

CREWING VESSELS WHILE UNDER ARREST

The Honourable Justice R E Cooper*

INTRODUCTION

The arrest of a ship is a defining moment in its life. Immediately upon arrest the ship becomes security in the custody of the court to abide the result of the proceedings giving rise to the arrest. Once arrested, the ship remains in the custody of the court until released upon the provision of alternative security or sale by the court. As Sheen J explained in *The Falcon*:¹

A ship is usually arrested in order to provide security for the plaintiff's claim. The extent of that security is measured by the net proceeds of the sale of the vessel. The amount of the net proceeds of sale is arrived at by deducting from the gross proceeds of sale the expenses of that sale and other expenses incurred by the Admiralty Marshal and the necessary costs of the plaintiff in whose action the ship was arrested up to the moment of arrest and all subsequent expenses of maintaining the arrest up to and including the completion of the sale of the ship.

For the plaintiff, the effect of the arrest on the position of the crew is ordinarily an issue of no consequence because trading ships will usually provide a P & I club letter of undertaking or post other security to secure release. Indeed, the jurisdiction historically has operated on the basis that a bail bond would be provided and the ship released to continue trading. What, however, is the situation where no alternate security is available? Do the crew have the right to remain on board and receive wages? Who may direct the crew as to what tasks, if any, are performed on board? Can the owner or demise charterer work the ship using the crew on board while the ship is under arrest?

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¹ [1981] 1 Lloyd's Rep 13, 17.

THE ACT OF ARREST

A ship is arrested by the Marshal acting as an officer of the court. The ship comes into the custody, but not the possession, of the Marshal. The position was described by Lord Atkin in *Government of the Republic of Spain v SS "Arantzazu Mendi"*:²

The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the Court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all remedies which are based on possession.

Once arrested, a ship cannot be moved from the place of arrest without the authority of the Marshal. To move the ship without such authority, whether to another place within the jurisdiction or to flee the jurisdiction, constitutes contempt of court.³ Similarly, any interference with the ship while under arrest, whether or not it involves any movement or attempted movement of the ship, will constitute contempt.⁴

The duty of the Marshal is to ensure the safe custody and preservation of the ship. That duty now finds expression in r 47(2) of the Admiralty Rules 1988 (Cth) which provides:

The Marshal shall, unless the court otherwise orders, take all appropriate steps to retain safe custody of, and to preserve, the ship or property, including:

- (a) removing from the ship, or storing, cargo that is under arrest;
- (b) removing cargo from a ship that is under arrest and storing it;
- (c) removing, storing or disposing of perishable goods that are under arrest or are in a ship that is under arrest; and
- (d) moving the ship that is under arrest.

THE CREW ON BOARD AND THE CUSTODY OF THE MARSHAL

² [1939] AC 256, 266.

³ *The Javlin* [1965] 1 WLR 1098.

⁴ *The Seraglio* (1885) 10 PD 120.

The Marshal owes no duty to the crew on board as such. The relationship of the Marshal to the crew will depend upon the circumstances as they affect the discharge of the Marshal's duty to retain custody of, and to preserve the ship.

The arrest of a ship does not operate to determine the employer/employee relationship between the owners or demise charterers and the master and crew. Nor does it follow that the issue of a writ against the ship by the master or crew to recover outstanding wages automatically determines the employment relationship. It will be a question of fact in each case whether or not there is conduct on the part of the owner amounting to repudiation of the employment contract, for example, failure to pay wages and allowances which are owing, which is accepted by the crew as terminating the relationship.⁵

If the employment relationship is terminated, then crew members may seek to recover wages up until the termination and thereafter damages for breach of contract calculated by reference to the wages lost, the cost of sustenance for a reasonable time at the place of termination pending repatriation to their home port, and the cost of repatriation.⁶ Such a claim ranks after the Marshal's claim against the ship, substitute security, or proceeds of sale for the Marshal's charges and expenses, the plaintiff's costs of the action, and other claims having priority.⁷

If the crew continue in employment after arrest, the ongoing liability for wages reduces the value of the ship or proceeds of sale to satisfy claims which have lesser priority than the claims of the master and crew. Although the continued engagement by the owner of the crew will give them a right to wages and entitlements, accommodation on board and the right to sustenance, those rights are not enforceable against the Marshal. However, the Marshal may, if the Marshal considers it is necessary to the safety of the ship or to preserve it, pay

⁵ *The Fairport (No 2)* [1966] 2 Lloyd's Rep 7, 14.

