International perspectives on admiralty procedures

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Introduction

The core of any country's admiralty jurisdiction is the action *in rem* against a ship owned by the person who would be liable *in personam* on a claim relating to that ship. All maritime countries allow a plaintiff to invoke judicial process to seize a ship owned by the alleged wrongdoer to obtain security for a claim relating to that ship. The most instructive part of any comparative analysis of admiralty procedure is an examination of how far beyond that core the admiralty jurisdiction reaches. Does the admiralty jurisdiction extend to seizure of other property owned by the person who would be liable *in personam*? Does it permit seizure of property owned by someone other than that person? Obviously, the broader the "reach" of a country's admiralty jurisdiction, the easier it is to invoke that jurisdiction and the more claims will be heard in admiralty.

Comparatively speaking, Australia's admiralty jurisdiction is conservative, with only limited "reach". Australia only permits action against property other than the wrongdoing ship itself in limited circumstances. The limited reach of Australia's provisions permitting *in rem* action against surrogate ships was illustrated recently by the decision of the Full Court of the Federal Court of Australia in *Kent v The Vessel Maria Luisa*.[1]

In this short paper, I will contrast the position in Australia with the position in two other countries where the admiralty jurisdiction has much more extensive "reach", namely South Africa and the United States. Although South Africa is widely regarded as having the most expansive admiralty jurisdiction because of its provisions for associated ship arrest, the United States can make a strong claim to have broader admiralty "reach" in some respects.

Surrogate arrest in Australia – Kent v The Vessel Maria Luisa

Section 19 of the Admiralty Act 1988 (Cth) establishes the right to proceed *in rem* against a surrogate ship on a general maritime claim[2] concerning a ship (hereafter called the wrongdoing ship).[3] The person who would be liable *in personam* must be:

- owner or charterer of, or in possession or control of, the ship to which the claim relates (s 19(a)); and
- *owner* of the surrogate ship (s 19(b)).

The most restrictive part of this provision is, of course, the requirement that the person who would be liable *in personam* (the "relevant person") must *own* the surrogate ship. "Owner" is

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1 [2003] FCA 93.

2 There is no right to proceed *in rem* against a surrogate ship on a proprietary maritime claim: see *Vilona v The Ship Alnilam* [2001] FCA 411. See also *Malaysia Shipyard and Engineering Sdn Bhd v The Ship Iron Shortland* (1995) 59 FCR 535 at 546 per Sheppard J; *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181 at 187, per Brennan CJ.

3 Because s 19 provides that the claim must be one "concerning [the first] ship", it must relate to that ship in some way. It is not sufficient that the ship or its surrogate is the property of a person who would be liable on a general maritime claim concerning *a* ship (any ship): see *Opal Maritime Agencies Pty Ltd v Proceeds of sale of vessel MV Skulptor Konenkov* (2000) 98 FCR 519; 172 ALR 481.

not defined in the Act, but in *Malaysia Shipyard and Engineering Sdn Bhd v The Ship Iron Shortland*,[4] the word "owner" was interpreted to mean not just *registered* owner but also *beneficial* owner. Although this extended the reach of the admiralty jurisdiction a little, the essentially restrictive nature of s 19 is illustrated by the recent decision of the Full Court of the Federal Court in *Kent v The Vessel Maria Luisa*.[5]

The plaintiff in *Kent* was a diver and deckhand employed by South Australian Marine Farms Pty Ltd (SAMF) to work on tuna fishing boats. He alleged that he had suffered severe decompression illness while working on the tuna boats *Monika* and *Boston Bay*. He commenced proceedings *in rem* in the Federal Court of Australia against the tuna boat *Maria Luisa* as surrogate for the *Monika* and the *Boston Bay*. The registered owner of the *Maria Luisa* was Everdene Pty Ltd, which was the trustee of the Maria Luisa Unit Trust. Everdene was wholly owned by Australian Fishing Enterprises Pty Ltd (AFE), which held all the shares of the Unit Trust. The plaintiff's writ *in rem* alleged that AFE owed him a duty of care, that AFE was the owner or charterer of, or in possession or control of, the *Monika* and the *Boston Bay* at the time his cause of action arose, and that AFE was the owner of the *Maria Luisa* at the time the proceeding was commenced.

