A Ship Constructor or Repairer's Rights to Secure Unpaid Monies Under Maritime Law

A. Introduction

The object of this paper is to explain the rights of a constructor or repairer of a ship to secure their unpaid monies under maritime law. After analysis of the historical background, consideration is given to the rights provided by the Admiralty Act 1988 (the "Act"). The common law position is also briefly explored for those claimants who fall outside the Act.

The paper also considers whether the construction or repair contract ought expressly provide for retention of title (for constructors) and equitable ownership (for constructors and repairers) until full payment is made. In addition their rights in possession are considered. The reason for such considerations is to try and fit within the provisions of the Act relating to proprietary maritime claims, rather than a general maritime claim, because in the former, ownership of the ship is not important.

Furthermore, the paper briefly analyses the rights of a sub contractor to the constructor or repairer and their possible rights to secure unpaid monies because they are *constructors or repairers* under the Act.

B. Historical Background

Maritime law has a long history and it is important to position the underlying development of the law in context in order to analyse the maritime claims for construction and repairs.

Maritime law, and admiralty law in particular, have the peculiar action *in rem* against the ship itself, which for centuries was the only device left to the Admiralty Courts because the common law courts in England progressively curtailed the jurisdiction of the Admiral[1]. It is important to understand the action *in rem* so that a plaintiff's rights under the Act are put in context. Hutton [2] discusses the personality (also known as "personification") and procedural theories regarding actions *in rem*. Personality connotes that the ship is liable after she is launched and acquires a personality and is competent to contract and be sued in her own name [pages 94-95], whereas the procedural theory suggests that arresting the ship is the mechanism to get the defendant to appear in the jurisdiction [pages 97-98].

Rue explained that admiralty and maritime law contains the unique legal fiction that "the vessel itself is a juridicial entity" i.e. as a person or a legal entity; meaning that the ship is liable for a tort or contract, even though the owner may not be[3]. In the US, which follows this personification theory, an action *in rem* does not result in the owner bearing any personal responsibility, so that if the ship is sold and the proceeds of sale is deficient to compensate the plaintiff, the owner is not liable for the shortfall[4]. O'Hare explained that the case of the ship *The Bold Buccleugh* reported in the case of *Harmer v Bell* (1850) 7 Moo. P.C. 267; 13 E.R.884 was the zenith of the personification theory[5]. O'Hare said that this maritime lien case *in rem* was not held by the Judicial Committee to be "a procedural device to coerce the owner into defending his personal liability (which would be an *in personam* claim), but an action to adjudicate the liability of the ship itself"[6]. The procedural theory has favour in the UK where

[1] CW O'Hare, 'Admiralty Jurisdiction (Part One)' (1979) 6 *Monash University Law Review* 91, 95 & 96
[2] Neill Hutton, 'The Origin, Development, and future of Maritime Liens and the Action in Rem' (2003) 28 *Tulane Maritime Law Journal* 81; ibid
[3] Thomas Rue, 'The Uniqueness of Admiralty and Maritime Law' (2005) 79(5&6) *Tulane Law Review* 1127, 1133 & 1134
[4] Ibid, page 1135
[5] CW O'Hare, 'Admiralty Jurisdiction (Part Two)' (1980) 6 *Monash University Law Review* 195, 201
[6] Ibid, page 202

the House of Lords in the *Indian Grace (No.2)*[7], through Lord Steyn held that the action *in rem* is the means to bring the person liable before the Court. In *Comandate*[8] the Full Federal Court rejected *Indian Grace* and held that an action *in rem* was against the ship, not against the owner, until the owner appeared unconditionally. This appears to be a return to the personification theory.

The Australian Law Reform Commission ("ALRC") report, ALRC 33, stated that actions *in rem* are not fully explained by a single theory[9] and that there are still basic questions upon which there is no binding precedent[10]. Derrington [11] canvassed the two theories and suggested a third because neither fully explained an action *in rem*, and suggested that the action *in rem* was instrumental in bringing a maritime claim [page 7].

The Act provides in s4(3)(n) for *a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched)* and in s4(3)(o) *a claim in respect of the alteration, repair or equipping of a ship* as being general maritime claims[12].