⁶ *United States Trust Company of New York v Master and Crew of the Ship "Ionian Mariner"* (1997) 149 ALR 200 (FC).

⁷ See *British Shipping Laws* Vol 1 para 1574.

wages and provide accommodation and sustenance to the crew on board for such time following arrest of the ship as the Marshal considers is necessary. With leave of the court the Marshal may also provide minimal sustenance in order to avoid hardship to the crew.⁸

The presence of the crew on board is justifiable only for so long as it does not interfere with the ship or the Marshal's custody of it and does not increase the Marshal's costs of maintaining custody of the ship and preserving it. For example, if a ship can conveniently be laid up as a dead ship pending trial or the provision of security, a crew will not be permitted to remain on board where that would involve unnecessary expense in providing power or access to the ship to enable the crew to live on board.

What happens if the crew refuse to leave or prevent the Marshal from laying up the ship if that is the appropriate course to follow in the circumstances? Such conduct is *prima facie* contempt of court for interfering with the Marshal's custody of the ship. However, the cases do not suggest that crew members are lightly dealt with for contempt.

A refusal by the master or crew to leave a ship is not uncommon. This is particularly so when a ship needs to be moved within the port or to another port or where the ship is to be sold *pendente lite*. In both cases, there is an attempt to force the Marshal or some other party to pay the outstanding claims for the master and crew and their costs of repatriation. In the case of a sale *pendente lite*, there is often the hope that a purchaser will re-engage the crew and thus will provide them with continuity of employment. How the issue of an obdurate crew is resolved can have significant consequences upon the fund ultimately available to satisfy the plaintiff's costs and claim and the claims of others against the ship.

There had been a practice in the English Admiralty Court, which is recorded in *The Fairport (No 2)*,⁹ to treat wages paid by the plaintiff after issue of the writ as the plaintiff's costs in the action and thus recoverable in priority to other claimants. That practice was disapproved of by Cairns J in *The Fairport (No 2)*. His Lordship said that

⁸ *Clausen v The Ship "Om Algora"* (1985) 38 SASR 494, 498, 500-501.

⁹ *Supra* n 5.

“if wages continue to accrue I think it must follow that they are recoverable by action and not merely as part of the costs of an action”.¹⁰

The result is that a plaintiff will receive no advantage in paying out the claim of the crew including the payment of repatriation costs, unless it receives the leave of the court to make the payment and to stand in the shoes of the crew in respect of any sums so paid.¹¹ Where a party stands in the shoes of the crew after payment, the right to recover monies so paid is postponed until after satisfaction of the Marshal’s costs and expenses and also until after satisfaction of the plaintiff’s costs. Payment of the monies without the leave of the court gives the payer no right to subrogation.¹²

Where no-one is prepared or able to pay off the crew in order to get vacant possession of the ship, the court may order that the Marshal pay the crew’s repatriation expenses and, if necessary, the wages claim. Such expenses may be rationalised as payments made to realise the ship on a Marshal’s sale *pendente lite* to best advantage. If ordered, the expenses will be part of the Marshal’s expenses and the first claim against the ship.¹³

Each of these two approaches sees the claim of the crew and its repatriation costs paid. However, the order in which the outlay is reimbursed from the fund arising from the sale of the ship is dependent upon who made the payment. Unless paid by the Marshal, the costs will rank after the Marshal’s costs and expenses of arrest, the costs and expenses of appraisal and sale, and the plaintiff’s costs of the action. If the fund is insufficient it will see the crew obtaining a priority in practice which was unavailable on a proper distribution. It will also see the payer who stands in the shoes of the crew failing to recover the outgoing.¹⁴

¹⁰ *Ibid*, 14.

¹¹ *Borneo Company v “Mogileff”* (1921) 7 Ll LR 130.

¹² *The Petone* [1917] P 198.

¹³ *The “General Serret”* (1925) 23 Ll LR 14, 15.

¹⁴ *The Myrto (No 2)* [1984] 2 Lloyd’s Rep 341, 348-349.

