Neutral Citation Number: [2018] EWHC 2033 (Admlty)

Case No: AD-2018-000071

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
Admiralty action in rem against the Ship MV ALKYON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

MR. JUSTICE TEARE

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Between :

NatWest Markets plc (formerly known as The Royal Bank of Scotland PLC)	**Claimant**
- and -	
Stallion Eight Shipping Co. SA	**Defendant**
And all other persons interested in the ship MV ALKYON	

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Robert Bright QC and Marcus Mander (instructed by **Watson Farley & William LLP**) for the **Claimant**
Tim Lord QC and Geoffrey Kuehne (instructed by **Hill Dickinson**) for the **Defendant**

Hearing dates: 23 July 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TEARE

Mr. Justice Teare:

1. This is an application for the release of a vessel from arrest pursuant to CPR Part 61.8(4)(b).

2. The application was also brought under CPR Part 3.1(3)(a) and 3.1(7) and under the inherent jurisdiction of the court but the argument before me did not suggest that a claim under those parts of the CPR or under the inherent jurisdiction of the court could succeed in circumstances where the application under CPR Part 61.8(4)(b) failed. I can therefore deal solely with the application pursuant to CPR 61.8(4)(b).

3. The Claimant is a bank, formerly known as The Royal Bank of Scotland plc, which lent US$15,700,000 to the Defendant, the owner of the MV Alkyon, a 2015 built 36,056 dwt bulk carrier registered in the Marshall Islands, pursuant to the terms of a loan agreement dated 30 January 2015. The loan was secured by, inter alia, a First Preferred Mortgage on the vessel dated 2 February 2015.

4. On 22 March 2018 the Bank notified the Shipowner that the market value of the vessel was US$15,250,000 which was 112% of the aggregate amount of the loan then outstanding and so less than the required VTL ratio of 125%. The amount of additional security required was US$1,750,000. The Shipowner disputed that valuation and provided the Bank with higher valuations. The Bank warned the Shipowner that if the shortfall in security was not cured there would be an event of default. On 25 April 2018 the Bank notified the Shipowner of an alleged event of default, namely, the Shipowner's failure to cure the alleged shortfall in the VTL ratio. Further time was given to cure the shortfall. On 15 June 2018 The Royal Bank of Scotland plc sent the Shipowner a Notice of Acceleration which declared the loan immediately due and payable. On the same day the Bank issued an in rem claim form and applied for and obtained the issue of a warrant of arrest against the vessel. On 21 June 2018 the Bank informed the Shipowner of the issue of the warrant and that it had requested the Admiralty Marshal to effect an arrest when the vessel berthed at Newcastle on 26 June 2018. On that date the vessel was arrested by the Admiralty Marshal when she arrived at the port of Tyne.

5. The amount outstanding under the loan agreement is said to be some US$13,496,922.33. The Shipowner denies that there was an event of default and that the Bank was entitled to accelerate the loan. The director of the Shipowner, Yannis Triphyllis, has stated that the claim will be defended on the basis that the Bank's valuation was "very materially off-market" and not in compliance with the terms of the loan agreement. It is alleged that the Bank did not exercise its powers in good faith or in pursuit of legitimate commercial aims.

6. The Shipowner considers that whilst under arrest the vessel will lose gross hire of US$11,350 per day, a profit of some US$3,500 – US$4,000 per day. It fears "a potentially catastrophic loss as its only income producing asset is out of operation". The Shipowner says that it cannot obtain a P&I Club letter of undertaking to secure the release of the vessel from arrest in the normal way because P&I cover does not extend to a disputed claim under a loan agreement. It is also said that security in the form of a guarantee or a bond cannot be provided because the Shipowner's only asset is the vessel and that is already mortgaged to the Bank. In addition it is said that the Shipowner does not have access to funds to effect a suitable security arrangement. Mr. Triphyllis believes that the Bank is only too aware of the position the Shipowner has been put in by the arrest and it appears clear to him that the Shipowner is being placed under commercial pressure to agree to sell the vessel in order to repay the loan which is precisely what the Bank intends to achieve.

7. Those are the circumstances in which the Shipowner has applied for an order releasing the vessel from arrest unless the Bank provides a cross-undertaking in damages in the form usually given in the context of freezing orders, namely, that if the court later finds that the warrant of arrest has caused loss to the Shipowner and decides that the Shipowner should be compensated for that loss, the Bank will comply with any order the Court may make.

8. The Bank says that it would be contrary to the court's practice to require such an undertaking in the context of an Admiralty arrest or to order the release of the vessel from such arrest save on terms that security is given in place of the arrest.

9. To those familiar with this area of the law (and there are some) it will be immediately apparent that the Shipowner's application raises for decision the issue which has concerned Sir Bernard Eder for over 20 years, namely, the question whether a claimant who arrests a vessel, like a claimant who seeks a freezing order, should provide a cross-undertaking in damages in respect of the damage which an arrest can cause a shipowner; see the lecture given by Sir Bernard Eder to the London Shipping Law Centre entitled *Wrongful Arrest of Ships* in December 1996 and *Wrongful Arrest of Ships: A Time for Change* by Sir Bernard Eder 38 Tulane Maritime Law Journal 115 (2013), and see also *Shipping lawyers: land rats or water rats?* by Stewart Boyd QC [1996] LMCLQ 317, *Damages for the wrongful arrest of a vessel* by Shane Nossal [1996] LMCLQ 368 and *Wrongful Arrest of Ships: a case for reform* by Aleka Mandraka Sheppard (2013) 19 JIML 41. Not everyone agrees with Sir Bernard Eder; see the reply to his article by Professor Davies at 38 Tulane Maritime Law Journal 137 (2013) to which Sir Bernard Eder replied at 38 Tulane Maritime Law Journal 143.

