

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN NEW ZEALAND

This Guide deals with the rights of seafarers of any nationality to arrest a ship for unpaid or underpaid wages in a port in New Zealand.

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

If a seafarer intends to arrest a ship in New Zealand, he is strongly advised to consult a lawyer qualified to practise in that country.

*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. Can a seafarer arrest a ship for unpaid wages regardless of his nationality and regardless of the flag of the ship?

1.1 The ability to arrest a specific ship, or sister ship as the case may be, is not contingent on, or precluded by the seafarers' nationality or the flag of the ship. Provided the seafarer's claim falls within the admiralty jurisdiction of the court as outlined in the Admiralty Act 1973, questions of nationality or the ship's flag state will be largely irrelevant for the purposes of establishing jurisdiction.

1.2 It must be noted however that whilst typically the flag of the ship will not be relevant to an arrest, it will not be possible to commence an *in rem* action (including arrest) against a New Zealand Crown-owned ship (New Zealand Government), or a ship of a foreign state entitled to sovereign immunity, unless immunity is waived. This general position is altered where a foreign state vessel is undertaking commercial activity (*iurus gestionis*) as opposed to true acts of state (*iurus imperii*), in which case the court will apply the restrictive theory of sovereign immunity to both *in rem* and *in personam* actions.

2. What is the time limit within which a seafarer must start a claim for unpaid wages?

2.1 The Admiralty Act does not prescribe any time limit in which a wages claim (*in rem* or *in personam*) must be commenced, this being the province of the Limitation Act 2010 or in certain circumstances, its predecessor, the Limitation Act 1950 and to a rarer extent, the equitable doctrine of laches.

2.2 For claims arising prior to 1 January 2011, the time limit is six years from date on which cause of action accrued.

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2.3 For claims arising post 1 January 2011, in most cases the claim must be brought no later than six years after the date of the act or omission on which the claim is based (primary period) unless the claimant has late knowledge of the claim (late knowledge date) and the claim is made after the primary period. In this instance, the claimant must bring his claim within three years of the late knowledge date or within a maximum of 15 years after the date of the act or omission on which the claim is based (long-stop period).

2.4 The equitable doctrine of laches remains of application in the admiralty jurisdiction although it appears rare that the defence will be successful.

3. What documents are required to obtain an arrest of a ship?

3.1 The procedural rules governing Admiralty proceedings are contained in part 25 of the High Court Rules. Arrest proceedings may only commence in circumstances where *in rem* proceedings or both *in rem* and *in personam* proceedings have been issued and commenced or are being simultaneously issued. Given the objective of securing the *res* as quickly as possible, plaintiffs will typically be advised to file proceedings simultaneously.

3.2 The documents required to commence and serve proceedings and obtain the arrest of a ship are as follows:

- (1) notice of proceeding *in rem*;
- (2) application for a warrant of arrest;
- (3) affidavit in support of the application for a warrant of arrest;
- (4) indemnity to the High Court Registrar (akin to Admiralty Marshall/Sheriff) and security to the satisfaction of the Registrar for any fees, expenses and harbour dues/berthage of the Registrar and appointed officers or agents in maintaining the ship while under arrest;
- (5) warrant of arrest; and
- (6) notice by the Registrar of arrest of property.

3.3 All prescribed documents referred to above must be in English and will typically be filed with the applicable High Court Registry by the plaintiff's solicitor. As the arrest proceeding is largely a procedural exercise, there is no requirement for a plaintiff to prove the merits of his claim by way of evidence, whether by way of affidavit or otherwise (that is a contract of employment etc.), this being left to the substantive proceeding. The plaintiff's solicitor will inevitably require information to properly advise the plaintiff and determine whether the claim falls within the admiralty jurisdiction, that is, a contract of employment, ratings agreement, time records etc.

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which may or may not require translation. This evidence will form the basis of the notice of proceeding *in rem* and affidavit in support of arrest but is not submitted to the court at this stage.

3.4 Notarisation/apostille/legalisation will not be required at the arrest stage of the proceedings. As the solicitor will be drafting and filing the documents on behalf of the plaintiff, there is no need for notarisation/apostille/legalisation. The only procedural requirement is that the affidavit in support of arrest be sworn by the solicitor acting for the plaintiff in front of a Justice of the Peace, Judge, High Court Registrar or other solicitor admitted to the bar.

4. What are the costs of the arrest, including court expenses and other expenses?

4.1 The cost of procuring an arrest can be split into three different categories, namely court fees on issue of proceedings; costs of the arrest and custody of the ship; and solicitor's fees.

4.2 The fees payable to the court on application for warrant of arrest is currently NZD1,111.70 (including goods and services tax). Should the matter proceed to substantive proceedings the current court filing fee amounts to NZD1,329.20 (including goods and services tax). An application can be made to the High Court Registrar to waive this cost.

