession was not effected, symbolical repossession could be enough if there was notice to the world that the vessel had been repossessed by the owners. Counsel for the owners argued that the vessel had been repossessed because the reason for C being on board had changed from that of a purchaser to that of a caretaker. However, Priestley J ruled that as actual repossession had not been taken and no notice had been given to the

world that symbolic repossession had been taken, the vessel was still under demise charter to C when it was arrested.

This decision means that the vessel will now be sold to meet debts that had nothing to do with the owners, and this seems a harsh result. Given that the underlying contract had been terminated and a new caretaker role agreed for C, why should it make any difference to that contractual arrangement that the owners had not given "notice to the world" of this change?

The main lesson that should be remembered is that if you have given possession of your vessel to another, whether under some type of contract for sale and purchase or by way of demise charter, and that agreement has "turned to custard", you should not only terminate the agreement in writing, but should also make every effort to regain possession of the vessel if you want to avoid the risk of the creditors of the buyer or charterer arresting your vessel and selling it to pay his debts. If there are practical difficulties in obtaining physical possession, then you should consider taking possession by having the vessel arrested. Odd as it may seem, an owner can arrest its own vessel where there is any dispute about possession or ownership.

Beware of what's in the wind

The decision in *Ultimate Lady Limited* v The Ship *Northern Challenger* (No 2) AD 7/SW2000, Auckland, 17/9/2001, Williams J, is probably most notable for the intensive and minute arguments about iron filings, which had led to comment as far away as the UK maritime community on the painstaking detail that can become involved in some maritime issues. Ultimately the case was resolved on a reasonably straightforward legal issue, but along the way there were some factual revelations that may surprise some vessel owners and repairers. The *Ultimate Lady* (a luxury catamaran) was berthed in the re-fit wharf at Tauranga, near a fishing vessel (the *Northern Challenger*) which was undergoing a partial re-fit. Workmen were carrying out cutting and grinding of guard rails on the *Northern Challenger*. It was subsequently discovered that the paintwork on the *Ultimate Lady* had been damaged to the extent that she eventually required almost complete repainting, at a cost of $385,000. The owners of the *Ultimate Lady* alleged that the damage was caused by iron filings blown onto the vessel from the grinding work carried out on the *Northern Challenger* and brought a claim against the vessel itself. A complex Court battle ensued, in which just about every factual allegation was disputed between the parties.

The primary legal issue was whether there was a claim at law against the vessel. A claim can be made against a vessel for damages "done by" that vessel. Damage resulting from the working of the vessel's machinery or gear by the vessel's crew or owners could amount to damage done by the *Northern Challenger*. However, the Judge found that the workers carrying out their angle-grinding were independent contractors using their own angle-cutting equipment. The owners of the vessel were not responsible for the independent contractors' actions and therefore any damage caused by them could not amount to damage done by the vessel, and therefore the claim must fail.

The Judge also found as a matter of fact that the work on the *Northern Challenger* did not cause the damage to the *Ultimate Lady*.

One factual finding that may be of interest to vessel owners was the evidence that, because of their shape, size, configuration and other aspects, grinding particles can travel quite some distance and attach themselves to paint surfaces, particularly

uneven surfaces such as non-skid areas, and such particles can be extremely difficult to dislodge by brushing or hosing. Those particles then oxidise very quickly, causing significant damage. In some cases the particles can adhere to the paintwork so strongly that the only remedial action that can be taken is to remove the paintwork entirely and repaint the vessel. In this case, the crew on the *Ultimate Lady* had thoroughly hosed and washed down the vessel when they noticed the particles, but this had had little effect. Accordingly, owners of luxury yachts should beware of going anywhere near vessels undergoing grinding work.

The Judge also decided that some of the damage to the paintwork was in fact caused by ash from a recent eruption at White Island.

This dispute took over 11 days of Court time, and led to a decision 97 pages long, which may lead some vessel owners to conclude that they should be avoiding Courts as much as passing downwind of White Island during an eruption.

Every sailor's dream

For a case with a more festive season feel, consider the story told to me by a Brisbane Maritime lawyer complaining about the endless problems that can arise after arresting a vessel. This lawyer arrested a bulk sugar carrier after it had loaded in Cairns and a major Court battle developed. The cargo could not be taken off (the port only had equipment for loading sugar, not unloading it) and the vessel was moored off Cairns for many months over one of the hottest summers in history. When the hatches were opened at the end of the dispute it was found that, as a result of the heat, ingress of water and pressure in the (semi) sealed holds, the entire sugar cargo had turned to rum!

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