10. It is accepted by counsel for the Shipowner that English Admiralty law does not require a claimant who wishes to arrest a vessel to provide a cross-undertaking in damages in order to obtain a warrant for the arrest of a vessel. Therefore, the only way in which the Shipowner can advance its claim for such a cross-undertaking in damages is to seek a release of the vessel from arrest in the event that the Bank fails to provide the requested undertaking. This was the method proposed by Sir Bernard Eder in his 1996 lecture at paragraph 35 and in his Tulane article at p.133.

11. The Shipowner's application was issued on 3 July 2018 and was heard on 24 July 2018. The vessel has been under arrest for a month. There is a need for a swift decision before the end of this legal term and so this judgment may not be as full as it ought to be and may not do justice to all of the matters eloquently addressed by Sir Bernard Eder in what he himself has described as a campaign for a change in the law.

The Admiralty action in rem and the purpose of an arrest

12. A claim in respect of a mortgage on a ship is within the Admiralty jurisdiction and may be brought in rem against the ship in connection with which the claim arises; see section 20(2)(c) and section 21(2) of the Senior Courts Act 1981. A claim in rem is started by the issue of an in rem claim form; see CPR Part 61.3(2). A claimant in rem may apply for the issue of a warrant of arrest; see CPR Part 61.5. The Practice Direction to Part 61 at paragraph 5.2 provides that when the court receives an application for arrest that complies with the rules and the practice direction the court will issue an arrest warrant.

13. Whilst the SCA 1981 and CPR 61 are the current statutory and court rule source of the right in rem and hence of the right to arrest the right in rem is of course an ancient right which can be traced back to the Elizabethan era; see *The Development of Admiralty Jurisdiction & Practice since 1800* by F.L.Wiswall Jr. (1970) at p.155. By 1802 it was recognised as the dominant Admiralty procedure by Arthur Browne LL.D in his *Compendious View of the Civil law and the Law of the Admiralty,* described by *Wiswall* as "a magnificent work"; see *Wiswall* pp.7-8 and 155.

14. It is necessary to bear in mind the purpose of an arrest. The purpose of an arrest is to enforce an admiralty action in rem. By arresting a ship the claimant establishes the jurisdiction of the Admiralty court to hear and determine the claim in the action notwithstanding that the ship is registered in a foreign country and that the claim has no connection with this country. By arresting the ship the claimant also obtains the means by which he can enforce his claim in the event that he establishes his claim. The ship may be sold by the Admiralty Marshal upon the order of the court and the claimant may recover his claim from the proceeds of sale. In that way an arrest provides security for the claim in rem. For other statements of the purpose of arrest see *The Stolt Kestrel* [2016] 1 Lloyd's Reports 125, [2015] EWCA 1035 per Tomlinson LJ at paragraph 12 and *The Styliani Z* [2016]1 Lloyd's Reports 395, [2015] EWHC 3060 (Admlty) at paragraph 20. Thus the right to arrest is "the unique feature of a claim in rem"; see *The Stolt Kestrel* per Tomlinson LJ at paragraph 21.

15. But more often than not an arrest is unnecessary. In the typical claim for lost or damaged cargo the contract of carriage or charterparty will provide for English jurisdiction and the shipowner's P&I Club will provide a letter of undertaking in order to avoid an arrest. In the typical claim for damage caused by collision the shipowners will have agreed to submit their dispute to the Admiralty Court and the respective hull underwriters or P&I Clubs will have provided guarantees to avoid an arrest. Thus in 2017 whilst 165 admiralty claims were issued there were only 10 arrests. Where there is an arrest a vessel will usually be released on the provision of other security thus making a sale unnecessary. Thus in 2017 although there were 10 arrests there were only 3 sales. This snapshot of life in the Admiralty court is not a new phenomenon though the number of claims is lower than in the past. *Wiswall* noted at pp.187-8 that warrants of arrest numbered less than 20% of the quantity of writs in rem issued since 1960. In 1964 when 310 writs in rem were issued there were but 47 arrests, and there were releases in 34 of those cases. Thus although the arrest is "the unique feature" of the Admiralty action in rem it is not often necessary to be effected.

The right to an arrest

16. In *The Varna* [1993] 2 Lloyd's Reports 253 the Court of Appeal held that the issue of a warrant of arrest was of right and was not discretionary. Accordingly there was no duty of full and frank disclosure as there is upon an application for an *ex parte* injunction. The rules of court made that clear. The rules had been amended after the Court of Appeal, in an earlier decision, *The Vasso* [1984] 1 Lloyd's Reports 235, had held that the issue of a warrant of arrest was discretionary. The decision in *The Vasso* may have caused surprise to some. In *The Rena K* [1978] 1 Lloyd's Reports 545 Brandon J. (a master of Admiralty law and practice) had described the process of arrest as not resulting from "the making of an order by the Court, but from the party concerned himself causing a warrant of arrest to be issued under RSC O.75 r.5, subject to the requirements of that rule." At any rate the rules were deliberately amended in 1986 after

the decision in *The Vasso*. Although CPR 61.5 (1) is not in the same terms as RSC Order 75r.5 (as amended in 1986) CPR 61.5 (4) is in the same terms as RSC Order 75r.6 (as introduced in 1986) and PD 61 paragraph 5.2 expressly provides that when the court receives an application for arrest that complies with the rules and the practice direction "the court will issue an arrest warrant". Thus it remains clear that the issue of a warrant is of right. The contrary was not argued on the application.

17. It is for this reason that counsel for the Shipowner accepts that the Bank was entitled to obtain the issue of a warrant of arrest without providing a cross-undertaking in damages.