Everdene moved for dismissal of the *in rem* proceedings for lack of jurisdiction, arguing that the *Maria Luisa* could not be a surrogate for the *Monika* and the *Boston Bay*, because AFE was not the owner of the *Maria Luisa*. By a majority, the Full Court affirmed the order of Beaumont J, granting Everdene's motion to dismiss the *in rem* action. The *Maria Luisa* was not a surrogate for the *Monika* and the *Boston Bay* because AFE was not the beneficial owner of the *Maria Luisa*. Thus, s 19(b) of the Admiralty Act 1988 (Cth) was not satisfied.

AFE operated the *Maria Luisa*, paid for its insurance, maintenance and repairs, and received all the income it generated. Nevertheless, AFE's status as beneficiary of a trust and owner of the shares of the trustee meant that it was two steps away from beneficial ownership, so far as the majority was concerned. As owner of all the shares of Everdene, AFE did not own the assets of Everdene;[6] as beneficiary of all the units in the trust, AFE had a beneficial interest in the ship, but that was a "contingent defeasible interest", not ownership.[7]

The decision in *Kent* shows how easy it is for ship operators to circumvent the surrogate ship provisions of the Admiralty Act 1988 (Cth). The court's resolute refusal to look through the corporate veil means that one need only interpose a wholly-owned subsidiary and/or a unit trust to be free of the possibility of surrogate ship arrest. If the wrongdoing vessel itself has been sold by the person who would be liable *in personam*, its assets are not subject to admiralty process at all. This puts Australian plaintiffs at a distinct disadvantage when proceeding against foreign ship operators, who routinely set up shipowning structures designed to utilize the corporate veil to the maximum extent possible. It was just these "shell game" structures that South Africa's associated ship procedure was designed to counteract.

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4 *Malaysia Shipyard and Engineering Sdn Bhd v The Ship Iron Shortland* (1995) 59 FCR 535.
5 [2003] FCA 93.
6 Ibid at para [47], per Tamberlin and Hely JJ.
7 Ibid at paras [71], [74] per Tamberlin and Hely JJ.

Associated ship arrest in South Africa

The associated ship arrest provisions of South Africa's Admiralty Jurisdiction Regulation Act 1983 are fairly intricate. Section 3(6) of the Act provides that an action *in rem* on a maritime claim[8] may be brought by the arrest of an associated ship instead of[9] the ship in respect of which the maritime claim arose. The definition of "associated ship" distinguishes between a "person" and a "company", but for these purposes "person" includes all juristic persons, including companies.[10]

An associated ship is a ship that is:

- owned, at the time the action is commenced, by the person who owned the wrongdoing ship at the time the claim arose (s 3(7)(a)(i)); or
- owned, at the time the action is commenced, by a person who controlled the company which owned the wrongdoing ship at the time the claim arose (s 3(7)(a)(ii)); or
- owned, at the time the action is commenced, by a company which is controlled by a person who owned the wrongdoing ship at the time the claim arose, or who controlled the company which owned it at that time (s 3(7)(a)(iii)).

Notably, the person who provides the link between the wrongdoing ship and the associated ship does not have to be the person who would be liable *in personam*, as it does under Australian law. Any person can provide the link.

At their furthest reach (which is in s 3(7)(a)(iii)), these provisions permit arrest of a ship if the same person (which may be a company) controls the company that owns the wrongdoing ship and also controls the company that owns the associated ship, even if he/she/it does not own either ship personally. This circumvents the common structure of a fleet of one-ship companies owned by a holding company. Under South African law, the fact that there is a single holding company controlling both one-ship companies would be sufficient to permit associated ship arrest. Indeed, the link between the one-ship companies may be even more tenuous than common ownership. In *The Heavy Metal*,[11] the Supreme Court of Appeal of South Africa held two ships to be "associated" for the purposes of the legislation because the same Cypriot lawyer owned a majority of shares in each of the one-ship companies that owned the ships, even though he did so as nominee for others.

To illustrate the breadth of the South African provisions, let us examine how they would apply to the facts of *Kent v The Vessel Maria Luisa*. AFE was the charterer of the *Monika* and the *Boston Bay*, so it would be deemed to be the owner of those ships by s 3(7)(c) of the South African Act.[12] The key question would be: did AFE also control Everdene, the

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8 Other than a claim "arising out of or relating to…any mortgage, hypothecation, right of retention, pledge or other charge on or of a ship, and any bottomry or respondentia bond": see s 1(1)(d), expressly excluded from s 3(6). In other words, roughly speaking, what Australia would call proprietary maritime claims cannot be brought against associated ships.