A more robust approach, and one which is neutral in terms of the priorities, was taken by Hewson J in *The Fairport*.¹⁵ His Lordship was persuaded that an order for sale *pendente lite* of the ship ought to be made. Twelve members of the crew and two officers refused to leave. The Marshal was unable to sell the ship with full and unencumbered possession. Upon being advised of the refusal, his Lordship said:¹⁶

One thing I can say and that is that if there is anybody left on board 24 hours from now he will get nothing thereafter. If anyone is on board 24 hours from now, whatever argument may be put forward he will get nothing more out of the fund in this Court. I do not say they will be paid up to 24 hours, but whatever happens this Court will not by any stretch of imagination order payment of anything 24 hours from now. I want that to be made absolutely clear. There has been quite enough nonsense. This Court is here to help, but it is not going to be humbugged. In view of the plain offer made by their own consul some time ago and in view of the decision made in Court this morning that they will be entitled to repatriation expenses, they have to get out of that ship. Whatever they do after that, they have got to get out of that ship. They will not get any more money out of this Court. They prayed this Court's aid and, having prayed its aid, they must abide by its decision.

The Admiralty Marshal reminds me of a practice that has been followed at times when there has been difficulty, and that is that the order for appraisalment and sale do lie in the Registry until such time as the Admiralty Marshal is satisfied that the crew have left the ship.

Counsel for the crew opposed such a course as it would cause delay; a wrong approach. His Lordship made his views immediately clear:¹⁷

Until this ship is sold nobody will get a penny piece, and the ship will not be sold until every mother's son has gone. The order will come out as soon as you inform the Admiralty Marshal. It will lie in the Registry. Priorities will be reserved. All things being equal, of course, I have no doubt that your clients, Mr Bene, will have a pretty high priority.

As should be apparent by now, the Marshal incurs no liability for crews' wages until such time as there is an agreement between the

¹⁵ [1965] 2 Lloyd's Rep 183.

¹⁶ *Ibid*, 185.

¹⁷ *Ibid*.

Marshal and the crew that the latter will provide services as and when requested by the Marshal.¹⁸

Whether or not a ship is crewed after arrest will depend upon whether crewing is necessary to discharge the Marshal's duty to retain the ship in safe custody and to preserve it. Thus, where a ship can be safely locked up as a dead ship, for example, a yacht or trawler on hardstand or on a permanent slipway, it may be unnecessary for even a ship's keeper to be appointed.¹⁹

There are of course a number of circumstances which may impact upon the decision of the Marshal as to what is necessary to discharge his or her duty in respect of the arrested ship. It is a matter of discretion for the Marshal to determine whether, and the method by which, a ship under arrest should to be moved.²⁰ For example, the ship may be incurring substantial wharfage charges at the place of arrest or may be adversely affecting the operation of the wharf or port to the detriment of other users or be posing a risk to safety in the position where first arrested.²¹ If the crew on board refuses to assist in the movement of the ship, then the Marshal may determine to tow the ship to a new location as a dead ship, which was the decision taken in *The Myrto*.²²

The power of the Marshal to move the ship is for the purpose of maintaining custody of it by the court and to preserve it. Therefore the costs incurred by the Marshal to move the ship must be reasonably incurred for that purpose and are treated as Marshal's expenses of the arrest. The Marshal is entitled to engage such crew members as are necessary to achieve that purpose and to maintain the crew at a prudent level consistent with the discharge of the Marshal's duty. In *The Turakina*²³ the Marshal appointed the master of the ship as the ship's keeper. The Marshal at the time of such appointment made it clear to the master that the Marshal had no intention of entering into any contractual obligation in relation to the wages or entitlements of the

¹⁸ *Patrick Stevedores (No 2) Pty Ltd v MV Turakina* (1998) 154 ALR 514, 523.

¹⁹ *Clausen v The Ship "Om Algora"*, *supra* n 8, 500.

²⁰ *The Martina Merchant* [1975] 1 WLR 147, 149.

²¹ *Ibid.*

²² *Supra* n 14.

²³ *Patrick Stevedores (No 2) Pty Ltd v MV Turakina*, *supra* n 18.

crew. The appointment of the master as ship's keeper did not authorise the master as agent of the Marshal to engage the crew on behalf of the Marshal.

The crew sought to argue that while on board the ship after arrest, and to the knowledge of the Marshal, they performed daily tasks in respect of the ship which contributed to the preservation and safe custody of it. As the Marshal was duty bound to ensure the safety and preservation of the ship, the crew argued that the work was directed at assisting the Marshal in the discharge of his duties. For that reason, the crew submitted, their wages for performing the work should be treated as the Marshal's costs of arrest and paid for as such. Tamberlin J rejected this argument.

