

Maritime Law-Ships Arrests Practice Procedure and Recent Developments

Presented to the Fiji Law Society

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1. INTRODUCTORY REMARKS

- 1.1 When our President asked me to present this paper to our members I did a quick check of past papers that I had, to see if something relevant had been presented previously to our members. I was quite surprised to find out that so far, apparently, no one in Fiji has presented such a paper to our members. Therefore the task of tying in all the loose ends of our admiralty law relating to ship arrest has fallen on to me. I soon realized that in accepting the President's invitation I had also rushed upon my fate, for the law relating to ships arrests is vast, complex and confounding. I profess no particular expertise in this area of the law, save to say, that I have arrested a few ships and defended a few arrests in my years of practice. I hope that you find this paper relevant and helpful to you.
- 1.2 Most of our difficulty in this area of law arises from the fact that we tend to rely on the English substantive and procedural laws which since the 1980's have been changing in England because of the Rome Convention 1980 (Convention on the Law Applicable to Contractual Obligations adopted in Rome on 19th June 1980 and in force from 1st April 1991) which binds all states of the European Union since 1991. Our Courts have finally began to develop their own substantive and procedural laws relating to ship arrest in recent years due to increasing number of ships being arrested in Fiji for various maritime claims. In this paper I will not discuss the remedy of Mareva Injunction as it relates to ship arrests but concentrate on maritime claims that can found an action in rem for ship arrest. I do note however that a Mareva injunction is also an effective pre-judgment remedy leading to a restraint on the movement of a ship. I will refer to a number of recent decisions throughout this paper to illustrate the

development of admiralty law relating to ship arrest in our jurisdiction.

2. WHAT IS OUR ADMIRALTY LAW ON SHIP ARREST

2.1 The practice of maritime law as it relates to ships arrest is essentially a knowledge of the procedures that provide pre-judgment security for claims as well as post judgment execution by way of judicial sale of the arrested ship. Pre-judgment security is of the highest importance to the maritime creditor who always faces the threat of being unable to recover his debt from an evasive, unscrupulous or impecunious debtor. The action in rem is the basic procedure on which the creditor can rely for pre-judgment security and post judgment enforcement. The arrest of the ship or other res such as cargo in an action in rem places the res under judicial detention pending adjudication of the claim. The idea of arresting the res lies in the concept of the ship itself being the wrongdoer and thereby liable to arrest and sale. It usually secures the appearance of the defendant ship owner and establishes the jurisdiction of the Court. If the Court allows the claim of the maritime creditor, judgment is then enforceable against the arrested res by judicial sale or security given to take its place.

2.2 The starting point in finding out what our admiralty law is begins with Section 18 of the High Court Act. Section 18(2) provides:

**“The High Court has the admiralty jurisdiction
which the High Court of Justice in England
possessed on 4th December 1987”**

It is generally accepted that in the absence of anything to the contrary, the High Court of Fiji will generally follow the practice and procedure of the High Court of Justice in England which is set out in the English White Book. This has been confirmed in the following decisions of our Courts:

1. **FIRCA v Manohan Aluminum & Glass (Fiji) Ltd** (2004) HBC 493 of 2004.
2. **Consort Shipping Line Ltd v FAI Insurance (Fiji) Ltd** (1998) HBC 383 of 1997

2.3 Section 23 of the High Court Act states that the practice of the English

Courts as existed on the 2nd January 1875 shall be in force in Fiji so far as they are not inconsistent with any general rules of the High Court relating to practice and procedure. The effect of Sections 18, 23 and the Admiralty Rules made under Section 25 of the High Court Act is therefore to bring the practice of the High Court of Fiji into broad harmony with that of the High Court in England and therefore implicitly accepting the application of the Supreme Court Act 1981 of the United Kingdom to Fiji.