Actions for wrongful arrest

18. As long ago as 1858 it was established that where an arresting party acted in bad faith or with such gross negligence as implies malice he was liable for any damage caused by a wrongful arrest; see *The Evangelismos* (1858) 12 Moo PC 352. That remains the law; see *The Kommunar (No.3)* [1997] 1 Lloyd's Reports per Colman J. and *Willers v Joyce* [2016] 3 WLR 477 at paragraphs 69-78 and 82-85 per Lord Clarke. Thus there is no right to damages in circumstances where an arresting party acts in good faith and without gross negligence but it is later found that he had in fact no claim in rem. In such a case, as noted by Colman J. in *The Kommunar* at p.33, the shipowner is left "without remedy". Although there has been much academic debate as to the scope of the action for damages for wrongful arrest (see the articles to which I have referred in paragraph 9 above) no such debate took place before me. The Shipowner reserved the right to argue in these proceedings (including any appeal) that the test for recovery in wrongful arrest is or should be other than as appears to be generally recognised at present.

19. It is to be noted that the cross-undertaking in damages which is sought in the present case is expressly intended to apply if the Bank does not succeed in its claim "without [the Shipowner] being required to satisfy the established tests for the tort of wrongful arrest"; see the application notice dated 3 July 2018.

Applications for release

20. The power to order a release from arrest is to be found in CPR Part 61.8(4) which provides that "property will be released from arrest if (b) the court orders the release on an application made by any party". Thus the court has a discretion to order release.

21. The usual circumstance in which a vessel is released from arrest is where alternative security is provided. Another circumstance is where a second arrest is an abuse of process.

22. There are few other instances of a vessel being released from arrest. I was referred to a small number of cases.

23. The first and earliest case to which I was referred did not in fact appear to concern an application for release. It was *The D.H.Peri* (1862) Lush 543. The arresting party was a foreign shipowner who alleged that the defendant's vessel had collided with his. The vessel was arrested whereafter the defendant informed the claimant that his vessel had not collided with the claimant's vessel and that the claimant would be liable in damages

for wrongful arrest. The defendant's vessel remained under arrest until she was released on bail. The defendant later sought security for its costs and security for damages. Security for costs was sought on the basis that the claimant was a foreigner and security for damages was sought on the basis that without security the defendant would be unable to recover damages for wrongful arrest and that the claimant had security for the damages alleged to have been caused by the collision. Dr. Lushington ordered security for costs but refused security for damages.

> "To order security for damages as for a wrongful arrest would be an innovation on the practice of the Court and would form a serious bar to foreigners suing in this court".

24. Although this was not an application for release the case demonstrates that it was not the practice of the court to require security in respect of the damages recoverable for a wrongful arrest. The decision appears never to have been challenged. When Dr. Lushington delivered his judgment he had been the Judge of the High Court of Admiralty for some 24 years and so must have been very familiar with its practice.[1]

25. It was said that this decision "pre-dates the changes to Admiralty practice introduced by the Judicature Acts 1873-1875, which introduced the writ of summons, prior to which arrest of the vessel was necessary to commence the action and found jurisdiction" and that "the position now is that a claimant in rem need not move to arrest in order to commence proceedings, or at all." The implicit suggestion was that the authority of this decision is in some way diminished. This submission was derived from Mr. Nossall's article at p.376. It is true that the writ of summons was introduced at the time of the Judicature Acts in place of the praecipe to institute but otherwise the rules of the High Court of Admiralty were to govern Admiralty proceedings in the new PDA Division of the High Court; see *Wiswall* at pp.103-4. The new writ of summons in rem, the form of which was set out in the 1875 and then the 1883 Rules, did not alter the nature of an action in rem; see *The Burns* [1907] P. 137 at pp.149-150 which, notwithstanding the decision of the House of Lords in *The Indian Grace (No.2)* [1987] AC 878, was followed and approved by the Court of Appeal in *The Stolt Kestrel* at paragraph 62. The action remained an action against the ship itself though it could proceed in personam after the owner had entered an appearance. I do not think that before the Judicature Acts it was necessary to arrest because an owner could avoid arrest by undertaking to appear and putting up bail; see *Wiswall* at pp.184-185 (the caveat procedure in the 1855 Rules). But assuming that it was necessary and that the position changed after the Judicature Acts I do not follow why the suggested change undermines the decision in *The D.H. Peri*. Counsel did not explain why that was so.

26. Since that decision there is no record, or at least counsel did not refer me to any record, of a shipowner seeking to reverse that decision or to distinguish it, notwithstanding that from the mid-nineteenth century and for much of the twentieth century the Admiralty

[1] For a review of Dr. Lushington's long tenure as Admiralty Judge from 1838-1867 see *Wiswall* at pp.67-74. It is of interest to note, having regard to the issue in the present case, that Dr. Lushington regarded the Admiralty court as a Court of Equity and that when a Court of Equity would relieve and a Court of Law could not he regarded it as the duty of the Admiralty Court to afford relief. *Wiswall* comments that in his view of the equitable nature of Admiralty Dr. Lushington was "consistently firmly assertive"; see pp.71-72. Whether Dr. Lushington was aware of the development in the courts of equity in the 1840s whereby an applicant for an interim injunction was required to give a cross-undertaking in damages is not (yet) known but perhaps, given his interest in equity, he was.

court was much busier than it is now. Thus in 1860, two years before the decision in *The D.H. Peri*, 562 causes were instituted in the High Court of Admiralty. In 1881, after the Judicature Acts, 410 Admiralty writs were issued in the PDA Division. At the turn of the century, shortly after the Merchant Shipping Act of 1894, the number remained of that order. The volume of business generated by the First World War was considerable; there were 900 writs in 1920 of which 800 were in rem. Business returned to the usual level of about 400 writs in 1926-1927 but fell to just over 200 writs in 1935 and to just over 100 in 1945-6. But by 1964-5 the number of writs in rem had recovered to over 350. (These figures, obtained from the Admiralty Registry, are set out in *Wiswall* at pp.58, 106-107, 137, 142 and 148.) That such levels of business in the Admiralty court did not produce a challenge to the practice of the Admiralty court recorded by Dr. Lushington in *The D.H. Peri* is, I think, of some note, notwithstanding that there would have been many fewer arrests than writs. It suggests that the shipping and marine insurance industry was content with the position. The decision does not even appear to be mentioned in either *Admiralty Practice* (1902) by Williams and Bruce or *Admiralty Jurisdiction and Practice* (1931) by Roscoe.