A leading expert in the area of Admiralty Law, who was a Research officer for ALRC 33, Dr. Damien J Cremean[13] in his important text suggested that if a strict interpretation of s4(3)(n) was adopted, as had occurred in the English case of *The River Rima*, then it was doubtful that a claim for payment due for construction would be within jurisdiction[14]. However, he also suggested that the section should not be limited to claims for actual construction, but could also be for claims for debts due for construction[15].

A strict (*River Rima*) approach to the interpretation of the Act was not taken by the Jersey J in the case of *Lloyd's Ship Holdings Pty Ltd v The Ship "Isis II"* (unreported Queensland Supreme Court, de Jersey J, 7 September 1989). In this case a claim for sales tax in relation to a contract involving the construction of a ship was held to be within jurisdiction, and Bardoel[16] reported that His Honour said that "The words ' in respect of' may be wide' and that ..'the obligation to pay sales tax arose directly from the contract under which the plaintiff agreed to construct the ship for the owner'", which resulted in His Honour's finding that it was a claim in respect of construction.

In addition, *Stingray Boats v Denmeade* [2002] FCA 1446, which was a short judgement of Spender J in the Federal Court relating to a claim for $20,500 as the balance due for the construction of a ship. The respondent asserted that the claim was not *in relation to* the actual construction of the ship but that it was merely a claim for a debt due and because it was not *in*

[7] Republic of India & Ors v India Steamship Company [1992] 2 Lloyds Law Reports 321
[8] Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45
[9] Australian Law Reform Commission, 'ALRC 33: Civil Admiralty Jurisdiction' (14 December 1986), paragraph 17
[10] Ibid
[11] Sarah Derrington, *The naure of the modern action in rem* (2007) <http://www.fedcourt.gov.au/how/admiralty_papersandpublications.html>, page7
[12] Admiralty Act 1988, s4(3)
[13] Damien J Cremean, *Admiralty Jurisdiction, Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (The Federation press, Third ed, 2008)
[14] supra, p97
[15] supra, p97 and reference to *Stingray Boats v Denmeade* [2002] FCA 1446
[16] WJ Bardoel, 'Grounds for arrest – "the construction of a ship" power' (1990) 7 *Australia and New Zealand Maritime Law Journal* 57, 59

relation to actual construction meant that it did not fall within the maritime jurisdiction. At paragraph 5 His Honour held:

> *It is, it seems to me, simply unarguable that the claim is not a claim in respect of the construction of a ship, and the submissions by Mr Denmeade lack any persuasive force at all. There is, in my view, jurisdiction in the Federal Court to entertain the claim of the plaintiff in the present proceedings and consequently the objection to jurisdiction must be dismissed. The plaintiff in the principal proceedings should have its costs of the hearing.*

Regrettably, there is no analysis to support his Honour's finding to discern the Court's approach in future cases. Nevertheless, these cases suggest Cremean's concerns about the strict approach have probably been allayed and allows some claims for unpaid monies to fall within jurisdiction.

C. Proceedings under the Act

1. Construction

In relation to construction, the Act provides:

> s4(3)(n) for *a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched)*

Whilst the common law position about ship construction contracts is no longer relevant since the Act, one needs to understand the rationale behind the Act. In the United States a contract for the construction of a ship is not a maritime contract[17] and this has been discussed but not decided by the High Court[18]. In *Thames Towboat Company v. The Schooner "Francis McDonald," Her Tackle, &C., Cummins, Claimant No. 97 Supreme Court Of The United States 254 U.S. 242*; *41 S. Ct. 65*; *65 L. Ed. 245*; *1920 U.S. LEXIS 1188* ("Thames") McReynolds J (giving the opinion of the 9 Judges of the Supreme Court of the United States) cited with approval the well-known case of *People's Ferry Co. v Beer*, 20 How.393 ("*Ferry*")
In *Thames* Mc Reynolds J said:

> *Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that contracts to construct entirely new ships are non-maritime because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water.*

The words in brackets to section 4(3)(n) *including such a claim relating to a vessel before it was launched* appear to be at odds with the definition of *ship* in s3(1)(3)(g) which excludes "*a vessel under construction that has not been launched*". Cremean[19] suggests that the claim does not arise until a launched ship comes into existence, at which time it is possible for the claim to have arisen before the ship was launched. This suggests that once launching has occurred, contract rights that were only common law rights, then become maritime rights.