2.4 The High Court (Admiralty) Rules are made pursuant to Section 25 of the High Court Act. This is our primary source of procedural laws on ship arrest. They were gazetted in Fiji on the 25th July 1894. If any particular procedure is not set out in these Rules, then the practice set out in Order 75 of the White Book is to be followed. The High Court (Admiralty) Rules provides rules on service, appearance, default of appearance, preliminary acts in collision cases, time frames for filings pleadings, intervention, judgment in default, bail bonds, caveats against release, claims for costs and sale by Court of the res. Order XV states that the forms in force and used in the Admiralty Division of the High Court of Judicature in England and contained in the Appendices to the Supreme Court (England) Rules 1883 shall with variations be in force and be used in admiralty actions in the High Court of Fiji. I usually just modify the forms set out in Volume 3 of Atkins Court Forms in Civil Proceedings relating to Admiralty and Shipping

2.5 The Admiralty Rules therefore are supplemented by Order 75 of the White Book in so far as the procedure on arrest is concerned. Mr. Justice Cullinan in the case of **“The Ship Haima 747”** in Supreme Court Admiralty Action No. 1 of 1985 has helpfully set out the history of the various rules and legislation relating to admiralty practice in England and as it applies in Fiji. Any one who may be interested in finding out the intricacies of how the rules of England have application in Fiji may contemplate reading this 56 page judgment for enlightenment on the origins of our admiralty rules.

After setting out the history of the admiralty jurisdiction in England, Mr. Justice Cullinan concludes that Order 75 applies in Fiji, in default of our admiralty rules and where not inconsistent with our admiralty rules. Mr. Justice Fatiaki in **The Ship “MV Voseleai”** High Court Admiralty Action No. 6 of 1994 has accepted this conclusion as well and applied Order 75.

- 2.6 So much for the procedural laws. What of the substantive laws. The Admiralty Jurisdiction (Fiji) Order in Council 1962 made pursuant to Section 25 of the High Court Act states in Section 2:

The Colonial Courts of Admiralty Act 1890, shall, in relation to the High Court of Fiji, have effect as if for the reference in subsection 2 of Section 2 thereof to the Admiralty jurisdiction of the High Court in England there were substituted a reference to the admiralty jurisdiction of that Court as defined by Section 1 of the Administration of Justice Act 1956, subject to the adaptation and modification of the said Section 1 that is specified in the First schedule.

Section 3 of the Order in Council 1962 states:

“The provisions of Sections 3,4,6,7 and 8 of Part 1 of the Administration of Justice Act 1956, shall extend to Fiji with the adaptations and modifications that are specified in column II of the Second Schedule”

- 2.7 The Administration of Justice Act 1956 of (UK) is essentially a restatement of the International Convention Relating to the Arrest of Sea Going Ships. (The Arrest Convention 1952). This Convention has been superseded by The Arrest Convention 1999 which has not been adopted by Fiji as yet. The 1956 Act has now been superseded in England by the Supreme Court Act 1981 (UK). Sections 20-27 being the relevant provisions of that Act as they relate to admiralty practice now apply to Fiji. This Act is similar to the relevant provisions of the 1956 Act. The relevant sections of the 1981 Act are set out in Vol. 2 of the White Book. Section 20(2) sets out a list of maritime claims that the High Court of Fiji has admiralty jurisdiction to hear and determine. Within this list of claims are maritime

liens as well as statutory rights in rem. There have been numerous references to the application of the Administration of Justice Act 1956 (UK) to Fiji in decisions of our Courts in the 1980's and 1990's. However I understand that it was Mr. Justice Scott in **Star Marine Ltd v Nambuk Fisheries Company Ltd, "Motor Vessel Chance 309"** Admiralty Action No. 4 of 2002 who has finally confirmed the application of the Supreme Court Act 1981 (UK) to Fiji in admiralty actions .

3. THE ARREST IN REM PROCEDURE IN BRIEF

- 3.1 The jurisdiction of the High Court of Fiji to entertain an action in rem to enforce a maritime claim is therefore vested in the High Court of Fiji by Section 21(3) of the Supreme Court Act 1981 (UK). The action in rem differs from an action in personam in that the ship or the proceeds of the judicial sale of the ship is the defendant together with the ship owner. The action in rem provides pre-judgment security for the maritime claim, founds the jurisdiction of the Court, and usually secures the appearance of the ship owner. It must be kept in mind however that pursuant to Section 24 of the Crowns Proceedings Act, no proceedings in rem in respect of any claim against the State or arrest, detention or sale of the State's ships may take place.
- 3.2 The admiralty action begins with the issue of the writ in rem properly intituled as such. The Defendant is usually named "**The Owners of the Motor Vessel...**" On the front top left of each document you must state "**Admiralty Action in Rem against (name of the vessel)**". This clearly indicates to all that this action is an action in rem. If the name of the Defendant ship owner is known then it may be added as a Second Defendant but the action against the Section Defendant named as such would proceed in personam. Arrest warrant is obtained on motion to the High Court supported by an Affidavit with supporting documents together with the Writ setting out the claim. A cash bond of about \$2,500 is usually