9 "Instead of" means what it says: if the guilty ship has already been arrested, whether in South Africa or somewhere else, no associated ship arrest is possible. See *The Fortune 22* 1999(1) SA 162 (C).

10 John Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* (Juta & Co, 1999), p 81.

11 *The Heavy Metal: Belfry Marine Ltd v Palm Base Maritime Sdn Bhd* 1999(3) SA 1083 (SCA).

12 Admiralty Jurisdiction Regulation Act 1983, s 3(7)(c) provides: "If at any time a ship was the subject of a charterparty the charterer or sub-charterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the subcharterer, and not the owner, is alleged to be liable".

company that owned the *Maria Luisa*? For these purposes, a person is deemed to control a company if he or she (or it) has power, directly or indirectly, to control the company.[13] Control over the day-to-day administration of the company is not sufficient, the person must have "overall control of the destiny of the company".[14] Whoever was responsible for the routine administration of Everdene's affairs, there can be little doubt that ultimate control of Everdene rested squarely with AFE, which owned all of Everdene's shares.

Thus, it would seem that the *Maria Luisa* would be an "associated ship" of the *Monika* and the *Boston Bay* under s 3(7)(a)(iii). The interposition of the Maria Luisa Unit Trust would apparently have no significance under s 3(7)(a)(iii), because the question would not be (or would not only be) whether AFE itself owned the *Maria Luisa*, but whether it controlled the company that owned it.

This example should serve to illustrate the breadth of the South African legislation. Of course, that is no surprise – everyone knows that the South African associated ship provisions catch more ships than the Australian surrogate ship ones do. Nevertheless, it is important not to overstate the reach of the South African legislation. If the owner of the associated ship challenges the exercise of the court's *in rem* jurisdiction, the plaintiff must establish the requisite degree of connection between the wrongdoing ship and the associated ship on the balance of probabilities,[15] just as it would have to under Australian law.[16] It must make that proof at a very early interlocutory stage, before discovery has taken place in relation to the merits of the claim.[17] Discovery is not readily ordered under the South African rules, and especially not to "fish" for unspecified documents to support an arrest.[18] Thus, a plaintiff planning an associated ship arrest in South Africa must be prepared to dig deep into the details of control of foreign shipowning corporations using only publicly-available information, and it must do that *before* it moves to arrest the associated ship.

The practical difficulties that may be faced, even in South Africa, in establishing the requisite degree of connection between the wrongdoing ship and the surrogate or associated ship leads one to ask: why does there have to be any connection *at all* between the plaintiff's claim and the property against which it proceeds? If the plaintiff has the right kind of claim (ie, a maritime claim) and the right defendant (ie, the person who would be liable in personam), why should the plaintiff not be allowed to proceed against *any* property of the defendant that it finds within the jurisdiction? If the plaintiff is in truth proceeding against the defendant rather than the property itself, as Anglo-Australian law insists,[19] why is its right to seize property confined arbitrarily to the wrongdoing property itself, or some other property with a defined connection to it? Why should the plaintiff not be allowed simply to seize *any* property of the defendant?

This deeming provision applies only to the wrongdoing ship, not the associated ship: see Hare, above n 10 at p 82.

13 Admiralty Jurisdiction Regulation Act 1983, s 3(7)(b)(ii).

14 *The Nefeli: E E Sharp& Sons Ltd v MV Nefeli* 1984(3) SA 325 (C).

15 Hare, above n 10 at p 90.

16 *Owners of the ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404.

17 I made the same point in relation to Australian law in Davies, "What is 'ownership' for the purposes of ship arrest under the Admiralty Act 1988 (Cth)? (1996) 24 ABLR 76.

18 *The Urgup*: *Owners of the MV Urgup v Western Bulk Carriers (Australia) Pty Ltd* 1999(3) SA 500 (C).

19 That is the consequence of the rejection in England and Australia of the personification theory: see below n 23 and accompanying text.

The short answer to these questions in South Africa and the United States is that there need not be any connection between the cause of action and the property seized, because the parallel procedure of attachment is available as well as arrest.[20] Thus, the South African procedure that truly extends the effective "reach" of that country's admiralty jurisdiction may not be the well-known surrogate ship provisions, but rather the lesser-known procedure for maritime attachment.[21] Because I know rather more about American law than I do about South African law, I shall explain the significance of attachment by looking at the position in the United States.