[17] 'Admiralty Jurisdiction and Ship-Sale Contracts' (1954) 6 *Stanford Law Review* 540; Churchill Rodgers, 'Ship construction Financing - Particularly legal problems relating to security under American Law' (1957) 12 *The Business Lawyer* 142, 145; Rue, page 1131
[18] The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc [1994] HCA 54
[19] supra, p98

Cremean, postulates that because a ship construction contract is usually made and carried out on land meant that there was a question whether s4(3)(n) is sustainable by section 76 (iii) of the Constitution. This infers support for the US approach. He refers to the case of *Owners Of The Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 425 ("Shin Kobe")[20] as support for the constitutional limitation.

With respect, this may be extending what the High Court said perhaps a little too far. At paragraph 43, after earlier canvassing the US authorities both supporting and criticising the notion that contracts for construction do not fall within the admiralty and maritime jurisdiction, their Honours said:

> *"There seems to be more logic in that approach than in an approach that would exclude a claim from s76(iii) simply because it or some aspect of it might protect the rights of a third party or because it might result in relief by way of specific performance....However, it is unnecessary to express a view of the applicability to this country of those US decisions holding that admiralty and maritime jurisdiction does not extend to contracts for the construction or sale of ships"*

It is unfortunate that the High Court did not express a view about this point, particularly since a general maritime claim is created by s4(3)(n), with the proviso that the ship must have been launched. A presumption may be that until the ship is launched, the contract is not a maritime contract, but upon launching, it then takes on a maritime character. Once that occurs, Cremean suggests that that a claim on the construction contract before launching is available because of the words in brackets.

This intellectual zig-zagging between non maritime contract, to maritime contract upon launch, to then being able to have a maritime claim for the pre-launch period on a non maritime contract is difficult to reconcile. With respect, it would have been eminently sensible for the High Court to have affirmed the criticisms of the non maritime contract theory. For example in the Stanford Law Review[21]("SLR") the authors criticised the *Ferry* case because it irreconcilably dealt with a location limitation (of being on land) and said "That the rule has little theoretical justification is clear. It is clear also that at least some advantages would result from a rule under which admiralty handled matters in which it has a special competence". As Rue[22] says, "one might think that the point of beginning for Admiralty jurisdiction would be the construction of a vessel".

If a construction of ship contract is not maritime, then one explanation is that the Act has clothed it with a maritime flavour to the extent of allowing an action *in rem* for a claim under it (once the vessel has been launched), even before a vessel is launched. This seems an unnecessary complex approach to the law. Would it not be simpler for the High Court to decide that ship construction contracts are maritime in nature because the *subject matter* is a ship which is involved in navigation, business or commerce? The SLR suggests the *subject matter test* comes from the civil law[23] and would allow s4(3)(n) to support the maritime contract "subject matter". One could then apply the exclusionary qualification of the *ship* definition, which excludes unlaunched ships [s3(1)(g) of the Act] and ships in inland waterways or for use in them [s5(3) of the Act]. Applying such an approach is consistent with history because the Courts of Admiralty did not have jurisdiction over contracts for unlaunched ships, nor for ships in inland waterways. However, that is a matter for the High

[20] Shin Kobe
[21] Admiralty Jurisdiction and Ship-Sale Contracts' (1954) 6 *Stanford Law Review* 540, 545
[22] Rue, page 1131
[23] Admiralty Jurisdiction supra, 543

Court to decide in future. Needless to say, in the *Lloyd's Ships* and *Stingray Boats* cases the Courts had very little difficulty in applying a very wide interpretation to the words "in respect of the construction of a ship" in order for Admiralty jurisdiction to be founded.

2. Repairs

In relation to repairs the Act provides:

> s4(3)(o) *a claim in respect of the alteration, repair or equipping of a ship*

Apart from a situation where a contract for repair is carried out on a slipway, which may be construed as being on land, contracts for repair of ships arguably are maritime in nature, because they occur upon a vessel that has already been launched.