4.3 With regard to the costs of the arrest and custody of the ship, the claimant must provide an indemnity to the registrar, and security to the registrar's satisfaction for fees, expenses and harbour dues (if any) whilst the ship is in the custody of the registrar. It is not possible to estimate the quantum of the costs as much would depend on factors such as the location and condition of the vessel, size of the vessel and the duration of the arrest. In practice the registrar will assess the situation and require advance payment of an amount he estimates would be sufficient for payment into the court prior to issuing a warrant of arrest. The registrar has the ability to seek directions from the court and require additional amounts and/or security.

4.4 In the event that the claim is successful, then the costs of the arrest and custody, that is, costs of obtaining and preserving the *res*, may be recovered either by way of damages or from the proceeds of the sale of the *res*.

4.5 It is important to note that whilst proceedings can be commenced and the vessel arrest within a few hours the court rules prescribe a timetable for dealing with the matter thereafter. Typically the defendant only has to file a memorandum of

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appearance within 10 working days. At that point, the defendant can file a conditional appearance in which jurisdiction is challenged, and may apply for the warrant of arrest to be discharged. The unfortunate result is that shipowners/charterers with greater financial resources can draw out the arrest proceedings whilst the arresting party remains responsible for the registrar's costs, which dependent on the type of ship and location (port fees in New Zealand vary widely) can accrue rapidly. Claimants should also be aware that the speed with which the court handles applications, including applications for sale and appraisal of the vessel (that is, *sale pendente lite*) may have a significant impact on whether the claimant obtains any recompense.

- 4.6 Dependent on the solicitor and/or firm engaged, in a clear-cut case, the legal fees in respect of advising, drafting and attending to court filing up to the point of the arrest of a ship (including court fees, but excluding registrar's costs and expenses whilst the vessel is in his custody) will range between NZD5,500 to NZD8,000. Legal fees post-arrest will be entirely contingent on the complexity and duration of the proceedings.
- 4.7 Although the claimant may be able to claim the costs of preserving the *res* and a proportion of the legal fees incurred in the proceedings in the event of a successful claim it must be noted that (a) circumstances, that is, delay may render this illusory/pyrrhic, and (b) conversely an unsuccessful claimant may have the defendant's legal costs awarded against them.

5. Does the arresting party have to lodge counter-security against wrongful arrest?

- 5.1 There is no requirement under New Zealand law for counter security to be lodged. Whilst the Admiralty Act 1973 and High Court Rules do not contain any express provision for wrongful arrest, allegations of wrongful arrest are typically dealt with as 'abuse of process'. The claimant will be held liable for damages for 'wrongful arrest' where the arrest has been procured through bad faith or gross negligence.

6. Once a vessel has been arrested, will the court accept jurisdiction over the substantive claim?

- 6.1 After service of the notice of proceeding *in rem*, the defendant is required to enter an appearance within 10 working days of service of the notice (time commencing one day after service). To avoid a default judgment, the defendant may enter a conditional or unconditional appearance within the timeframe stipulated in the notice of proceeding.

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- 6.2 A conditional appearance is typically entered when the defendant wishes to challenge the jurisdiction of the court or seeks to stay domestic proceedings for that of another forum or dispute resolution mechanism. Common grounds for challenge to jurisdiction/stay of proceedings are:
- (1) defective service or non-complying proceedings;
 - (2) no jurisdiction under the Admiralty Act 1973;
 - (3) stay sought in reliance on an arbitration clause;
 - (4) stay sought in reliance on an exclusive jurisdiction clause; or
 - (5) stay sought on the grounds of *forum non conveniens* or *lis alibi pendens*.
- 6.3 If a conditional appearance is entered, it will become unconditional within eight working days after the appearance is filed, unless an application is made to set aside the notice of proceeding and an order is so made.
- 6.4 In the event that the defendant enters a conditional appearance and seeks to set aside the notice of proceeding on the basis that there is no admiralty jurisdiction for the claim as pleaded, the burden of proof will shift to the plaintiff to demonstrate, on the balance of probabilities, that there is an arguable case for jurisdiction which will not require affidavit evidence. If the court finds that the concise statement of claim contained in the notice of proceeding falls within the heads of claim in s. 4 of the Admiralty Act jurisdiction will be established and subject to any additional challenges or settlement out of court, will accept jurisdiction over the substantive claim.
- 6.5 If the defendant is unable to persuade the court to stay proceedings, the court will accept jurisdiction over the substantive claim.
- 7. Will the crew and vessel be maintained/supported during the arrest?**
- 7.1 In the event that the ship is arrested by a third party, the registrar will be responsible for feeding and maintaining the vessel and crew during the period of arrest. This expense is funded by the indemnity which the arresting party was required to provide before the vessel could be arrested. These costs can be added to a successful claim.
- 7.2 The crew may also be able to seek assistance from organisations such as the Salvation Army or City Missions to provide accommodation and food if the crewmembers do not remain onboard.