27. *The Vanessa Ann* [1985] 1 Lloyd's Reports 549 concerned an application for release but did not concern the question of a cross-undertaking in damages. There was a dispute between the co-owners of fishing vessel which was to be converted into a topsail schooner. The parties fell out. One owner issued an admiralty action in rem and arrested the vessel in Padstow. The defendants, the other two owners, sought the release of the vessel from arrest. They wished her to sail to Antigua where she was to be chartered. The claimant sought a sale *pendente lite*. Staughton J. was "reluctant to resort to the barren remedy of leaving the vessel under arrest" and ordered the release of the vessel from arrest on condition that the defendant executed an equitable mortgage of the vessel to secure the claimant's claim. His justification for doing so was the decision in *The Vasso* "that the power to arrest a ship, and the power to release a ship from arrest, are both discretionary." He also derived some support from a passage in *Roscoe's Admiralty Practice* (5th.ed., 1931) at p.44 referring to an action of restraint whereby the minority owners of a British ship who object to the majority owners sending the ship on a voyage may arrest the ship and have her detained until security is given for her safe return. To the extent that the judge relied upon the power to arrest being discretionary such reasoning would now not be available. However, the power to release is discretionary and that support for the judge's decision remains. But it is to be noted that the judge said:

> "No doubt in the ordinary way if the plaintiff has a valid claim within the Admiralty jurisdiction of the High Court, the ship is arrested and, unless security is provided, she is not released. Counsel and the staff of the Admiralty Registrar could not recall a case which had departed from the ordinary practice. But the discretion is still there."

28. This case therefore establishes that the discretion to release is not restricted to circumstances where the defendant provides security in the usual form in order to obtain the release. But the circumstances of that case are very different from those before me.

29. In *The Bazias 3 and Bazias 4* [1993] 1 Lloyd's Reports 101 the claimant was the bareboat charterer of two vessels from the defendants and had sub-let the vessels to Sally Line who employed them in a cross-channel ferry service. The defendants

withdrew both vessels from the charters for non-payment of hire and other breaches. After the defendants had withdrawn the vessels from the charters they entered into fresh bare boat charters with Sally Line. The defendants commenced arbitration proceedings against the claimant and the claimant counterclaimed. The claimant also issued in rem proceedings against the vessels and arrested them on 28 September 1992 in order to obtain security in the sum of US$10,700,000 million in respect of their counterclaim in the arbitration. The defendants then sought a stay of the in rem proceedings pursuant to section 1 of the Arbitration Act 1975. The application came before Saville J. as Vacation Judge in Admiralty, on 29 September 1992. Sally Line applied to intervene. The application was dealt with in a great hurry and Saville J. ordered that the vessels should remain under arrest but allowed them to return to their employment on their cross-channel service. This was a remarkable order because, as was later observed in the Court of Appeal, "there was no way in which the vessel could remain within the custody of the Admiralty Marshal and yet be allowed to trade outside the jurisdiction." On 5 October 1992, Sheen J. the Admiralty Judge, varied the order by requiring the vessels to remain in the jurisdiction pending a full hearing on 9 October 1992. But on 6 October 1992 the defendants and Sally Line obtained from Sheen J. leave to appeal from his order and from Saville J. leave to appeal from his order. When granting leave Saville J. said that he had only intended an immediate short term and temporary commercial solution, balancing the interests of all the parties as best he could. The appeals were heard on 8 and 9 October 1992.

30. The Court of Appeal granted the stay pursuant to section 1 of the Arbitration Act 1975. The question then arose as to how the court would exercise its discretion pursuant to section 26 of the Civil Jurisdiction and Judgments Act 1982 with regard to the arrest being retained as security for the satisfaction of any arbitration award. Lloyd LJ upheld a submission that the discretion should be exercised in the same way as the discretion to release in an Admiralty action in rem. Upon that basis counsel accepted that "the usual practice has always been that the vessel will only be released on the provision of sufficient security to cover the amount of the claim, plus interest and costs, on the basis of the plaintiffs' reasonably arguable best case." Lloyd LJ noted that the authority for that proposition was *The Moschanthy* [1971] 1 Lloyd's Reports 37 at p.44.

31. Counsel for Sally Line, the interveners, submitted that the court should also order that the claimants give a cross-undertaking in damages in case the arrest turned out to have been unjustified. This would appear to have been the first occasion on which the practice noted by Dr Lushington in *The D.R. Peri* was challenged, though the actual decision was not referred to. After noting counsel's submission Lloyd LJ said:

> "But, as he accepts, this has never been the practice in Admiralty actions and I do not regard this case as being one in which we can introduce so far reaching a change in the practice for the first time."

32. Lloyd LJ would have been very familiar with the practice requiring a claimant seeking an interim injunction, and in particular a *Mareva* injunction or freezing order, to give a cross-undertaking in damages. Despite the long established reasons for requiring a cross-undertaking in damages in such cases Lloyd LJ did not consider that the Court of Appeal could ignore the practice of the Admiralty Court in not requiring such a cross-undertaking. Counsel for the interveners was Stewart Boyd QC who later that year delivered the Donald O'May Lecture in which he drew attention to this case and to the

absence in an Admiralty arrest of a requirement for a cross-undertaking in damages. He suggested that change might need legislation or at least an amendment to the rules of court; see [1993] LMCLQ at p.328.