payable to the High Court Registry as security and the Plaintiff's undertaking to pay any further costs while the ship is under arrest is also required. A further fee of about \$300 is also payable to the Admiralty Marshall to execute the warrant. You will need to take a return date in 3 weeks time as Order V Rule 1 and 2 of our Rules allows judgment in default to be entered after 18 days of service. The writ together with all relevant documents including the arrest warrant is served on the ship by the Admiralty Marshall by pasting the documents on its mast provided the vessel is within the jurisdiction of the High Court of Fiji. Copies of the documents are normally also served on the Port Authority and Customs Department. You must ensure that the ship is secured and a security guard is kept on the ship during its arrest. The Suva Harbour in particular is notorious for piracy and theft on ships. Where the writ is served or where service is deemed to have occurred by virtue of the ship owners acknowledgement of the issue of the writ, the proceedings continue as a joint action in rem and in personam so that eventually judgment is enforceable against both the arrested ship and the debtor's other property. If the Defendant disputes jurisdiction then it could either file an application to set aside the arrest immediately, with or without a conditional appearance.

- 3.3 The ship owner may release the ship from arrest by issuing a bail bond or by providing a letter of undertaking from a local bank to cover the amount claimed by the Plaintiff together with estimated costs of the arrest and interest. This should be based on the Plaintiff's "reasonably arguable best case" but not exceed the value of the arrested ship. A claim for damages by the Defendant ship owner for wrongful arrest can only be made if he can show bad faith or gross negligence. Finally always remember that other lien holders will come out of the woodwork once news of the arrest of the ship spreads. Following the trial of the action, if the claim is allowed and the Plaintiff remains unpaid the ship may be sold by judicial sale after public advertisement of the sale. Judicial sale by way of a "Bill of Sale"

signed by the Registrar of the High Court of Fiji conveys to the Purchaser a title to the ship free and clear of all prior liens and other encumbrances of any kind. The proceeds are then distributed to the Plaintiff and any other claimants who have intervened in the action according to an order of priority of claims well established by common law with equity also playing an important role in any change in that order of priority.

4. WHAT MARITIME CLAIMS CAN SUPPORT AN ACTION IN REM

4.1 The Supreme Court Act 1981 (UK) in Section 20(2) presents a closed list of maritime claims which fall within the Admiralty Jurisdiction of the High Court of Fiji. Section 20 (1) (a) of the Act states:

1. **The Admiralty jurisdiction of the High Court shall be as follows, that is to say**
 - (a) **Jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2).**

This section therefore permits enforcement of actions in rem or in personam proceedings. The list in Section 20(2) reflects the provisions of the Arrest Convention 1952, which has been applied to Fiji since 1963. Under Section 20 (2) of the Act, in rem enforcement is permitted with respect to claims relating to the following matters using the lettering of that Section:

- (a) Any claim to the possession or ownership of a ship or to any share therein;
- (b) Any question arising between co-owners of a ship as to possession employment or earnings of that ship;
- (c) Any claim in respect of a mortgage of or charge on a ship or any share therein;
- (d) Any claim for damage received by a ship;
- (e) Any claim for damage done by a ship;

- (f) Any claim for loss of life or personal injury sustained in consequence of any defect in a ship... or in consequence of the wrongful act, neglect or default of the owners ... or master or crew of a ship ... being an act, neglect or default in the navigation or management of a ship...
- (g) Any claim for loss of or damage to goods carried in a ship;
- (h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- (i) (Missing in the Act!)
- (j) Any claim in the nature of salvage.....
- (k) Any claim in the nature of towage in respect of a ship or an aircraft;
- (l) Any claim in the nature of pilotage in respect of a ship or an aircraft;
- (m) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (n) Any claim in respect of construction, repair or equipment of a ship or dock charges or dues;
- (o) Any claim by a master or member of the crew of a ship for wages;
- (p) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- (q) Any claim arising out of an act which is or is claimed to be a general average act;
- (r) Any claim arising out of bottomry ;
- (s) Any claim for the forfeiture or condemnation of a ship or of goods.

4.2 As you can see many maritime claims are enforceable by an action in rem. However they fall in either of two categories. They are either true maritime liens or they are statutory rights in rem. This categorization has far reaching implication for their enforcement and security.