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8. Is the presence of the crew on board the vessel necessary during the course of the legal proceedings or can the crew be repatriated before the ship is sold?

8.1 The master has an obligation (contractually and under international law) to ensure that the vessel is operated safely and in accordance with both international conventions and the laws of the flag state of the vessel. Accordingly, the vessel must continue to be manned in accordance with the safe manning certificate/minimum safe manning document issued by the flag state during the arrest.

8.2 However, crew can be repatriated before the ship is sold. The repatriation of seafarers has always been included as part of the seaman's lien for wages, but there has been little judicial analysis as to why this is the case. The crew can be repatriated voluntarily and claim the costs back from the proceeds of the vessel, or the registrar can pay for repatriation with the costs thereof forming part of the Registrar's expenses which will be settled from the proceeds of the sale of the vessel.

9. Do the seafarer's wages continue to accrue during the arrest?

9.1 The act of arrest does not end the employment relationship with the owner/charterer and as such wages will continue to accrue.

10. How long on average does it take for the court to sell the vessel and then distribute the sale proceeds in settlement of the crew's claim?

10.1 The court has the discretion to order that any property is appraised and sold, or sold without appraisal, either before or after final judgment and where the property is deteriorating in value, may order immediate sale.

10.2 The court procedures would allow a sale of the vessel to take place in one to three months of arrest. For example, should the vessel's owner not enter an appearance within the stipulated timeframe (10 working days), the claimant may apply for judgment by default and subsequently apply for the appraisal and sale of the vessel in the prescribed form. Practically, there is no average time for the sale of the vessel. A new well-found vessel will sell quickly. A poorly maintained, old vessel may end up being scrapped.

10.3 The registrar, upon instructions of the court and receipt of an undertaking to pay the registrar's expenses on demand, will commence the sale process. The commission for sale and appraisal is prescribed and directs the registrar to:

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- (1) appoint an experienced person (usually a shipbroker) to appraise the property (usually market value);
- (2) arrange for the sale by way of tender, public auction or private treaty for no less than the appraised value (unless the court orders otherwise, on application by the registrar); and
- (3) pay the proceeds of the sale into the court along with the certificate of appraisal, the commission and the account of sale (signed by the registrar).

10.4 The High Court Rules do not provide guidance as to the mode of sale or the sale terms, which provides the registrar with flexibility subject to any order of the court and the registrar's overriding obligation to obtain the highest price possible. To that end dependent on the valuation report (which may take some time to complete), whether and to what extent the court requires the vessel to be advertised (that is, locally, internationally) and the mode of sale chosen by the Registrar, concluding a sale could arguably take anywhere from a few weeks to a number of months.

10.5 Once a sale has been concluded, the Registrar is bound to pay the proceeds into the court. The court has jurisdiction to hear and determine any questions as to priority in respect of the proceeds of sale and a party who may apply to the court for an order determining the order of priorities. In ordering the sale the court may also order that the order priorities only be determined after 65 working days (or other court determined period) from the date the proceeds are paid into the court. In addition, the registrar may be ordered to give notice to parties having a claim against the ship of the sale and priorities hearing.

11. How are the lawyer's fees for arresting the ship paid?

11.1 The manner in which the seafarer pays for legal counsel will depend on the fee arrangement with his chosen counsel.

11.2 A proportion of legal fees may be recovered in the event that the action is successful.

12. Are there any other procedures to enforce a seafarer's wage claim?

12.1 New Zealand does not recognise an arrest of an associated ship, but the seafarer can claim unpaid wages against a sister ship or a ship on demise charter but should carefully consider the following prior to doing so. Thus a seafarers' lien for wages lies only against the specific ship he was employed on. Also claims against a sister ship can only be advanced as a statutory *in rem* claim which unlike a maritime lien requires a nexus between the personal liability of the owner/charterer of the ship

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when the cause of action arose and when the action is brought. Further, if the sister ship has been sold, lost or its demise charter terminated before the action has been brought, the statutory link will not be met, and the claim will fail. Finally, a statutory *in rem* claim ranks much lower in priority than maritime liens, and dependent on the number of claimants, the available fund should the vessel be sold may provide the claimant with little or no recompense.

- 12.2 In suitable cases, the court will issue a mandatory injunction (with or without notice to the defendant) to prevent the defendant from removing, disposing or dealing with asset/s in New Zealand. What was formerly known as a 'Mareva injunction' is now referred to as a 'freezing order'.