33. The Court of Appeal's decision was given in October 1992. In December of that year *The Havhelt* [1993] 1 Lloyd's Reports 523 was decided by Saville J. In that case a claimant in rem arrested a merchant vessel in support of a cargo claim. The contract of carriage referred disputes to Norway and so a stay of the action was sought. A stay was granted and the question arose as to whether the arrest obtained in England should be retained as security for any judgment in Norway pursuant to section 26 of the Civil Jurisdiction and Judgments Act 1982. The judge would have been disposed to order the release of the vessel from arrest if he had been persuaded that as a matter of Norwegian law the claim was likely to fail because time-barred. But he was not so satisfied and so he did not order release. He ordered that the vessel remain under arrest as security for the satisfaction of any award or judgment in Norway. However, pursuant to the power of the court under section 26(2) to attach such conditions as the court thinks fit, he made it "a condition of that arrest continuing" that the plaintiffs "provide security for the losses which the defendants in their affidavit submit that they are likely to sustain in the immediate future if the vessel is not available to them." Such security was fixed in the sum of £30,000 and the matter was stood over until Monday of the next week to enable the defendants to provide evidence that under Norwegian law the claim was time barred whereafter the judge would reach "a more permanent view" as to whether or not the vessel would remain under arrest.

34. The decision of the Court of Appeal in *The Bazias 3 and Bazias 4* was not cited to the judge and he made no mention of it. Both decisions concerned section 26 of the Civil Jurisdiction and Judgments Act 1982. In both cases the court considered the imposition of a term that the vessel remain under arrest on condition that a cross-undertaking in damages be given (in the one case) or security in a fixed sum be given (in the other case). The Court of Appeal considered that it could not effect such a far reaching change in practice. The judge saw no such problem. It seems to me arguable that, notwithstanding the practice in Admiralty actions to which Lloyd LJ referred, the court had a greater freedom of action when deciding the terms upon which an arrest should remain as security for an arbitration award or the decision of a foreign court pursuant to section 26 of the 1982 Act. However, that argument does not appear to have found favour with the Court of Appeal in *The Bazias 3 and Bazias 4* but does appear to have found favour with Saville J. in *The Havhelt.*

35. *The Tjaskemolen* [1997] 2 Lloyd's Reports 476 was a case in which a vessel had been arrested in Rotterdam in support of a cargo claim in a London arbitration but had then been released from arrest after consideration of the merits of the claim. When the vessel arrived in Liverpool she was arrested in support of the same claim. Security was provided and she was released. The defendant owners applied to discharge the security on the grounds that the arrest in Liverpool was vexatious and an abuse of the process of the court. Clarke J. accepted (at p.479) that "in general, where a plaintiff satisfies both the statutory criteria and the provisions of the rules of Court he has a right of arrest: *The Varna* [1993] 2 Lloyd's Reports." He also accepted (at p.479) that the court may refuse to permit an arrest or a second arrest where bail or other security had been given and not released on the ground that it would be vexatious or oppressive. After considering the merits of the claim and the proceedings in Holland the judge held (at

p.483) that, subject to one condition, it would not be oppressive or vexatious to allow the security which had been given to obtain the release of the vessel from arrest in England to stand. The judge noted (at p.483) that the defendants had not only secured the release of the vessel from arrest in Rotterdam but had also obtained security for their claim for damages for wrongful arrest. He concluded (at p.484) that it would not be oppressive to permit the plaintiffs to retain the security "provided that they in turn provide security for any loss which the owners prove that they have suffered as a result of arresting the vessel in England if their claim fails before the arbitrators." He said:

> "I recognise that such counter-security is not required in the ordinary case of an arrest, but this case is unusual. As I understand it, if the arrest had been maintained in Holland and the plaintiffs' claim in the arbitration failed, the owners would be entitled to recover from the plaintiffs any loss caused by the arrest without having to prove mala fides or crassa negligentia (to use the old expressions). They would also have been able to obtain security for that claim. It appears to me that on the facts of this case the position here should be the same as it would have been in Holland if the arrest had been maintained and that it would be oppressive to permit the plaintiffs to retain the security for their claim if to do so would put them in a better position than they would have been in Holland. On the other hand the maintenance of the security will not be oppressive if appropriate counter-security is given."

36. It appears to me that the court in that case was considering the question of abuse of process which can potentially arise where a claimant arrests twice. No such question arises in the present case. Further, the special or unusual facts regarding the position in Holland which was particularly relevant to the question of security for losses caused by an arrest are not replicated in the present case.

37. The final case to which reference should be made is *Willers v Joyce* [2016] 3 WLR 477. That case was not an admiralty case but concerned the question whether English law recognised a tort of malicious prosecution. It was held, by a majority of 5 to 4, that it did. Lord Clarke of Stone-cum-Ebony (as he had become) was in the majority and made reference to the action for damages for wrongful arrest. At paragraph 68, having referred to such claims, he said:

> "A person who arrests a ship does not have to provide security to the defendant in respect of any loss which he might incur. It is thus not helpful (as I see it) to note that it is now commonplace for claimants to be required to give undertakings as a condition of obtaining a freezing order. I recognise that there are those who favour the introduction of such an approach in the case of the arrest of ships: see for example Sir Bernard Eder in a lecture given on 12 December 1996 under the auspices of the London Shipping law Centre entitled Wrongful Arrest of Ships ... ... .However, so far as I am aware, no such approach has been adopted in any decided case. "

38. It was suggested that these comments were *obiter* and expressed *per incuriam* because none of the authorities to which I have referred above, including Lord Clarke's own decision in *The Tjaskemolen,* were cited. Whether or not Lord Clarke's comments were strictly *obiter* does not appear to me, sitting at first instance, to matter. They are comments of, at the least, great persuasive authority. Moreover, the cases to which I have referred, in so far as they required a cross-undertaking in damages, did so either in the context of section 26 of the Civil Jurisdiction and Judgments Act 1992 (*The Havhelt*) or in the context of an application based upon an alleged abuse of process (*The Tjaskemolen*). The only consideration given to the subject by the Court of Appeal (in *The Bazias 3 and Bazias 4*) resulted in a refusal to require a cross-undertaking in damages expressly because "this has never been the practice in Admiralty actions and I do not regard this case as being one in which we can introduce so far reaching a change in the practice for the first time." I do not consider that Lord Clarke's comments can be regarded as having been expressed *per incuriam.*

