

SEAFARER SUBJECT GUIDE

MARITIME LIEN FOR SEAFARERS' WAGES IN NEW ZEALAND

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of New Zealand flagged ships, and foreign ships which are in the ports of New Zealand. These rights can be enforced in the High Court in the exercise of its admiralty jurisdiction, where they are secured and preferred by maritime liens and enforced by the arrest and forced (judicial) sale of the ships.

This document is not intended to be legal advice, nor does it constitute legal advice.

If a seafarer intends to claim his wages, he is strongly advised to consult a lawyer qualified to practise in New Zealand.

*A full text version of this Subject Guide including footnotes will become available for subscription in due course. In the meantime if there is a specific inquiry on any Subject Guide, please contact SRI.

1. What is the maritime lien for seafarers' wages? How is it enforced?

- 1.1 Maritime law in New Zealand is found primarily in statute and decisions of the New Zealand courts. In admiralty jurisdiction, New Zealand law has a strong English heritage and to a significant extent applies the law developed by the English Court of Admiralty, particularly in areas where there is a dearth of New Zealand precedent. Decisions of other common law countries remain of relevance and will often be referred to, although their applicability would depend on the commonality between the specific common law country and New Zealand admiralty jurisdiction.
- 1.2 A maritime lien creates a security interest, not dependent on possession or change of ownership, over a vessel from the time of the event which gives rise to it. The charge remains inchoate until brought into legal effect by the commencement of proceedings against the ship.
- 1.3 The maritime lien for seafarers' wages is only defined in the Admiralty Act 1973, which states:
 - (1) 'Maritime lien, without derogating from the generality of the term, includes a lien in respect of bottomry, respondentia, salvage of property, seamen's wages, and damage.'

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- (2) The key factor for the maritime lien for wages is service to the ship; the lien is not dependent on who hired the seaman, whether it be the owner or the charterer or any other person.
 - (3) The concept and definition of wages has been broadly interpreted by the courts as any payment or financial benefit accruing for the benefit of the seafarer by reason of service to his ship.
 - (4) The maritime lien for seafarers' wages is a 'secret charge' against the vessel on which the seafarer was employed (or a sister-ship in the case of a statutory right of action *in rem*), for any payment or financial benefit or emolument which can properly be described as wages, which exists from the time the seafarer commenced employment on the ship and continues until the vessel is destroyed or sold by way of judicial process.
- 1.4 A seafarer's claim for wages must be commenced by way of *in rem* or *in personam* (or both simultaneously) proceedings. Jurisdiction in proceedings *in personam* is commenced by a notice of proceeding and established by way of service combined with a claim falling within the heads of claim in the Admiralty Act 1973. Proceedings commenced both *in rem* and *in personam* can only be served outside the jurisdiction to the extent that it is an *in personam* claim.
- 1.5 Given the practical difficulties in serving proceedings on a foreign shipowner/charterer/employer and the fact that a more powerful 'tool' exists in the *in rem* process, unless there are cogent reasons for commencing an *in personam* action, plaintiffs are more likely to rely upon *in rem* proceedings coupled with the arrest of a vessel.
- 1.6 In order to enforce a wages claim and establish the *in rem* jurisdiction of the court under the Admiralty Act 1973 the following requirements must be met:
- (1) the claim must fall within the heads of claim under section 4 of the Admiralty Act;
 - (2) the procedural requirements under the High Court Rules must be met; and
 - (3) the ship must be in the jurisdiction.
- 1.7 It is important to note the practical distinction between a wages lien properly so called, and a statutory right of action *in rem* in respect of a wages claim. The Admiralty Act 1973 does not distinguish between liens and statutory rights *in rem* under the heads of claim outlined in section 4 of the Act, but in line with historical characteristics the wages lien in the true sense is restricted to the ship that the seafarer worked on. Unlike the wages lien, a statutory right of action *in rem* for wages

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provides a claimant with a right to commence statutory *in rem* proceedings against the specific ship on which the seafarer worked or a sister ship.

2. Which courts have jurisdiction over seafarers' wage claims?

- 2.1 The High Court has jurisdiction to hear and determine actions commenced both *in rem* and/or *in personam*. This jurisdiction is derived both from statute and the inherent jurisdiction of the High Court.
- 2.2 The District Court has jurisdiction to hear and determine *in personam* claims in respect of claims to a maximum of NZ\$200,000.00 but has no *in rem* jurisdiction.
- 2.3 New Zealand citizens, permanent residents, or foreign crew with a New Zealand work permit employed by New Zealand companies on New Zealand ships or foreign flagged vessels demise chartered to New Zealand companies, also have limited access to the Employment Relations Authority ('the ERA') and the Employment Court. Whilst the ERA process is less formal, very effective and relatively inexpensive it must be noted that neither the ERA nor the Employment Court have jurisdiction *in rem* and as such are unable to secure the *res* by way of the arrest of a ship. The *in rem* proceeding in admiralty jurisdiction remains available despite any applicable New Zealand employment legislation.