Attachment in the United States

American law contains no procedure for surrogate ship arrest, or for associated ship arrest. A plaintiff may only arrest the wrongdoing ship itself, by proceeding against it *in rem*. An *in rem* action is not merely a means of obtaining security and forcing the appearance of the shipowner, as it is in the UK and Australia:[22] it is an action against the ship itself, personified as the defendant.[23] Thus, the ship may be held liable *in rem* when the shipowner would not be liable *in personam*.[24] If the shipowner does come before the court to defend the claim against the ship, it does not so by entering an appearance because it is not (and cannot be) party to the *in rem* proceeding.[25] Because the ship *is* the *in rem* defendant under American law, it follows that the plaintiff cannot proceed against any other property as surrogate for the wrongdoing ship, no matter what the connection between them.

Thus, if one looks only at the American procedure for an action *in rem*, it appears as if the American admiralty jurisdiction does not "reach" beyond what I described at the outset of this paper as the core of admiralty procedure – that is, an action against the wrongdoing ship itself. That is a very misleading impression, though. As well as the procedure for an arrest properly so called, there is a parallel procedure for maritime attachment, which is much broader in scope. Attachment of a ship leads to its seizure by judicial process, which makes the procedure look confusingly similar to that of arrest. So far as ships are concerned, the

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20 There does have to be some connection in Australia: see *Opal Maritime Agencies Pty Ltd v Proceeds of sale of vessel MV Skulptor Konenkov* (2000) 98 FCR 519; 172 ALR 481.

21 A plaintiff may proceed against any person *in personam* in Admiralty if that person's property within the court's area of jurisdiction has been attached to found or confirm jurisdiction: see Admiralty Jurisdiction Regulation Act 1983, s 3(2)(b). The court may make an order for anticipatory attachment when the property is not yet in the jurisdiction; the order is then carried into effect when the property enters the jurisdiction: see Admiralty Jurisdiction Regulation Act 1983, s 4(4)(b). For a consideration of the South African procedure of attachment, see Hare, above n 10 at pp 59-64.

22 *Republic of India v India Steamship Co Ltd (The Indian Grace)(No 2)* [1998] AC 878; *Ocean Industries Pty Ltd v M/V Steven C* [1994] 1 Qd R 69.

23 See generally Davies, "In defense of unpopular virtues: personification and ratification" (2000) 75 Tul L Rev 337.

24 For example, the carrying ship may be held liable *in rem* on a bill of lading issued by a time charterer as contracting carrier, even though the shipowner would have no liability itself: *United Nations Children's Fund v S/S NORDSTERN*, 251 F Supp 833 (SDNY, 1966); *Tube Products of India v S/S RIO GRANDE*, 334 F Supp 1039, 1971 AMC 1629 (SDNY, 1971); *Demsey & Associates, Inc. v. S/S SEA STAR*, 461 F 2d 1009, 1972 AMC 1440 (2d Cir, 1972); *British West Indies Produce Inc v S/S ATLANTIC CLIPPER*, 353 F Supp 548, 1973 AMC 163 (SDNY, 1973); *Cavcar Co v M/V SUZDAL*, 723 F 2d 1096, 1984 AMC 609 (3d Cir, 1983); *Cactus Pipe & Supply Co v M/V MONTMARTRE*, 756 F 2d 1103, 1985 AMC 2150 (5th Cir, 1985).

25 Until recently the procedure for the shipowner's "appearance" was called a "claim of owner". Now, the shipowner must file a verified statement asserting "a right of possession or any ownership interest": FED. R. CIV. P. SUPP. C(6)(b)(i).

end result of both procedures is the same – the ship is detained within the jurisdiction – but the underlying theories are very different. The two procedures are usually called by the name of the rule in the federal Supplemental Admiralty and Maritime Claims Rules[26] that governs them – Rule C arrest and Rule B attachment. The key difference between Rule C arrest and Rule B attachment is that the latter is an adjunct to an *in personam* claim, whereas the former is an adjunct to a true *in rem* claim against the ship itself.

If a plaintiff proceeds against a defendant *in personam* on a maritime claim, it faces the perennial problem of finding the defendant, serving it with process and persuading it somehow to enter an appearance. If the *in personam* defendant is not "found within the district" – ie, if the defendant is not personally present in the jurisdiction of the court – then the plaintiff may establish jurisdiction over it by attaching some of its property – *any* of its property – or by garnishing debts owing to the defendant. Rule B(1)(a) provides:

> If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process.