The application in the present case

39. Counsel for the Shipowner submitted that "the current practice of this Court not to require a cross-undertaking in damages is increasingly anomalous and unjustifiable in comparison to the practice of the English courts in relation to interim injunctions, including freezing orders and proprietary injunctions, with which the remedy of arrest is broadly analogous." It was submitted that the stringency of the test for wrongful arrest "provides important context for the [Shipowner's] contention that justice requires that a party in its position should be afforded the protection of a cross-undertaking in damages." Counsel submitted orally that where the "coercive power" of a court's order was employed justice requires that the party obtaining such order provide a cross-undertaking as is recognised by the practice which pertains whenever an interim injunction is sought. Moreover, on the facts of the present case the requirement for a cross-undertaking in damages would cause no prejudice to the Bank, and none was suggested. Counsel described the Shipowner's application as being for a modest development or "tweak" of the court's practice and that the case for doing so was "overwhelming and unanswerable". The application was, it was submitted, consistent with the overriding objective of dealing with a case justly and ensuring that the parties were on an equal footing. The arrest places great pressure on the Shipowner and the cross-undertaking is an obvious way of holding the ring between the parties "lest the arrest turns out to be unwarranted".

40. Counsel for the Bank did not challenge the inherent justice in the requirement that when an interim injunction is sought a cross-undertaking is damages is invariably required. It would be impossible to do so. Rather, he submitted that to exercise the court's discretion to order release for the reasons relied upon by the Shipowner would circumvent the established law of wrongful arrest, would result in the ship being released without alternative security being put in place and would be contrary to the established practice of the court. The change in practice required should be matter for Parliament, rather than the court. The change "would have significant implications for the shipping industry and for the relative attractions of this jurisdiction for vessel arrests."

Discussion

41. The court has a discretion to release a vessel from arrest. Usually, as stated by Staughton J. in *The Vanessa Ann* and by Lloyd LJ in *The Bazias 3 and Bazias 4,* a vessel will not

be released unless security in the usual form is provided. However, the discretion is not restricted to such circumstances as the decision in *The Vanessa Ann* shows. But the discretion to release must be exercised in a principled manner.

42. One of the principles in this area of the law is that a claimant in rem may obtain the issue of a warrant of arrest as of right. It is not dependent upon him providing a cross-undertaking in damages. If the court were to say, following an arrest, that in exercise of its discretion to order release, the vessel must be released from arrest unless a cross-undertaking in damages were provided, that exercise of its discretion would, it seems to me, cut across and negate the principle that a claimant may obtain the issue of a warrant of arrest without providing a cross-undertaking in damages. That would appear to me to be, in a relevant sense, an unprincipled exercise of its discretion or, at any rate, an exercise of discretion which pays insufficient regard to the principle underlying the issue of a warrant of arrest. If it were appropriate in this case to order release in the event that the Bank did not provide a cross-undertaking in damages it seems to me that it would be equally appropriate in a great many cases to make such an order. Thus a very substantial change as to the circumstances in which an arrest can be obtained and maintained would occur overnight. Sometimes such changes do occur overnight in the practice of the law, as happened when the *Mareva* injunction or freezing order was developed. But the suggested change in this field would mean that the entitlement of a claimant in rem to obtain the issue of a warrant of arrest upon making an application in accordance with the rules and practice direction would be nullified. That is a significant step to take (not, as it seems to me, a modest development or a "tweak").

43. The use, and utility, of cross-undertakings in damages throughout the law is well recognised. Lord Neuberger in his dissenting judgment in *Willers v Joyce* made the following observation at paragraph 60:

> "It is perhaps worth adding that the courts have developed a different and more wide ranging power in this context, by requiring, almost as a matter of course in most cases, a cross-undertaking in damages to be given by a party who obtains an interlocutory order. In other words, rather than limiting damages claims by victims of wrongly granted ex parte or interlocutory orders to maliciously brought applications leading to loss of liberty or of property, the law grants an almost automatic right to such victims, irrespective of the nature of the loss or of the presence of malice. "

44. It was submitted that, if it is appropriate on the grounds of fairness and justice to require a cross-undertaking in damages in the context of an application for an interim injunction, in particular a freezing order, to ensure that the interim injunction does not operate unjustly or oppressively, then so should it be appropriate in the context of an Admiralty arrest. The apparent force of this argument derives from the assumption that a freezing order and an Admiralty arrest are comparable. They have completely different origins but it is true that in one sense they are comparable in that a freezing order seeks to ensure, if security is not provided in place of the freezing order, that the defendant's assets will be available for the satisfaction of any judgment which the claimant obtains and an arrest detains the vessel in the jurisdiction so that, if security is not given in place of the arrest, it may be sold in order to satisfy any judgment which the claimant obtains. But the proceedings are not of the same character. This was

observed by Brandon J. in *The Rena K* [1978] 1 Lloyd's Reports 545 at p.561 when he considered whether the arrest of a ship was "an order in respect of securing the amount in dispute" for the purposes of section 12(6)(f) of the Arbitration Act 1950. Brandon J. said that it was not, "because such arrest does not result from the making of any order by the Court, but from the party concerned himself causing a warrant of arrest to be issued under RSC O 75 r.5, subject to the requirements of that rule." By contrast he considered that the section covered the grant of a *Mareva* injunction (or freezing order). The distinction is, in my judgment, significant because it reflects the circumstance that the arresting party is entitled to the issue of a warrant of arrest as of right and is not dependent upon a court order to that effect. It shows that the court should exercise care before concluding that because a cross-undertaking is appropriate in the case of interim injunctions, and in particular freezing orders, so it is appropriate in the case of Admiralty arrests. (I recognise that *The Rena K* was decided before *The Vasso* and *The Varna* but the language of Brandon J. suggests that he understood that a claimant was entitled to the issue of a warrant of arrest so long as he complied with the requirements of the rules.)