Tamberlin J summarised the position of the Marshal as follows:²⁴

The payment of the wages and other employment entitlements of the crew after arrest and up to sale or repatriation is, generally speaking, not the responsibility of the Marshal unless the Marshal considers it appropriate or necessary to enter into an agreement to engage such crew. The number and nature of the crew to be engaged by the Marshal will vary from time to time depending on the status of particular vessels, such as, for example, whether they are laid-up. In many cases the vessels will be carrying cargo. Where this is so the number of crew necessary to man the ship will reflect the need to preserve and exercise custody over the cargo. The appropriate crew number may also depend on whether it was necessary to move the vessel in order to effect discharge of cargo or to berth at a suitable location which may vary from time to time as a result of exigencies at the port of arrest. What is necessary or appropriate in any particular case will depend to a large extent on the nature and quantity of the cargo.

TRADING A SHIP WHILST UNDER ARREST

It is a contradiction to say that a ship remains within the custody of the Marshal when it is outside the territorial jurisdiction of the court.²⁵ Accordingly, assuming a power to allow a ship to trade whilst under arrest, it is unlikely that such a ship will be permitted to trade outside territorial waters.

²⁴ *Ibid*, 523.

²⁵ *The Bazias 3 and the Bazias 4* [1993] QB 673, 679 (CA).

The difficulty with the concept of the ship trading whilst under arrest is that the duty of the Marshal to keep the ship in safe custody and to preserve it does not extend to managerial control and operation of the ship for the purpose of generating an operational profit for the ship owners and those interested in it. The operational control of a ship requires that the master and crew operate the ship in accordance with the owner's or demise charterer's instructions. It is impractical for the Marshal to exercise a veto in respect of those instructions and the on-board management of the ship unless the Marshal or his nominee is presently on board the ship supervising its operation. In any event, are the Marshal's costs of supervision in such circumstances costs of the arrest?

Where the ship is traded, the crew is not engaged by the Marshal. The crew either continue in employment with the owner despite the arrest or are signed on by the owner specifically for the purpose of using the ship in trade. In that situation, the wages and entitlements of the master and crew are to the account of the owner or demise charterer and, in the event of non-payment, may be claimed against the ship. Obviously, where the benefits of the trading are not secured for claimants or where the continued trading is unprofitable, there is no practical benefit in other claimants allowing the crew's claims, both real and potential, to further encumber the ship. Also, because the purpose of the arrest is to secure the ship as security for the claim which led to the arrest, to permit the ship to trade without substitute security is to significantly depreciate the worth of the ship as security. The degree of the depreciation will depend upon the nature of the trading, the risk of loss or damage from perils of the sea, or loss of the security by flight of the ship from the jurisdiction. Where the owner or demise charterer cannot secure acceptable security to procure release of the ship, to allow a ship to be crewed and traded involves questions which go to the heart of why arrest is available and why arrest should not lightly be rendered nugatory by relaxing the effective control of the Marshal.²⁶

²⁶ These same reasons persuaded Kiefel J to refuse to allow the movement of a vessel to complete the voyage and discharge cargo remaining throughout under arrest of the Court: *Sovremenniy Kommercheskiy Flot v The Ship "Socofl Stream"* [1999] FCA 42.

Trading the ship needs to be distinguished from moving the ship within the jurisdiction and offloading cargo, whether or not the discharge of cargo is to enable the ship to be sold by the Marshal either *pendente lite* or to satisfy a final judgment of the court. The distinction is seen in the orders made by the court in respect of the ship *Martha II*.

On 14 February 1996, the *Martha II* was arrested in Melbourne on the application of the mortgagee. In expectation that the ship would be refinanced and released, the owner applied to the court to work the ship pending release. Specifically the owner sought permission to sail the ship to Sydney and there to load and unload cargo in accordance with its scheduled cargo operations. The application was opposed by the plaintiff/mortgagee. The Victorian Deputy Sheriff who arrested the ship on behalf of the Marshal would not consent to the movement without formal orders of the court.

Olney J granted the application subject to certain conditions being fulfilled and undertakings being given by the time charterer, ABC Container Lines (“ABC”). Essentially the entire cost of the movement, including the Marshal’s costs of supervising the movement, were to be paid by ABC. The costs to be paid included the costs of arrest up to the time of the order, which later costs and expenses were to be paid before the ship left Melbourne. To ensure that the ship proceeded without delay or deviation to Sydney and did not flee, the Marshal and two armed members of the Australian Protective Service were on board.