5. THE MARITIME LIENS

5.1 Jurisdiction to bring an action in rem to enforce a maritime lien is vested in the High Court of Fiji by virtue of Section 21 (3) of the Supreme Court Act 1981 (UK). Section 21(3) states:

“In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed an action in rem may be brought in the High Court against that ship, aircraft or property.”

A maritime lien is a secured claim against the ship. It is a true privilege derived from the civil law and the “**lex maritima**” of medieval Europe. As such it constitutes a substantive right in the property of another (and not merely a procedural right) and therefore should not be regarded as a mere matter of procedure. Maritime liens arise with the claims that they secure without any registration notification or other formalities. They are independent of possession and follow the ship into whoever’s hands it passes and thereby surviving the sale of the ship although not a judicial sale. Maritime liens rank immediately after special legislative rights, such as claims by the Ports Authority, forfeiture of the ship by the State for example under the Marine Spaces Act, costs of arrest and judicial sale, expenses incurred in arresting and keeping custody of the ship and prior possessory liens. Maritime liens however take precedent over ship mortgages and other statutory rights in rem. Liens are given priority according to type and age. The general rule within a category of lien is “last in time, first in right”.

5.2 Mr. Justice Scott in **Jeyang International Company Limited v the Owners of the Motor Vessels Kao Ya No. 1 and Kao Ya No. 137** Admiralty Action No. 9 of 2001 has accepted the priority classification by Lord Diplock in **The Halcyon Isle (1980) 3 ALL ER 197** of there being 6 classes of maritime liens in their order of priority as follows:

1. Salvage;
2. Collision damage;
3. Seamen’s Wages;
4. Bottomry (now obsolete);
5. Master’s wages;
6. Master’s disbursements

These 6 classes of traditional maritime lien take priority over claims under mortgage and together they take priority over all other statutory rights in

rem set out in paragraph 4.1 above. An informative analysis of maritime liens and statutory rights in rem was done by Mr. Justice Fatiaki, as he then was in **Donald Pickering and Sons Enterprises Limited and Others v Karims Limited, “Motor Vessels Bainivualiku and Seinibiyau”** Admiralty Action No. 2 of 1996. In that case the Defendant had resisted claims of the Plaintiff for repairs, and maintenance charges stating that they do not found an in rem action. The Court held that repairs and maintenance although not maritime liens did give rise to statutory rights in rem that allowed the Plaintiff to arrest the ship.

- 5.3 Maritime liens are frequently described as privileged claims and they enjoy superior priority over all other maritime claims. In **The Bold Buccleugh (1843-60) ALL ER rep 125 at 128**, Sir John Jervis defined maritime liens as follows:

“a maritime lien is well defined... to mean a claim or privilege upon a thing to be carried into effect by legal process... that process to be a proceeding in rem...This claim or privilege travels with the thing into whoevers possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached”

On the other hand a statutory right in rem only permits arrest of the ship provided the beneficial owner has remained the same as when that statutory right in rem arose, and the beneficial owner of the ship has not changed by the time action is taken. Being procedural in nature this right only arises upon issue of the writ or the making of the Intervention Order.

6. STATUTORY RIGHTS IN REM

- 6.1 A statutory right in rem, is a pure procedure, the function of which is to confer on the claimant a maritime claim which entitles him to the right to arrest the ship in an action in rem as security for that claim. Such claims includes supplies, repairs, shipbuilding and other necessaries as well as

claims for breach of charterparty, cargo loss or damage, towage, pilotage or general average. The High Court of Fiji may exercise its jurisdiction over such claims by virtue of Section 21 (4) of the Supreme Court Act 1981 (UK) and is limited to those claims set out at paragraph (e) to (r) of Section 20(2) and which are not maritime liens. Certain specified conditions prescribed by the Act must be met. These are as follows:

- (a) The claim arises in connection with a ship; and
- (b) The person who would be liable on the claim in an action in personam (the relevant person) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship;
- (c) An action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against:-
 - (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respect all the shares in it or the charterer of it under a charter by demise; or
 - (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

It is therefore necessary prior to the arrest of a "sister ship" to ascertain whether the beneficial owner of the two vessels is the same where an arrest in rem action is being taken for claims set out at paragraphs (e) to (r) of Section 20(2) of the Act. Privileged maritime liens on the other hand have no such restrictions. Therefore the concept of legal or beneficial ownership is very important where statutory rights in rem are being exercised and sometimes may involve lifting of the corporate veil.