45. There is also a factual or contextual difference between arrests and freezing orders. As a result of the availability of arrest as a means of establishing the jurisdiction of the court to hear and determine the claim in rem and as a means of providing security for a claim in rem there was developed a procedure whereby arrest could be avoided by a shipowner. This procedure first appeared as the caveat procedure in the 1855 Rules whereby an owner undertook to appear and provide bail. That procedure developed into the modern practice of undertakings being given privately to appear (now to acknowledge service) and provide security; see *Wiswall* pp.185-188. I have already noted that as a result arrests are relatively infrequent. There is no such established procedure by which a defendant can protect himself against the possibility of a freezing order which can affect all of his assets, not just one of them. Thus in the shipping and marine insurance industry there are established means by which a shipowner can protect himself against the threat of an arrest. Indeed, whereas an arrest is usually effected after notice, as happened in the present case, a freezing injunction is usually ordered without notice to the defendant. This is a further reason for pausing before concluding that what is appropriate in the context of a freezing order must necessarily be appropriate in the context of an admiralty arrest.

46. I must of course also note, when considering the submission made on behalf of the Shipowner in this case, that judges of great authority have not been compelled by the comparison between a freezing order and an arrest to suggest that a cross-undertaking in damages should also be required in an Admiralty case. Thus Lloyd LJ in *The Bazias 3 and The Bazias 4* must have been very aware of the practice of requiring cross-undertakings in damages in the context of freezing orders and yet refused to require a similar cross-undertaking in the case of an Admiralty arrest. It was too "far reaching" a change in practice even for the Court of Appel to alter. And Lord Clarke in *Willers v Joyce* referred expressly to the comparison between a freezing order and an arrest and did not consider it "helpful". That was because "a person who arrests a ship does not have to provide security to the defendant in respect of any loss which he might incur".

47. In these circumstances it would be a particularly bold step for a first instance judge to say, as counsel for the Shipowner urges me to say, that by comparison with the practice of the courts in relation to interim injunctions the current practice of this Court not to

require a cross-undertaking in damages is anomalous and unjustifiable and should now be changed. Indeed, I do not consider that such a course is open to me at first instance.

48. I must of course consider the particular circumstances of the present case. The Shipowner will suffer loss whilst the vessel remains under arrest unable to trade. If the Bank fails to prove its claim the Shipowner may never recover that loss from the Bank because it may not be able to establish the tort of wrongful arrest (though I note that the Shipowner alleges a lack of good faith on the part of the Bank). But those circumstances do not make the present case unusual or exceptional. There does not appear to be anything in the circumstances of the present case to justify a departure from the court's usual practice. It was stressed by counsel that this was not a case of a shipowner failing to make the required payments of principal and interest under his loan agreement. That appears to be the case. But the Bank's case is, nevertheless, that the Shipowner committed an event of default by failing to cure what the Bank maintains was a breach of the required VTL ratio. That, says the Bank, required a payment which the Shipowner failed to make. I do not consider that this circumstance justifies a departure from the court's usual practice.

49. The Shipowner has adduced some evidence that it is unable to provide security in order to secure the release of the vessel in the ordinary way, which thus raises the possibility of the arrest causing an injustice to the Shipowner because it may be unable to secure the release of the vessel and may not be able to establish that the arrest was wrongful; see *The Kommunar* per Colman J. at p.33. In *The Varna* Scott LJ left open (at p.258) the question whether the Admiralty Court has a general discretionary power on an inter parties application to set aside a warrant of arrest if continuance of the arrest would be unjust. Mr. Tryphillis may well be right to say that P&I Club cover does not extend to the claim by the Bank in this case. But his evidence that the Shipowner is unable to procure alternative security is insufficiently particularised to establish an inability to provide such security. Where a shipowner wishes to show that he is unable to avail himself of the remedy usually adopted to avoid loss caused by an arrest he ought, it seems to me, condescend to particulars. Thus the evidence ought to deal, not merely with the Shipowner's own resources, but also with the Shipowner's ability to provide security by calling upon the resources of its shareholders, direct and indirect. The Shipowner may be a one-ship owning company registered in the Marshall Islands but it appears to be part of a larger shipping group (though there is some uncertainty as to its size). It was submitted on behalf of the Shipowner that it was speculation to consider whether the Shipowner could provide security by means of its indirect shareholders. But the evidential burden lies upon the shipowner.

50. Counsel further submitted that consideration of the provision of security misses the point of the application because the provision of security will itself cause loss. That is true; but it is also true in any case where security is provided (though where the in rem claim is insured the shipowner may bear the cost though his insurance premium or P&I Club call). Whilst the amount of the cost in this case may be substantial, because of the size of the Bank's claim, the nature of the loss is not unusual.

51. It was also submitted that it was irrelevant to consider the question of security because the Bank already has security, namely, the mortgage, an assignment of insurances, charges over the Shipowners' accounts, personal guarantees and so forth. But that, to use counsel's phrase, misses the point. The Bank is seeking to realise the security it has by arresting the vessel and, if necessary, by selling it through the court. That is of benefit

to the Bank because a sale by the Admiralty Marshal gives a clean title free of encumbrances; see *The Union Gold* [2014] 1 Lloyd's Reports 53 at paragraphs 5 and 7.