The ship proceeded to Port Botany, Sydney, where it arrived on 24 February 1996 and some cargo was offloaded. On the same day Sheppard J varied the order of Olney J to direct that no new cargo be loaded on board, the refinancing not having materialised, and ordered the ship to proceed from Port Botany to Port Jackson to berth or anchor in the custody of the Marshal.

On 1 March 1996 the owner and time charterer applied for orders to permit the ship to proceed to Port Botany to offload the balance of the cargo other than the bulk mineral sands on board and thence to proceed to Newcastle to offload the mineral sands, it being alleged that there were no suitable facilities for offloading the sands in Sydney. As

well as the owner and time charterer, cargo owners applied under r 49 of the Admiralty Rules 1988 (Cth) for orders for discharge of the cargo.

Rule 49 provides:

(1) Where:

(a) cargo on board a ship is under arrest but the ship is not; or

(b) a ship is under arrest but its cargo is not;

a person who is entitled to immediate possession of the ship or the cargo, respectively, may apply, in accordance with Form 17, to the Marshal to discharge the cargo from the ship.

(2) Where:

(a) the Marshal is satisfied that the applicant is entitled to immediate possession of the ship or cargo;

(b) the applicant gives an undertaking in writing that is satisfactory to the Marshal to pay on demand to the Marshal the fees and expenses of the Marshal in connection with the discharge; and

(c) If the Marshal so requires, the applicant indemnifies the Marshal, in a form satisfactory to the Marshal, in respect of any claim against the Marshal arising from the discharge;

the Marshal may comply with the application.

(3) Where:

(a) cargo on a ship is under arrest but the ship is not; or

(b) a ship is under arrest but its cargo is not;

the court may, on application and subject to such terms and conditions as are just, order the cargo to be discharged from the ship.

Form 17 includes an undertaking by the applicant for discharge to pay the fees and expenses of the Marshal in complying with the application.

On 6 March 1996, Sheppard J made orders for the movement of the ship and discharge of the cargo. However, his Honour would not allow the ship to sail to Newcastle. His Honour made the following order as to the costs of the movement and unloading:

2. Prior to the “Martha II” leaving her present anchorage ABC will pay or cause to be paid to the Admiralty Marshal the sum of AUS\$300, 000 (“the Fund”).

3. The Marshal will pay forthwith from the Fund all costs, charges, payments and fees incurred of and incidental to the voyages of the “Martha II” from Port Jackson to Port Botany and from Port Botany to Port Jackson and all movements of the “Martha II” in Port Jackson and Port Botany to the completion of mooring at the designated lay up berth or anchorage in Port Jackson, together with all costs and charges incidental to any discharge of cargo undertaken pursuant to order 1, including but not limited to all:

insurances; stevedoring costs; pilotage fees; port service charges; wharf-age; mooring and unmooring charges; unshackling and reshackling charges; hire of tugs; line boat charges; navigation charges; crew wages and overtime; bunkers consumed; watchmen;

and no such costs, charges, payments or fees incurred will be or will be deemed to be a cost of arrest.

The form of the order demonstrates, in my view, that Sheppard J did not treat the application before him as one for leave to continue to trade whilst under arrest. Rather, as his Honour’s reasons show, the purpose was to enable the cargo to be offloaded and re-shipped. The applications were, in substance, made under r 49 of the Admiralty Rules and, to the extent that costs and expenses were incurred, including crew wages, those costs and expenses were to be discharged by the Marshal with funds supplied by the primary applicant for discharge, the time charterer ABC.

In the circumstances of this case, the costs and expenses, being the costs and expenses of discharge of cargo, were not to be treated as part of the costs of arrest.

CONCLUSION

Unless the Marshal engages the crew to provide services to the Marshal in order that the Marshal may discharge his or her duty to keep the ship in safe custody and to preserve it until release or sale, the presence on board, the sustenance of, and the payment of the crew after arrest is not a responsibility of the Marshal, and any costs associated therewith are not Marshal’s costs and expenses of the arrest. Nor are they part of the plaintiff’s costs of the action.

Until their employment is terminated by the master or owner of a ship under arrest, crew on board remain the responsibility of the ship owner or demise charterer and their rights, if any, to enforce payment for ongoing wages and entitlements lie against the ship and not against the Marshal.