Interestingly, Tetley[24] says that a repairman in most jurisdictions does not have maritime lien, but only a statutory lien and a possessory lien (providing they keep possession of a ship). He says that the United States law virtually alone gives the repairman a maritime lien. In Australia, however, the work of a repairman does not expressly fall within the inclusive definition of maritime lien in s15(2) of the Act. Before considering the procedural steps under the Act, it is instructive to explore whether a United States repairman seeking relief in an Australian court, could convince a Court to recognise his claim under section 15(2) of the Act.

s12 of the Act provides:

> *"The jurisdiction that a court has under this Act extends to jurisdiction in respect of a matter of Admiralty and Maritime jurisdiction not otherwise within its jurisdiction that is associated with the matter in which the jurisdiction of the court under this act is invoked."*

Could this provision be used to recognise a United States repairman's maritime lien, because section 15(2) of the Act is an inclusive definition?

McQueen [25] provided some useful discussion and reference to authority dealing with the recognition of liens. He referred to the ALRC report recognising the uncertainty as to whether a maritime lien, that does not exist under Australian law, could be accepted by Australian courts. Although the ALRC pre-dates the Act, there is some suggestion that Australia would not recognise new maritime liens. In paragraph 94, the authors discussed the lack of uniformity in international maritime law, and referred to the Privy Council maritime lien case of *Bankers Trust International Limited v Todd Shipyards Corp; "The Halcyon Isle*" [1981] AC 221" ("*The Halcyon Isle"*) where Lord Scarman and Salmon held:

> *"Unfortunately the maritime nations, though they have tried, have failed to secure uniformity in their rules regarding maritime liens: see the fate of the two Conventions of 1926 and 1967 … each entitled (optimistically) an International Convention for the Unification of Certain Rules of law relating to Maritime Liens and Mortgages. Though it signed each of them, the United Kingdom has not ratified either of them … In such confusion policy is an uncertain guide to the law. Principle offers a better prospect for the future."*

[24] William Tetley, 'Repairmen's Liens' (1982) 13(2) *Journal of Maritime Law and Commerce* 177

[25] Peter McQueen, 'Ship Arrest in Australia' (Paper presented at the Ship Arrest Seminar, 2002), pages 20 to 22

McQueen[26] briefly referred to the case of *Morlines Maritime Agency Limited and Others v The Proceeds of Third of the Ship "Skulptor Vuchetich"* [1997] FCA 432 as one authority where a maritime lien from another jurisdiction was not recognised by Australian law.

A close review of that case establishes that Sheppard J followed *The Halcyon Isle* and said:

> *"The majority held that, in proceedings in rem against a ship, the order of priority between claims and the recognition of a right to enforce a maritime lien is a matter to be determined according to the lex fori of the country whose court was distributing the proceeds of sale of the ship.... The claim was for the price of repairs to a ship. It was held that it did not fall within any of the classes of claims recognised as giving rise to a Maritime lien. The court was not able to extend those classes. Accordingly, the ship repairers claim was not enforceable as a maritime lien."*[pages 14 and 15].

After having referred to the categories of maritime liens recognised by Australian law, His Honour said, "The claim based on clause 17 of the master lease agreement does not fall within any of these categories. It is not recognised as a maritime lien by the law in force in Australia. Accordingly it will not be treated as entitled to priority afforded maritime liens in this country." [page 15]

Accordingly, a repairman's lien is not considered a maritime lien in the lex fori of Australia, which means one needs to consider section 4(3) of the Act as a general maritime claim, or perhaps a proprietary maritime claim discussed below.

The Act does not exclude repair contracts which may take place on a slipway from the definition of general maritime claim, so if one construes the statute's purpose and the subject matter approach referred to above, such a contract is considered to be maritime.

As in the case of construction contract, the courts have adopted a wide interpretation of the meaning of the words "in respect of" when dealing with repair contracts: *Banwell v The Ship "the Sydney Sunset*" [2001] FCA 210, where the Court made findings of fact about the services falling within s4(3)(o) and *Brisbane Slipways Operations Pty Ltd v Pantaloni* [2010] FCA 654 where Justice Greenwood dealt with issues related to ownership of the vessel, but in a repair context.