52. There is therefore nothing unusual about the present case. Indeed, because of that very circumstance, the requested release, in the absence of a cross-undertaking in damages, would (or may) have, as counsel for the Bank submitted, "significant implications for the shipping industry". I can envisage at least two. First, since there is nothing unusual about the present case claimants in other typical cases would be required to give a cross-undertaking in damages. Some, depending upon their means, may be discouraged from exercising the right of arrest which statute and the rules of court have given them. I have in mind the crew of a vessel or the supplier of necessaries to a vessel. Vessels are trading assets and an arrest will almost always cause loss. Claimants, even well-resourced claimants, may be unwilling to given an open-ended undertaking. Second, at present P&I Clubs and hull underwriters routinely give undertakings either to avoid arrest or to secure release from arrest. That they do so enables the Admiralty jurisdiction to be exercised by those with Admiralty rights in rem with relatively little dispute and with few arrests and sales actually being required. That may be thought to be a benefit to the shipping and marine insurance industry. If the court, following an arrest, routinely required a cross-undertaking in damages as the price of retaining the arrest, there might, it seems to me, be uncertainty as to whether an arrest would be maintained and so P&I Clubs and hull underwriters might not so readily provide security as they presently do and have done so for a great many years. Of course, these and any other issues which the suggested change in practice may throw up may be capable of being dealt with over time. For example it is suggested in *Maritime Law* 4th ed.by Profes sor Yvonne Baatz at pp.512-513 that a requirement for a cross-undertaking should not extend to claims by the master and crew. But the shipping and marine insurance industry has worked for a very long time, it appears without complaint (save possibly by Sally Line in *The Bazias 3 and Bazias 4*), on the basis that cross-undertakings in damages are not required in the context of an Admiralty arrest.

53. In view of the size of the Bank's claim there is, notwithstanding that an inability to provide security has not been established, the potential for injustice in this case and the requested cross-undertaking in damages would serve to avoid that injustice, reduce the pressure upon the Shipowner and thereby put the parties on what was submitted to be an equal footing. But there is, it seems to me, much to be said for the view that the requested change in practice (assuming that a court at first instance were free to bring it about) is or may be so far-reaching in its consequences that it should be a matter either for Parliament to consider (if a change in primary legislation is required or desirable) or for the Rules Committee to consider (if all that is required is a change in the rules of court) having consulted with the Admiralty and Commercial Court Users' Committee and the shipping and marine insurance industry. In this regard it is to be noted that when the 1952 Arrest Convention (which is the foundation of the present statute conferring jurisdiction in rem) was under consideration the UK delegate to the diplomatic conference was opposed to a suggestion that arresting courts be empowered to order security and in the event the proposal was defeated. The UK delegate said that actions for wrongful arrest are very rare in England and that "he has never heard of any complaint in that respect" (see *Berlingieri on Arrest of Ships* Vol.1 p.373 paragraph 18.05). The 1999 Arrest Convention does contain such a provision but the UK has not ratified that Convention (see *Berlingieri on Arrest of Ships* Vol.2 p.120 paragraph 11.01). In *The Law and Practice of Admiralty Matters* by Derrington and Turner (2nd

ed. 2016) at p.351 it is commented that this provision represents "a significant departure from the existing position in the law of the United Kingdom". Only 11 countries have ratified the 1999 Convention but there are others which have a provision enabling security for damages for wrongful arrest to be ordered; see *Berlingeri on Arrest of Ships* Vol.2 paragraph 2.01 and Vol.1 paragraph 18.42-18.62.

54. It is also to be noted that in *Armada Lines ltd. v Chaleur Fertilizers Ltd* [1997] 2 SCR 617 when the Supreme Court of Canada was urged not to follow *The Evangelismos* and to adopt a new rule that made a claimant liable for all damages caused by the arrest in order to remove the "disparity" between the position of an arresting claimant and a claimant seeking a freezing order it concluded that "such a change in the law falls not to the courts, but rather to the legislature to carry out." (It appears that the court below, the Federal Court of Appeal, had indeed agreed that a cross-undertaking in damages should be required when arresting a vessel but the Supreme Court disagreed; see *Damages for the Wrongful Arrest of a vessel: The Venerable Rule Confirmed* by Margolis [1998] LMCLQ 11 at p.13.)

55. The right of arrest in an admiralty action in rem assists a claimant in rem not only to establish the jurisdiction of this court over the claim (in the absence of agreement to the jurisdiction) but also to obtain security for his claim. Given that ships are mobile assets that may be within the jurisdiction for only a short period of time such a right may well be essential to a claimant obtaining justice. The shipowner whose vessel is arrested and will as a result suffer trading losses may recover that loss by an action for damages for wrongful arrest but only if he can establish the serious conduct required as set out in *The Evangelismos*. He can obtain the release of his ship by providing security in the sum assessed by the reference to the claimant's reasonably arguable best case as explained in *The Moschanthy*. The court is aware that "the power to exact security in support of a claim in rem is a very strong power and it must not be used oppressively". If the claimant does not "put his cards fairly on the table" he may suffer a costs penalty (see *The Moschanthy* at pp.46-47 per Brandon J.) But those protections for the shipowner are not complete. If a shipowner is unable for some special reason to obtain a release of his vessel from arrest by putting up security he may therefore suffer a loss which he cannot recover because the circumstances of the case cannot be brought within the scope of an action for damages for wrongful arrest, as explained in *The Kommunar* by Colman J. p.33. And even if he does put up security he will or may incur a cost which he cannot recover for the same reason.

56. Whether the balance between, on the one hand, the interests of the claimant in rem and, on the other hand, the interests of the shipowner, which has been struck by English Admiralty law and practice over the last 150 years or more remains appropriate and sufficiently "responsive to modern realities" (the phrase used by the Supreme Court of Canada) is, in my judgment, not a matter for the court to judge but a matter for either the legislature or the Rules Committee to consider.

Conclusion

57. The court is unable to accede to the application that the vessel be released in the event that the Bank fails to provide a cross-undertaking in damages. To exercise the court's discretion to release in that way would (i) run counter to the principle that a claimant in rem may arrest of right, (ii) be inconsistent with the court's long-standing practice that such a cross-undertaking is not required, and (iii) be contrary to the decision of the

Court of Appeal in *Bazias 3 and Bazias 4* and to the dicta of Lord Clarke in *Willers v Joyce* which I, as a first instance judge, must respect. Finally, any change in Admiralty law and practice, given that the present position has prevailed for so long, is not a matter for the Court to change overnight (even assuming it could do so) but for Parliament or the Rules Committee to consider after proper consultation.