Thus, Rule B permits attachment of a ship within the jurisdiction if the defendant itself is not present. It produces the same result as Australia's surrogate ship provisions, because it permits the plaintiff to attach *any* ship owned by the person who would be liable *in personam*.[27] Importantly, though, it goes beyond those surrogacy provisions, because it permits attachment of the defendant's property whether or not that property has anything to do with the plaintiff's claim. The only requirement is that it be "tangible or intangible personal property" of the defendant.

The breadth of the Rule B attachment process has been graphically illustrated by a recent decision of the US Court of Appeals for the Second Circuit, which has caused quite a stir.

In *Winter Storm Shipping Ltd v TPI,*[28] the plaintiff chartered its ship *Ninemia* to the defendant for a voyage to carry oil from Saudi Arabia to Thailand. It claimed that the defendant had breached the charterparty contract by underpaying freight. Although the charterparty contained a clause providing for arbitration of disputes in London, the plaintiff instituted proceedings against the defendant *in personam* in the US District Court for the Southern District of New York. The plaintiff then applied *ex parte* for an order of attachment of funds passing through the Bank of New York in New York. The defendant, a Thai corporation, had entered into an unrelated commercial transaction with a corporation (Oppsal Shipping) that had a bank account in London. That transaction required the defendant to pay Oppsal Shipping in US dollars. An electronic funds transfer (EFT) was to be made from the defendant's Thai bank to Oppsal Shipping's London bank via the Bank of New York as intermediary. When the electronic transfer reached the Bank of New York from Thailand, the bank obeyed the court order of attachment and placed into a suspense account a sum representing the plaintiff's claim against the defendant, before forwarding the remainder to Oppsal in London.

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26 The rules governing admiralty procedure are a supplement to the Federal Rules of Civil Procedure.

27 See Tetley, "Arrest, Attachment and Related Maritime Law Procedures", 73 Tul L Rev 1895, 1935 (1999) ("Because the United States has the attachment, sister ship arrest *in rem* is unnecessary.").

28 310 F 3d 263 (2d Cir, 2002), *cert denied* 123 S Ct 2578 (2003).

The defendant moved to vacate the attachment of the funds held by the Bank of New York. The US District Court for the Southern District of New York vacated the attachment and dismissed the plaintiff's complaint for lack of jurisdiction.[29] The plaintiff appealed successfully to the US Court of Appeals for the Second Circuit, which held that the attachment of the EFT was valid under Rule B. The EFT was "tangible or intangible personal property" of the Thai defendant, which was "not found within the district" itself. It was immaterial that the transaction between the defendant and Oppsal had no connection whatever with the plaintiff's claim. Rule B does not require any connection between the claim and the attached property.

The *Winter Storm* decision has created something of a storm because any electronic funds transfer in US dollars, from anywhere in the world to anywhere else, must pass through a US bank, and most pass through New York City.[30] The possibility that any of the billions of dollars of EFTs that pass through New York every day might be subject to seizure by maritime attachment was met with some concern (to put it mildly) by New York's banking community. Most unusually, both the Federal Reserve Bank and the New York Clearing House Association filed *amicus curiae* briefs in support of the Thai defendant's motion for a rehearing of the case by the Court of Appeals *en banc*,[31] but to no avail: the motion was denied without comment.[32] The Supreme Court of the United States also refused to grant certiorari – in other words, refused to give the defendant leave to appeal.[33] Thus, the Thai defendant was made subject to the jurisdiction of the US District Court for the Southern District of New York, even though it was probably entirely unaware of the fact that any of its property was likely to pass through New York at any time.

The *Winter Storm* decision is all the more striking because the state of New York has legislation that specifically provides that a court may only restrain the originator of a funds transfer, the originator's bank, or the beneficiary's bank, but not an intermediary bank.[34] The *Winter Storm* court held that that state statute was pre-empted (ie, overridden) by the federal rules of admiralty procedure, which clearly permitted seizure of an EFT held by an intermediary bank.

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29 The attachment provided the only basis for jurisdiction over the Thai defendant, which was not present in the Southern District of New York and could not be served with process there.

30 See Joseph A Sommer, "Where is a bank account?", 57 Md L Rev 1 at 33, 49-51 (1998).

31 A rehearing *en banc* is a rehearing by all sitting members of the Circuit Court of Appeals. It is, in effect, an appeal from the decision of the three-member panel that constituted the Court of Appeals.

32 See George F Chandler III, "*Winter Storm Shipping Ltd v TPI*: Maritime Attachment Creates a Storm", 1 Benedict's Maritime Bulletin 138-139 (2003).