3. Procedures available to construction and repair claimants

ALRC[27] stated, "The key feature of admiralty is the action *in rem*, which allows civil jurisdiction to be asserted over disputes, wherever arising, involving a ship. This jurisdiction is predicated mainly upon service of process on the ship, and can be backed up by arrest of the ship by the court, with the subsequent sale of the ship providing a fund from which claims can be met."

McQueen[28] states that *in rem* proceedings allow proceedings to be commenced against an elusive defendant as well as obtain security for a claim. The Act provides that actions *in rem* and *in personam* are both available to a plaintiff and in *Brisbane Slipways*[29] Justice Greenwood allowed an *in personam* claim to proceed after having dismissed an *in rem* claim.

[26] Ibid, page 21
[27] Australian Law Reform Commission, page 4
[28] McQueen, page 18
[29] Brisbane Slipways Operations Pty Ltd v Pantaloni [2010] FCA 654, paragraph 126

Although the Act provides for Admiralty jurisdiction *in personam* on a maritime claim: s9(1)(a) of the Act, the principal focus is the action *in rem* because this is where a claimant may have security. s14 of the Act provides that a proceeding cannot be commenced as an action *in rem* against a ship or other property except as provided by the Act.

As claimants under a general maritime claim, constructors and repairers may, under s17 of the Act, proceed *in rem* on the owner's liabilities, which allows the ship that has been constructed or repaired to be arrested. This connotes a procedural philosophy for the Act, because there is specific reference to the owners liability, rather than the ship's liability, but as ALRC33 and Derrington recognise there is no single philosophy that applies, particularly where *Comandate* appears to follow the personification theory.

There is a distinction between commencing action *in personam* and *in rem*. Rule 18 of the Admiralty Rules 1988 (the "Rules") prohibits the same initiating process being used for an *in personam* and an *in rem* claims. It is not clear from *Brisbane Slipways* how this obstacle was overcome because the *in personam* claim was allowed to continue. Rule 18 provides that an action *in rem* must be commenced by writ in accordance with form 6.

4. Arrest of a ship

Rule 39 of the Admiralty Rules 1988 (the "Rules") allows a plaintiff to apply (in accordance with form 12) for an arrest warrant in respect of the ship or other property against which the proceeding was commenced. An affidavit in support of the application must be provided by an Australian legal practitioner or an agent of the applicant [Rule 39(2)] and (in accordance with form 13) setting out the particulars of the claim and any necessary facts to establish entitlement for the action *in rem* [Rule 39(3)].

One of the practical difficulties confronting an applicant under the general maritime claim is the provisions of section 17 which provides as follows:

> *"17. Where, in relation to a general maritime claim concerning a ship or other property, a relevant person:*
>
> *(a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and*
>
> *(b) is, when the proceeding is commenced, the owner of a ship or property;*
>
> *a proceeding on the claim may be commenced as an action in rem against the ship or property."*

The Honourable Justice James Allsop[30] explained that:

> *"Paragraph (a) identifies the matters which must be identified at the time the cause of action arose: there must, at that time, be a certain kind of relationship between the ship or other property and the relevant person (being the person who if successfully sued would be liable to the plaintiff as the defendant). That relationship is as owner or charterer of or in possession or control of the ship or property. However, that is only the first connecting requirement. The second connecting requirement, in paragraph (b), must be satisfied when the proceeding was commenced: at that time, the relevant person must be the owner of the ship or other property."*

[30] the Honourable Justice James Allsop, 'Admiralty jurisdiction, some basic considerations and some recent Australian cases' (Paper presented at the University of Newcastle maritime interest group, MLAANZ (NSW & ACT branches) and University of Canberra, Newcastle, 2007), page 5

Most of the cases in this area have focussed on the relief from arrest of a ship brought by a defendant because the claimant has not demonstrated the facts to support s17 of the Act. The point of departure of an analysis under section 17 is the reference to the "relevant person". Section 3(1) of the Act provides the following definition:

> ***relevant person***, in relation to a maritime claim, means a person who would be liable on the claim in a proceeding commenced as an action *in personam*.