3. Can the courts refuse to hear seafarers' claims for wages?

- 3.1 The court in its inherent jurisdiction and by way of statute may exercise its discretion to decline jurisdiction.
- 3.2 Upon arrest of the ship (or commencement of the *in rem* proceedings), the defendant shipowner/charterer can enter a 'conditional' appearance either seeking to strike out the proceeding on the basis of defective service/non-compliance with procedures or lack of jurisdiction under the Admiralty Act 1973. He can also seek a stay of proceedings on the basis of an arbitration clause or exclusive jurisdiction clause in a contract, or on the basis of a *forum non conveniens/lis alibi pendens* argument.
- 3.3 In the instance of a lack of jurisdiction under the Admiralty Act, the burden of proof is on the plaintiff to establish that there is an arguable case for jurisdiction (not requiring affidavit evidence). Failure to establish jurisdiction may lead to the court striking out the action.
- 3.4 According to the doctrine of *forum non conveniens*, the court may stay proceedings if it is satisfied that there is another forum which is clearly more appropriate, given the overall interests of justice and interests of the parties, to determine the matter.

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- 3.5 Despite the foregoing, the court, as part of its overall assessment, will consider whether there are any other circumstances which tell against granting a stay notwithstanding the existence of a more appropriate forum. The fact that the arrested ship represents full security for the plaintiff's claim will be a strong factor against the court granting a stay, unless the defendant is prepared to lodge security with the court or another forum.
- 3.6 Clauses in contracts conferring exclusive jurisdiction on a foreign court (within the context of contractual claims and not within the context of the international carriage of goods by sea) will not automatically oust the jurisdiction of the New Zealand court but may be a factor considered by the court in a *forum non conveniens* analysis. Where parties have validly agreed to a jurisdiction in respect of disputes (in the absence of fraud or duress), the court will generally grant a stay of proceedings unless strong grounds or exceptional circumstances militate against the grant.
- 3.7 Arbitration (domestic or international) conducted in New Zealand is governed by the Arbitration Act 1996 which incorporates (with amendments), the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the 1985 UNCITRAL Model Law on International Commercial Arbitration.
- 3.8 Should the court grant a stay of proceedings, this will not necessarily be fatal to the seafarers' security inherent in the *res*.

4. Who can claim seafarers' wages?

- 4.1 The wages lien, as defined in the Admiralty Act 1973, refers to 'seamen's wages', as such the plaintiff must clearly be a seaman to claim the lien. The Act does not define seamen. The courts however have taken a very liberal view as to which parties qualify as seamen.

5. Which ships are subject to the jurisdiction of the courts?

- 5.1 With the exception of New Zealand Crown owned (government) vessels and vessels owned by a foreign state all vessels are subject to the jurisdiction of the High Court in its admiralty jurisdiction, provided the vessel is within the geographical jurisdiction and the claim falls within the heads of claim in the Admiralty Act 1973 and the procedural requirements of the High Court Rules are met.
- 5.2 Occasionally questions may arise as to whether the particular vessel, which is the subject of an *in rem* action, is within the definition of a 'ship' and therefore falls within the subject matter of admiralty jurisdiction. A ship is defined in the Admiralty Act as 'including any description of vessel used in navigation; and includes a hovercraft.'

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Whilst each case will turn on its own facts, the courts have generally regarded a ship as a vessel designed to carry people or objects and, whilst not necessarily having navigation on the sea as its main purpose, is capable of moving from place to place in an ordered manner.

6. What is included in the maritime lien for seafarers' wages?

- 6.1 The concept and definition of wages has been broadly interpreted by the courts as any payment or financial benefit accruing to the benefit of a seafarer by reason of service to his ship.
- 6.2 The wages lien has been extended to sums due in lieu of notice, paid leave, sick leave, long-service leave, overtime, social insurance, food allowances, union dues, repatriation expenses, damages for wrongful dismissal and, in principle, redundancy payments.

7. Can seafarers' wages be claimed if there is no written contract of employment?

- 7.1 Despite the fact that cases such as the *Ever Success* and *Jackson Bay* accept that provided the services rendered by the crew are referable to the ship, a contractual link between the owner/charterer and the crew is not required, the position in New Zealand is firmly entrenched. The New Zealand Court will require evidence of a clear contractual link between the ship and the master or crew in respect of a wages lien claim in order to assess the quantum of the claim and whether the monies claimed can properly fall within the concept of wages or emoluments.