33 123 S Ct 2578 (2003).

34 NYUCC Art 4A-503.

More about attachment

Striking though the *Winter Storm* decision might be, it should be stressed that maritime attachment is *not* another piece of exotic legal Americana that could not function outside the unique atmosphere of the US legal system. It is a doctrine with strong civil law roots, which once formed part of the English admiralty jurisdiction.[35] American maritime attachment grew from the civil law tradition of the English courts of Admiralty, not from any influence of the code-based civil law of the European continent.[36] Although American maritime attachment is similar in some respects to the modern French procedure of *saisie conservatoire*, it is quite different in that maritime attachment actually *confers* jurisdiction on the attaching court, whereas the French *saisie conservatoire* does not.[37]

Despite the long (and originally English) pedigree of admiralty attachment, the Australian Law Reform Commission did not give it much consideration when it surveyed admiralty jurisdiction in its historic report *Civil Admiralty Procedure* (ALRC 33, 1986). It only considered attachment in the context of its consideration (surely hardly serious) of abolishing the admiralty jurisdiction altogether:[38]

> *[N]o support at all has been forthcoming for such an approach [ie, abolition of the admiralty jurisdiction]. One reason is that this would probably involve adopting some other basis for the assertion of jurisdiction over foreign defendants, eg by way of saisie conservatoire or attachment ad fundandam jurisdictionem (both forms of seizure of property in order to procure the appearance of an absent defendant). This could involve major, and potentially controversial, changes to the existing structure of civil jurisdiction in Australia. Except in maritime cases, Australian interests do not support the expansion of jurisdictional claims based only on the presence of assets within the jurisdiction (where the cause of action arose elsewhere). Such jurisdictional claims are (again with the exception of maritime claims) also controversial internationally.*

Unfortunately, the Commission did not seriously consider the possibility of adopting attachment "*ad fundandam jurisdictionem*" (as it called it) *as part of* the admiralty jurisdiction, rather than as a substitute for it.[39] The quoted passage concludes, quite rightly, that a *general* procedure for basing jurisdiction on the presence of assets in the jurisdiction would require a fundamental change in the nature of Australia's civil procedure.[40] That is

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35 See Wiswall, *The Development of the Admiralty Jurisdiction and Practice since 1800* (Cambridge UP, 1970), pp 16-17; Tetley, "Arrest, Attachment and Related Maritime Law Procedures", 73 Tul L Rev 1895, 1900-04 (1999). The procedure for maritime attachment fell into disuse in the eighteenth century, because of the efforts of the common law courts to prevent the admiralty courts from exercising *in personam* jurisdiction: see ibid.

36 The position in South Africa is rather different. Under the Admiralty Jurisdiction Regulation Act 1983 (SA), s 6, English law still governs matters that fell within the admiralty jurisdiction of the English courts in 1891, and Roman-Dutch law governs other matters. Because maritime attachment had fallen into disuse in England by 1891, South Africa's adoption of a maritime attachment procedure in 1983 was therefore the creation of new law, which is governed by Roman-Dutch law by operation of s 6: see *The Valabhai Patel* 1994(1) SA 550 (SCA); Hare above n 10 at p 59. Thus, although Roman-Dutch law governs South African maritime attachment, it does not do so because the procedure derives from Roman-Dutch civil law roots.

37 Tetley, "Arrest, Attachment and Related Maritime Law Procedures", 73 Tul L Rev 1895, 1940-47 (1999).

38 Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (ALRC 33, 1986), para 85.

39 The only other paragraph of the report to consider attachment at any length is para 94, which merely asserts that "international perception" is that it is "exorbitant".

40 Although it must be noted that a general procedure does exist in Queensland: see Supreme Court Act 1995 (Qld), ss 71-74.

not (and never was, it must be said) a reason for rejecting a specifically *admiralty* attachment procedure. As the quoted passage itself acknowledges, "Australian interests" *do* support the notion of basing jurisdiction on the presence of assets within the jurisdiction, at least in maritime cases.

In any event, how exorbitant is the reach of Rule B attachment? As we did when looking at South African associated ship arrest, let us begin our examination of the procedure by considering the facts of *Kent v The vessel Maria Luisa*. The first difference to note would be that the plaintiff, Kent, would not be proceeding *in rem* against the *Maria Luisa*, but would be proceeding *in personam* against AFE. Pursuant to that admiralty proceeding *in personam*, he would be entitled to attach any of AFE's property if AFE were "not found within the district". It should be obvious immediately that Kent would not be able to attach the *Maria Luisa* for two reasons. The first is exactly the reason why he could not arrest the ship in the actual Australian proceedings: because it was not AFE's property. The second reason would be that AFE *would* be "found within the district", so the procedure would not be available at all. Kent would simply be entitled to proceed against AFE and to satisfy his judgment from AFE's assets if successful.