6.2 The statutory right of action in rem differs from a maritime lien in at least three ways:

- (a) The right arises only from the time of the issue of the writ in rem or from the intervention order. See: **ASD Marine Proprietary Ltd and Others v Pacific Navigation Ltd and Others (Motor Vessel "Ship No. 91)** (1992) FLR 4. The maritime lien arises when the services are provided to or the damage is done by the ship concerned. The position in respect of interveners in Fiji is different as they do not have to file individual Writs once a Plaintiff has arrested the ship. (**Fiji Fish Marketing Group Ltd v Great Pacific Seafoods Ltd and Others.** Admiralty Action No. 11 of 2001).
- (b) The claim secured by a statutory right in rem unlike a maritime lien claim, does not follow the ship into whoever's hands it passes, so the ship may not be arrested if it is sold by mutual consent before the issue of the writ or intervention order. This prohibition is set out in Section 21(4)(b)(i) of the Supreme Court Act 1981 (UK). This provision requires that an action in rem for claims mentioned in Sections 20(2)(e)-(r) of the Act may only be brought against the ship if the person who would be liable on the claim in an action in personam was the owner, charterer or person in possession or control of the ship when the cause of action arose. As stated before this condition does not apply to privileged maritime liens.
- (c) A statutory right in rem claimant has a much lower priority than a maritime lien holder in the distribution of the proceeds of the judicial sale, ranking after, rather than before the ship's mortgagee. An important feature of the statutory right in rem is that it is asserted only on the issue of the writ or the intervention order. However according to English law, a statutory right in rem such as for ship repairs and supplies can only be founded upon the issue of a writ and not by a mere intervention order. In this regard our Courts have departed from the English practice and have allowed interveners to assert and claim statutory rights in rem without the

issue of a writ by them. This position has recently been confirmed in the following cases:

1. **CKP Fishing Company Limited v the Owners Vessel Woo Yang, Marine Pacific Limited and Shipbuilding Fiji Ltd**, Admiralty Action No. 1 of 1998.
2. **Fiji Fish Marketing Group Limited v Great Pacific Seafoods Limited and Westpacific Seafood Limited, Motor Vessels Mary M, Holy G and Mary G**, Admiralty Action No. 11 of 2001.

6.3 The position in Fiji appears to be in line with that in Canada where the statutory right in rem arises only with the arrest of the ship by a Plaintiff. The statutory right in rem claimant should always proceed to file a caveat against the release or payment out of any funds that may be generated by the judicial sale of the ship and obtain an intervention order which makes him directly a party to the proceedings with rights to maintain the arrest or claim on the bail bond or the proceeds of the judicial sale.

7. WHAT IS THE ORDER OF PRIORITY OF MARITIME CLAIMS

7.1 The traditional ranking of priority of maritime claims in Fiji are as follows:

- (1) Special legislative rights; such as dock charges under Maritime and Ports Authority of Fiji Act and forfeiture of the vessel under the Marine Spaces Act.
- (2) Court costs which includes the costs of seizure, keeping the ship in custody, claims of solicitors acting for the Plaintiff and of sale of the ship. These are not liens but recognized as priority claims by all Courts.
- (3) Maritime Liens i.e traditional maritime liens such as salvage, collision damage, seamen's wages, bottomry, master's wages and masters disbursements in that order of priority.

- (4) Ship mortgages (registered)
- (5) Necessaries such as supplies, materials and repairs which give statutory rights in rem as set out at Section 20(2) (e) to (r) of the Supreme Court Act 1981,

These:

- (a) do not follow the ship when sold;
- (b) only the owner or the beneficial owner may bind the ship and he must be the same person when the action is filed;
- (c) can be for fuel, repairs, supplies, towage, pilotage, disbursements on account of the ship, etc;
- (d) statutory rights in rem can arise upon an Intervention Order being made after arrest by a Plaintiff, unlike in UK, where they arise only upon the issue of the writ. In Canada they arise upon arrest of the ship which is in line with Article 7 of the Arrest Convention 1952.

7.2 It is significant to note that the ranking system in the United States and other Commonwealth countries is different and therefore text books on the question of priority have to be closely scrutinized with the case law on this subject in Fiji. For example in the United States repairs, supplies of fuel and other necessaries rank before mortgages in some case by special legislation.