Under s17 of the Act the *relevant person* must therefore be liable to the claimant and connected with the ship, and when proceedings are commenced, must be the owner of the ship. In *Brisbane Slipways* the claimant ultimately failed to establish that the *relevant person* was the owner of the ship at any time.

If the ship is not within jurisdiction a substitute ship within jurisdiction may be arrested as s19 of the Act provides as follows:

> ***19 Right to proceed in rem against surrogate ship***
>
> *A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if:*
>
> *(a)* *a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first mentioned ship; and*
>
> *(b)* *that person is, when the proceeding is commenced, the owner of the second mentioned ship.*

The same strict tests apply as in s17, except that ownership of both the "offending ship" and the surrogate ship must be established when proceedings commence. In the case of *Vilona* the Federal Court [31] dismissed a proprietary maritime claim against three surrogate ships because section 19 did not contemplate a claimant under a proprietary maritime claim which was the claimant's basis for proceeding [paragraph 9]. Hely J held that that even if section 19 was applicable, there was no evidence to demonstrate that the defendant was the owner or charterer of, or in possession or control of, the first mentioned ship, nor that the defendant was the beneficial owner of any of the three vessels. His Honour cited the Full Court case of *Iran Amanat* as authority that it was for the owner of the ship to satisfy the that it shall not be arrested, rather than for the plaintiff to satisfy the court that it should be.

If a defendant challenges whether the relevant person test has been satisfied, the High Court has said that the claimant must establish these facts on the balance of probabilities in light of all the evidence advanced[32]. The High Court has also said that it is not incumbent on the claimant at the time of a challenge to jurisdiction to prove that a defendant "relevant person" is liable on the claim in the proceeding (the "ultimate issue"). The Court said the plaintiff only needs to establish that the defendant would be liable, (as provided in the s3 definition), since the question of jurisdiction turns upon the nature of the claim, not its strength[33]. In the *Iran Amanat*, the judge at first instance in an interlocutory application had determined the ultimate issue, which the High Court said was wrong[34].

[31] Vilona v The Ship "Alnilam" [2001] FCA 411
[32] Shin Kobe infra paragraph 46
[33] Iran Amanat v KMP Coastal Oil [1999] HCA 11, 196 CLR 130, paragraphs 18 and 19
[34] Ibid

This means that the supporting material and affidavits do not have to go prove the ultimate issue. Lack of available word space precludes consideration of the devices that a defendant may employ to have the ship released from arrest, or lodging caveats preventing arrest. The focus is on what is available to claimants, not what they might face if they proceed in Admiralty.

5. Sale and proceeds of sale

The advantage of being able to arrest a ship is that it can be sold by order of the Court of under rule 69(1) of the Admiralty Rules (the "Rules") and Rule 71(b) provides that the Marshal pays the proceeds of sale into Court. Thereafter, a claimant can apply under Rule 73 for a Court determination on the priorities of the claims against the ship but priorities outside the scope of this paper.

The prospect of the having the proceeds of sale available therefore is a very useful mechanism to provide security for a constructor or repairer, to secure unpaid monies

D. Claimants who either fall outside the Act, or cannot proceed *in rem* under s17 or s19

6. Claimants fall outside the Act

If the claimant has constructed or repaired a ship which is an inland waterways vessel, or the vessel has not yet been launched, then the Act does not apply. Nevertheless a constructor or repairer of a ship (not within the s3(1) of the Act definition) generally may have possession of the ship at the time of carrying out their work, subject of course to the terms of the contract with the owner.

"A possessory lien is a right to retain possession of a ship or other property until payment of discharge of a debt or obligation arising in respect of the ship or property has been made"[35]. The lien requires that possession be maintained[36].

Such a person may commence common law proceedings to enforce payment of their unpaid monies, whilst, if possible, retaining possession of the ship. However, such proceedings cannot be construed as *in personam* proceedings under the Act because one is not dealing with a *ship* under the Act.