Far from demonstrating how exorbitant the American Rule B procedure is, this example leads us on to a fairly searching question. Why are the assets of *Australian* defendants subject to seizure in admiralty proceedings at all? The American Rule B is confined to cases where the defendant is "not found in the district". If the defendant *is* found within the district, he or she or it is subject to the process of the court in the ordinary way, and all of his or her or its assets are available to satisfy any judgment eventually won by the plaintiff. There is no justification in such a case for allowing the plaintiff to use the favoured admiralty procedure of seizing the defendant's assets as soon as the proceeding is commenced. If the plaintiff cannot get security in advance against a defendant who is present in the jurisdiction, and if it seems as though the defendant is taking assets out of the jurisdiction in order to make itself judgment-proof, then the plaintiff can use the existing procedural protection given by the Mareva order.[41] Why should a procedure designed to force appearance by an absent defendant be available against a defendant who is already present in the jurisdiction and subject to the court's process?

Let us return, however, to the context where Rule B is designed to be used, that of a foreign defendant with assets in the jurisdiction – even transiently in the jurisdiction, as *Winter Storm* shows. In such a case, attachment of the defendant's assets is enough to give the court personal jurisdiction over the defendant. That certainly does constitute a broad-reaching admiralty jurisdiction. Normally, that outcome would be regarded as unacceptable under American law, because it would violate the Due Process clause of the Fifth Amendment of the Constitution.[42] Judicial seizure of a person's property without prior notice or an opportunity to be heard would ordinarily be regarded as an unconstitutional deprivation of property without due process of law.[43] Nevertheless, federal courts have consistently held Rule B attachment to be consistent with constitutional safeguards. (The *Winter Storm* court reiterated that view, after exhaustive consideration of authorities.[44]) That conclusion is due at least in part to the fact that the Supplemental Admiralty Rules guarantee the defendant a

41 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.

42 U.S. Const. Amend. V provides, in part: "No person shall…be deprived of life, liberty or property, without due process of law…"

43 See, eg, *Shaffer v Heitner*, 433 US 186, 97 S Ct 2569, 43 L Ed 2d 683 (1977).

44 See above n 28.

prompt post-seizure hearing in all cases, whether of Rule C arrest or Rule B attachment. Although the order for attachment can be obtained *ex parte*,[45] the defendant who is the owner of the property is entitled to an early review of whether judicial seizure was appropriate. Rule E(4)(f) provides:

> *Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules.*

The details of the post-attachment (or post-arrest) hearing are left to the court's discretion. The intention is not to resolve the dispute between the parties, but merely to determine whether there were reasonable grounds (or "probable cause" to use the usual American terminology) for issuing the warrant for attachment or arrest.[46] Because the plaintiff bears the burden of showing cause, it must bring forth sufficient evidence to show probable cause.[47]

No similar safeguard exists in English or Australian law.[48] The owner of an arrested ship must challenge service of the writ *in rem* or apply for summary dismissal of the plaintiff's claim.[49] If the plaintiff alleges facts that would make out an admiralty claim if proved, the claim is within jurisdiction because the court assumes the facts supporting the claim to be as alleged by the plaintiff,[50] with the result that shipowner's only remaining pre-trial recourse is to apply for summary dismissal of the plaintiff's claim, an order that is available only in the rare case where the claim is so clearly untenable that it cannot possibly succeed.[51]

In other words, although the American procedure for admiralty attachment under Rule B has a longer "reach" than the equivalent procedures in England and Australia, the guarantee of a prompt post-seizure hearing has the result that abuses of the procedure are few.

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45 FED. R. CIV. P. SUPP. B(1).

46 *20th Century Fox Film Corp v MV Ship Agencies, Inc*, 992 F Supp 1423, 1998 AMC 2514 (MD Fla, 1997).

47 See, eg, *Linea Naviera de Cabotaje CA v Mar Caribe de Navigacion CA*, 2000 AMC 357 (MD Fla, 1999), considering affidavit evidence only.