7.3 I may also state that the ranking of the priorities is merely prima facie order and may be departed from by the Court upon reasonable grounds. These grounds may include unconscionable conduct, gross delay or where the mortgagee has allowed necessaries to be supplied to a ship on the credit of the ship owner knowing him to be insolvent. The Court has an inherent discretion to depart from the usual order of priorities but it must be satisfied that the usual ranking would produce obvious injustice or a plainly unjust result. In this regards the decision of Mr. Justice Pathik in

Fiji Fish Marketing Group Ltd v Great Pacific Seafoods Ltd Admiralty Action No. 11 of 2001 is significant and an attempt to protect local suppliers and repairers from foreign mortgagees who stood by and allowed credit to an insolvent ship owner to build up as a result of which a large number of local repairers and suppliers were not paid. I must say however that the **Fiji Fish** decision is currently on Appeal to the Fiji Court of Appeal.

8. CONFLICTS OF LAW: THE HALCYON ISLES DECISION

- 8.1 An important aspect of the admiralty law relating to ship arrest is how the Courts deal with different maritime claims that may have arisen outside of Fiji. There have been very few cases in Fiji that deal with the question of jurisdiction where both the Plaintiff and the Owners of the ship are not resident in Fiji and the maritime claim has arisen outside the jurisdiction of Fiji as well. Jurisdiction is usually easy to establish if the claimants are Fiji residents or the crew are temporarily based in Fiji and are making claims for wages etc.
- 8.2 In **Star Marine Limited v Nambuk Fisheries Company Limited “Motor Vessel Chance 309”** Admiralty Action No. 4 of 2002, Mr. Justice Scott discharged a warrant of arrest on the ground that the dispute had no connection to Fiji. In that case a Hong Kong registered company supplied fuel to a Taiwan flagged ship on the high seas near Hawaii which ship was owned by a Korean registered company. Star Marine Limited which supplied the fuel to the ship arrested the ship in Fiji for alleged claims due and owing in respect of fuel supplied to it. Mr. Justice Scott held that there was no nexus between the parties and Fiji except for the present location of the ship in the Suva Harbour and therefore discharged the warrant of arrest. Not surprisingly the Plaintiff did not pursue the action in personam thereafter. The Defendant were never able to claim costs from the Plaintiff as no security for costs was obtained by the High Court prior to the grant of the arrest warrant. This is a major deficiency in the practice of the High

- Court when arrest warrants are set aside with the Defendant having no recourse in costs from a foreign Plaintiff.
- 8.3 Because of the different ranking of priorities in various countries we should be aware as to how a Court in Fiji confronted with overseas maritime claims would decide on priority and under which law. The High Court of Fiji must first decide whether or not to recognize a foreign maritime claim as a maritime lien or statutory right in rem despite the fact that a corresponding claim arising within our Courts jurisdiction would not constitute a maritime lien or statutory right in rem as set out in Section 20(2) of the Supreme Court Act 1981 (UK).
- 8.4 In the United Kingdom, the Privy Council in 1980 held in the **Halcyon Isles** (1980) 3 ALL ER 197, a landmark decision being followed in many Commonwealth countries, that the Lex Fori (the law of this country and not the country where the action arose (the lex loci)) alone governs the recognition and ranking of foreign maritime liens in the United Kingdom. The decision arose out of a repair in United States of a British ship subject to a British ship mortgage. The vessel sailed away from New York without paying for the repairs. The British mortgage was registered subsequent to the repairs but no notice of mortgage was ever given to the repairer in United States. The British mortgagee ordered the ship to go to Singapore where English law prevailed and had it arrested resulting in competing claims by the British mortgagee and the American repairer to the inadequate proceeds of the judicial sale. The High Court of Singapore refused to recognize as maritime lien any claims which differed from the six traditional maritime liens recognized in England. In consequence the American ship repairers claim ranked below that of the British mortgagee because the repairer's United States maritime lien for repairs was not a maritime lien in England but was a mere statutory right in rem which did not travel with the ship and which ranked after the mortgage. In America they would rank above the mortgage which was registered after the