8. Must seafarers' services have been rendered on board the ship?

- 8.1 Provided the plaintiff forms part of the crew and the service is rendered to the ship to which the lien attaches, there is no requirement that the seafarer be on board or live aboard the ship when rendering services.

9. What is the ranking of seafarers' claims for wages in the event that sale proceeds are distributed?

- 9.1 Ranking of a wages claim would depend on whether the claim is a wages lien against the ship on which the lien attaches, or a statutory right *in rem* against either the ship on which the seafarer rendered his service or a sister-ship.

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9.2 The general order of priority is as follows:

- (1) registrar's costs and expenses of arrest;
- (2) costs of the preserver of the *res*;
- (3) maritime liens, (d) mortgages; and
- (4) statutory *in rem* claims.

10. Can wages be claimed if the employer is not the shipowner or acts illegally?

10.1 This depends on the basis on which the seafarer advances his claim. The basis for a wages lien is service to the ship and therefore the identity of the shipowner/charterer is generally irrelevant in the context of a wages lien, provided services were rendered to the ship to which the lien attaches and proceedings are commenced against that ship.

10.2 In order to exercise a statutory right of action *in rem* against a sister-ship a seafarer claiming wages needs to establish a nexus between *in personam* liability for the claim and the ownership/charter of the ship in respect of which he wishes to proceed *in rem* by fulfilling the statutory requirements in the Admiralty Act 1973. This may present considerable difficulties if the ownership or demise charter has either been transferred or has been terminated. In addition, the difficulty of establishing the *in personam* link may be exacerbated if the shipowner has structured the vessel ownership utilising a one-ship company structure as the courts are generally slow to lift the corporate veil. If the *in personam* link is not made or the court is not convinced that the transaction or ownership structure is a 'sham', the claim will fail.

11. Can the seafarer's maritime lien for wages be abandoned or waived by agreement?

11.1 A maritime lien cannot be abandoned or waived by agreement. The Maritime Transport Act 1994 provides that:

'A member of the crew of a ship shall not by any agreement forfeit his or her lien on the ship, or be deprived of any remedy for the recovery of his or her wages, or abandon his or her right to wages in case of the loss of the ship, or abandon any right that he or she may have or obtain in the nature of salvage; and every stipulation in any agreement inconsistent with this subsection shall be void.'

11.2 Third parties not contractually liable to pay wages to the crew are unable to pay off the crew and assume lien status by way of agreement or by operation of the doctrine of subrogation unless sanctioned by the court.

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12. When is the seafarer's maritime lien for wages forfeited or not recognised or extinguished?

- 12.1 The equitable doctrine of laches remains of application in the admiralty jurisdiction although it appears rare that the defence will be successful.
- 12.2 Under the Fisheries Act 1996 fisheries officers are provided with extensive powers to seize vessels if they believe (on reasonable grounds) that the vessel has been involved in fisheries offences.
- 12.3 The Fisheries Act 1996 provides that, in respect of certain offences, property used in the commission of the offence is forfeit to the Crown unless the court for special reasons relating to the offence orders otherwise. Forfeiture occurs irrespective of whether or not property has been seized.
- 12.4 Any vessel forfeited to the Crown as property used in the commission of an offence against the Fisheries Act 1996 will vest in the Crown absolutely and free of all encumbrances. In *Kareltrust* the court held that a statutory right of action *in rem* will be extinguished if commenced before the vessel is forfeited, but can be resurrected once the vessel has been released. The practical issue which may be fatal to a statutory claim is whether the *in personam* link required by legislation can be made post-release.
- 12.5 The Fisheries Act 1996 provides (in the context of a forfeited vessel) that any person with an interest in the forfeited property may apply to the court for relief within 35 working days after the date of forfeiture. The definition of 'interest' includes in the case of a foreign vessel, foreign owned New Zealand vessel, or foreign operated fish carrier an interest as determined by the Employment Relations Authority or any other court that any fishing crew have in unpaid wages.
- 12.6 Legislation seems to require determination of the wages claim prior to an application for forfeiture (which given the nature of sea service and the time limit of 35 working days to obtain a judgment recognising the 'interest' places practical difficulties in front of prospective claimants) and additionally provides no recourse for crew on board New Zealand registered/owned vessels.
- 12.7 The maritime lien for wages and indeed all liens will be extinguished in the following circumstances:
- (1) destruction of the res;
 - (2) dismissal, satisfaction or extinction of the claim giving rise to the lien;

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- (3) judicial sale; and
- (4) forfeiture.

12.8 It must be noted that, at least insofar as seafarers employed on New Zealand ships are concerned, despite the destruction of the *res* extinguishing their wages lien, the Maritime Transport Act 1994 provides that in the event of the loss or foundering of the ship, the employer will continue to pay the seafarer his wages until he is otherwise employed or the expiry of a period of two months from the date of the loss or foundering, whichever is earlier.