48 Tetley, "Arrest, Attachment and Related Maritime Law Procedures", 73 Tul L Rev 1895, 1916 (1999).

49 See, eg, *Vilona v The Ship Alnilam* [2001] FCA 411 for a consideration of the relationship between the two procedures.

50 *Owners of the Motor Vessel Iran Amanat v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130.

51 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

Conclusion

Surrogate ship arrest was unknown in Australia before 1988. The ALRC recommendations in 1986 were deliberately conservative, because the Commission took the view that Australia should not move beyond what was then regarded as internationally acceptable.[52] Although the Commission had some harsh words for the 1952 Arrest Convention, its view of what was internationally acceptable seems to have been shaped in large part by the positions taken in that Convention.[53] In retrospect, that seems unfortunate. The proliferation of one-ship companies occurred in direct response to the notion of "sister ship" arrest in the 1952 Convention, and it has proved almost completely effective: any ship operator can avoid surrogate ship arrest if it wishes to organize its affairs to do so. That was already true in 1988, when Australia signed on to a 1952-style regime. The failure of the 1999 Arrest Convention to solve the problem internationally by adopting a South African-style "associated ship" procedure was disappointing, to say the least, and it seems likely to doom the Convention to those dusty shelves at UNCTAD and IMO where unwanted conventions live out a sad but unwanted existence. However, the very fact that UNCTAD and IMO gave serious consideration to internationalizing the South African model in the 1999 Convention shows that world opinion has moved on since 1952 and 1986. Australia unsuccessfully supported adoption of the South African-style procedure in the debates on the 1999 Convention,[54] so there are some Australian reformers ready for change, it seems.

However, those Australian reformers should not only focus on the South African model. Adoption of an American-style attachment procedure is also desirable and is actually more consistent with the basic concepts underlying Australian admiralty procedure. As a matter of principle, confining arrest to the "wrongdoing" property only makes sense in the context of a personification theory. The UK and Australia have both emphatically rejected that theory in favour of the idea that the *in rem* procedure is nothing but a device to force the appearance of the *in personam* defendant. However broadly stated the notion of surrogacy or "associated ship" arrest, it still requires some connection between the seized property and the wrongdoing ship. That alleviates the plaintiff's position to some extent without removing the conceptual incoherence of the restriction. If the purpose of judicial seizure in admiralty is simply to secure appearance of the defendant *in personam*, why must there be any connection between the property and the cause of action at all? Once the defendant enters an appearance in the *in personam* proceedings, its other assets are subject to the court's process to satisfy the judgment, so why should those assets not all be available for seizure in the first place?

In a recent address to Tulane's Admiralty Law Institute, the great Canadian maritime lawyer Bill Tetley described the decline of maritime attachment in English admiralty procedure as "a serious weakness", and he also described American maritime law as "uniquely rich" in providing both arrest and attachment.[55] As I have tried to show, American maritime

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52 See, eg, Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (ALRC 33, 1986), para 94 ("If the interest of potential plaintiffs is in having the widest possible jurisdiction *in rem*, there are international constraints on how far this can be done").

53 See, eg, ibid at para 204, stating that the proposed definition of "surrogate ship" was appropriate because, among other reasons, "This corresponds to the 1952 Arrest Convention art 3(4)".

54 See the report of Richard Shaw, a member of the UK delegation, to the British Maritime Law Association, at http://www.bmla.org.uk/annual_report_1998/international_convention_on_arre.htm.

55 Tetley, "Arrest, Attachment and Related Maritime Law Procedures", 73 Tul L Rev 1895 at 1898 ("serious weakness"), 1939 ("uniquely rich").

attachment is not always "exorbitant" in effect, by any means. For example, it does not provide a complete solution to the one-ship company structure, because one can only attach property owned by the *in personam* defendant. If that defendant is a one-ship company, the only attachable asset is the wrongdoing ship itself – *or*, it must be added, any other property owned by or debts owing to that one-ship company. Even one-ship companies have bank accounts and receivables. Admittedly, the ability to intercept funds belonging to the defendant has greater practical significance in New York than Sydney, Melbourne or Brisbane, but that is no reason for Australia to eschew the procedure in principle.

Lest it be thought that my head has been turned by living in America, and that I am now advocating concepts that are insufferably foreign to Australian legal culture, I should close by drawing your attention to ss 71-74 of the Supreme Court Act 1995 (Qld). Those sections contain a procedure for foreign attachment available to *all* plaintiffs, not just admiralty ones. In this, as in so many other things, what is good for Queensland is surely good for the rest of Australia.