However, having obtained court judgement against a defendant under that common law claim, could a claimant enforce the judgement fall within s4(2)(c) and have a proprietary maritime claim entitling them to proceed *in rem* under s16 of the Act against the defendant's maritime property (about which the claimant had no cause of action)? If one adopts the personification theory approach, then the claimant could not have an action *in rem*, because the cause of action did not involve a *ship* as defined by the Act. Even the procedural theory, "at its narrowest, views the action *in rem* as a procedural device to bring the true person liable before the Court[37]. Therefore, as a matter of statutory construction it appears that s4(2)(c) invokes Admiralty jurisdiction on the basis that the *judgement* had to have been given *by a court against the ship or other property*, so a non maritime claimant with judgement cannot take enforcement proceedings under the Act.

[35] Lexis Nexis Butterworths, 'Halsbury's Laws of Australia' in Damien J Cremean (ed), *Maritime Law* (
[36] Ibid
[37] Derrington, page 6

One further difficulty arises if another claimant arrests the ship in the possession of the claimant. Is possession lost, such that the lienee loses a priority to claim for unpaid monies. This is outside the scope of this paper, but is an important topic for further research.

7. Claimants cannot proceed *in rem* under s17 or s19

If the constructor or repairer cannot establish the elements of s17 or 19 of the Act, although they still have a general maritime claim, they cannot proceed *in rem* under those provisions. This could be because ownership has already changed, or the contracts were not with the owner. Are they still able to invoke the *in rem* proceedings under another provision?

It is feasible for a construction or repair contract to give a claimant a right to title (in construction cases) or equitable ownership (in either or both construction and repair cases) until all outstanding monies are paid. For example in *Thor Shipping* [38] the construction contract provided that the constructor (Sovereign) retained title until acceptance of the vessel had occurred and all monies were paid to Sovereign. This could allow a constructor claimant to proceed *in rem* under s16 of the Act on the basis that the constructor had a proprietary maritime claim under s4(2)(a)(ii) as to title. Similarly, could not an equitable owner repairer also invoke this s4(2)(a)(ii) as to ownership, or s4(2)(b) as a claim between co-owners relating to possession or ownership of the ship?

Shin Kobe Maru recognise equitable ownership and in fact was prepared to consider the issue of remedies as separate from issues of ownership [paragraphs 33 and 34]. At paragraph 35 the Court held that, "a claim relating to ownership… should only be limited if it is clearly required" and the Court gave it a broad meaning. It added that a proprietary maritime claim could be "brought in rem notwithstanding that the claim involves the further assertion that the appropriate remedy is specific performance, or indeed, some other remedy that has its origins in equity, rather than in Admiralty". This allows the Court in equity to fashion a remedy to suit the justice of the case, and may well assist a claimant as owner or equitable owner, to obtain security for their unpaid monies.

In *Vilona* the claimant proceeded under section 4(2)(a) of the Act as equitable owner [paragraph 16] and the defendant accepted that a claim for equitable ownership was a proprietary maritime claim. The Court found no evidence to suggest that the plaintiff's funds had been employed in the construction of a ship. Nevertheless, there was a recognition that a beneficial owner could proceed under section 16 for a proprietary maritime claim. In order to do so that person would have to fall within section 4(2) of the Act.

Furthermore, a constructor (of a launched vessel) or repairer who has possession of a ship as lienee could make a claim under section 4(2)(a)(i) relating to possession of a ship. Despite there being specific provisions for constructors and repairers under the general maritime claim provisions [s4(3) of the Act], if a claimant cannot invoke s17 or s19, it appears open for a Court to allow a proceeding *in rem* under s16. This has support under the personification theory because the work is done on the very ship the subject of proceedings supportable by *Comandate*.

Accordingly, it is open for a constructor or repairer who under a contract may have title or an equitable right to own a ship or having possession, pending payment of all monies due to fall within s4(2)(a) of the Act. The advantage of s16 *in rem* proceedings is that ownership does not have to be demonstrated. However, Rule 15 still requires identification of the relevant person, who in this case would be the person with whom they had contracted to carry out the work.

[38] Thor Shipping A/S v The Ship "Al Duhali" [2008] FCA 1842

E. Claims by subcontractors

The paper has been considering constructors or repairers who have worked for people directly connected with the ship, but it should be asked what rights do a sub contractor to the constructor or repairer have to secure unpaid monies because they are *constructors or repairers* who may fall under the Act.