- repairs. The Singapore Court of Appeal applied the *lex loci* rule (which I believe is the preferred rule and in line with many other countries) and upheld the American repairer's claim over the mortgagee's claim. The Privy Council reversed this decision by 3 to 2 and held that the British mortgagee has priority over the American repairer and as a result confirmed the application of the *lex fori* rule in commonwealth countries.
- 8.4 In another example, in **The Betty Ott v Generals Bills Ltd** (1992) 1 NZLR 655 (CA) the New Zealand Court of Appeal following **The Halcyon Isles** refused to recognize an Australian ship mortgage as equivalent to a ship mortgage registered in New Zealand simply because the mortgage was not registered in New Zealand. As a consequence the Australian ship mortgage was subordinated to an equitable charge resulting from a debenture.
- 8.5 The problem with this Privy Council decision emanates from the fact that the Supreme Court Act 1981 (UK) merely sets out a closed list of maritime claims subject to the admiralty jurisdiction of the High Court, some of which are secured as maritime liens and others by mere statutory rights in rem. There is no room to expand the categories of maritime claims except by legislation. *Lex Fori* rules of the **Halcyon Isles** protects the mortgagees (usually large banks) from the claims of ship suppliers and repairers who otherwise would rank ahead of mortgagees in United States and Canada. It is significant to note that South Africa, New Zealand and Australia as well as Singapore and Malaysia have all followed the **Halcyon Isles** decision in not recognizing the priority ranking of foreign maritime claims of the country where these claims occur. Unfortunately for Fiji, the Rome Convention 1980 which binds all States of the European Union and which requires choice of law to be that of where the contract was made rather than the rule in "*lex fori*", should change the **Halcyon Isles** rule in England. Therefore if the **Halcyon Isles** case were to be decided by the Privy Council today, the American ship repairer's maritime

lien may have to be recognized in priority to the British mortgagee. There is a case for legislative recognition in Fiji of local ship repairers and suppliers claims, (currently statutory rights in rem) to rank ahead of foreign mortgagees if no notice of mortgage has been given to them.

9. CONCLUDING REMARKS

- 9.1 As you can now see from the foregoing, the practice and procedure relating to ship arrest is complex and confounding leading to conflicts of laws. More so because of the reliance upon English laws and legislation. Only recently in the last few years have there been decisions in admiralty matters in Fiji where an opportunity has been given to our Courts to develop our law in this area. We are still reliant on the old English law which probably now, does not have as much relevance given the influence of The Rome Convention 1980 on United Kingdom. The arrest of the vessel by way of an in rem action is a very powerful pre-judgment procedure which enables a claimant to secure an asset of an otherwise evasive impecunious or unscrupulous debtor. Similarly the possibility of post judgment execution by way of judicial sale of the arrested ship is a key consideration providing security to the claimant post judgment. I have set out in the Schedule to this paper a list of relevant admiralty judgments of the High Court of Fiji. I hope that this list of cases as well as other references to books and articles would assist you in your research in any future claim or defence relating to ship arrest. I thank you all for listening.

Schedule

I acknowledge the assistance I have had from the following cases, articles and text books.

1. Cases

- (a) FIRCA v Manohan Aluminum & Glass (Fiji) Limited (2004) HBC 493 of 2004.
- (b) Consort Shipping Line Ltd v FAI Insurance (Fiji) Ltd (1998) HBC 383 of 1997.
- (c) The Ship Haima 747, Supreme Court Action No. 1 of 1985.
- (d) The Ship "MV Voseleai", High Court Admiralty Action No. 6 of 1994.
- (e) Star Marine Ltd v Nambuk Fisheries Company Ltd, "MV Chance 309" Admiralty Action No. 4 of 2002.
- (f) Jeyang International Company Limited v The Owners of the MV Kao Ya No. 1 and Kao Ya No. 137, Admiralty Action No. 9 of 2001.
- (g) Donald Pickering and Sons Enterprises Limited and Others v Karims Limited, "Motor Vessels Bainivualiku and Seinibiyau" Admiralty Action No. 2 of 1996.
- (h) ASD Marine Proprietary Ltd and Others v Pacific Navigation Ltd and Others (MV Ship No. 91) Vol. 38 FLR (1992).
- (i) CKP Fishing Company Limited v MV Woo Wang, Marine Pacific Limited and Shipbuilding Fiji Ltd, Admiralty Action No. 1 of 1996.
- (j) Fiji Fish Marketing Group Limited v Great Pacific Seafoods Limited and West Pacific Seafood Limited, MV Mary M, Holy Q and Mary G, Admiralty Action No. 11 of 2001.
- (k) The Halcyon Isle (1980) 3 ALL ER 197
- (l) The Betty Ott v Generals Bills Ltd (1992) 1 NZLR 655 (CA)
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