A subcontract constructor's unpaid money claim would fall within s4(3)(n) of the Act as it is still *in respect of construction of a ship*, which is considered broadly by the Court. Similarly, a subcontract repairer's unpaid claim would fall within s4(3)(o) as *in respect of the repair of a ship,* so both claimants have a general maritime claim. However, their causes of action are against the principal contractor who (subject to what is discussed below) would generally not be the owner of the ship, at the time of the cause of action, as well as at the time that proceedings are commenced. This means that the claimants would be unable to proceed *in rem* under s17 or s19 of the Act. They would still have *in personam* claims under s9 of the Act, but they do not have security for their claim.

Arguably, however, if the principal contractor still had title (in full or in part), or was an equitable owner of the ship (under a construction or repair contract) as discussed under heading 7 above, if the subcontractor moved quickly before the ship was sold, then *in rem* proceedings under s17 or s19 is available because ownership, which can include equitable ownership[39] could be demonstrated. It would be vital for the subcontractor to know of title or equitable ownership of the principal contractor, because speed in such cases is important.

F. Conclusion

The paper establishes that for *in rem* construction or repair claims, under general maritime claims, ownership is important to establish under sections 17 and 19 of the Act. If ownership cannot be established, claimants may have proprietary maritime claims to pursue *in rem* under s16 of the Act. In other instances claimants may only have an *in personam* claim under the Act, or common law lien claims if they do not fit within the Act, which does not provide the security afforded by the arrest of the ship.

Subcontractors may have in *personam* claims under the Act, unless they can establish the principal contractor has ownership or equitable ownership, where *in rem* proceedings may be available.

G. Bibliography

http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC33.pdf

Admiralty Act 1988

'Admiralty Jurisdiction and Ship-Sale Contracts' (1954) 6 *Stanford Law Review* 540

Brisbane Slipways Operations Pty Ltd v Pantaloni [2010] FCA 654

Iran Amanat v KMP Coastal Oil [1999] HCA 11, 196 CLR 130

[39] Shin Kobe

The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc [1994] HCA 54

Thor Shipping A/S v The Ship "Al Duhali" [2008] FCA 1842

Vilona v The Ship "Alnilam" [2001] FCA 411

Allsop, the Honourable Justice James, 'Admiralty jurisdiction, some basic considerations and some recent Australian cases' (Paper presented at the University of Newcastle maritime interest group, MLAANZ (NSW & ACT branches) and University of Canberra, Newcastle, 2007)

Australian Law Reform Commission, 'ALRC 33: Civil Admiralty Jurisdiction' (14 December 1986)

Bardoel, WJ, 'Grounds for arrest – "the construction of a ship" power' (1990) 7 *Australia and New Zealand Maritime Law Journal* 57

Cremean, Damien J, *Admiralty Jurisdiction, Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (The Federation press, Third ed, 2008)

Derrington, Sarah, *The naure of the modern action in rem* (2007) <http://www.fedcourt.gov.au/how/admiralty_papersandpublications.html>

Hutton, Neill, 'The Origin, Development, and future of Maritime Liens and the Action in Rem' (2003) 28 *Tulane Maritime Law Journal* 81

Lexis Nexis Butterworths, 'Halsbury's Laws of Australia' in Damien J Cremean (ed), *Maritime Law* (

McQueen, Peter, 'Ship Arrest in Australia' (Paper presented at the Ship Arrest Seminar, 2002)

O'Hare, CW, 'Admiralty Jurisdiction (Part One)' (1979) 6 *Monash University Law Review* 91

O'Hare, CW, 'Admiralty Jurisdiction (Part Two)' (1980) 6 *Monash University Law Review* 195

Rodgers, Churchill, 'Ship construction Financing - Particularly legal problems relating to security under American Law' (1957) 12 *The Business Lawyer* 142

Rue, Thomas, 'The Uniqueness of Admiralty and Maritime Law' (2005) 79(5&6) *Tulane Law Review* 1127

Tetley, William, 'Repairmen's Liens' (1982) 13(2) *Journal of Maritime Law and Commerce* 177