ADMIRALTY JURISDICTION AND VESSEL ARRESTS IN FIJI

MAURICE J. THOMPSON*

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1. INTRODUCTION

1.1 The 2005 Fijian High Court decision of *Fiji Fish Marketing Group Ltd.* v. *Great Pacific Seafood Ltd*[1] provides an object lesson in the intricacies of the law as it relates to admiralty jurisdiction and vessel arrests in Fiji. The issues and fundamental concepts of maritime law raised in the case are not unique to arrest proceedings in Fiji however, and are dealt with on a regular basis by admiralty courts internationally. The same could be said for the underlying issues that arise in any merger and acquisition, or with respect to any banking and finance matter. However, where maritime matters are concerned, the difference is that most of the major maritime law jurisdictions internationally have either adopted particular international conventions with the result that their maritime laws in respect of various subjects are similar, or they have drafted their local legislation to closely reflect such internationally recognised legal principles.

1.2 In that regard, Fiji is no different. Indeed, due to its commonwealth heritage, the country's maritime law was intended, by the English legislature of the 19th and 20th centuries at least, to closely reflect (if not mirror) the maritime law in England. In the last 25 years in particular, however, as a result of the development of Fiji as a major power amongst the South Pacific nations and the increased trading activity this has generated, commercial shipping in the South Pacific has steadily been gaining momentum. At the same time, the number of cases filed before the Fijian courts involving maritime related matters has also been on the rise, such that there is now a considerable body of Fijian maritime case law.

1.3 While the possible harmonization of maritime laws amongst island nations in the South Pacific continues to be an issue that is raised in various echelons of government in the region and has been the subject of an academic analysis[2], perhaps of equal importance to the region is to ensure that the region's maritime law develops in full knowledge of the developments taking place in maritime law in other major maritime law jurisdictions such as England, Australia and USA. For, while independent South Pacific island nations obviously have a sovereign right to develop their own unique maritime laws, it would be naïve to think that the development of the region's maritime laws is not being closely observed by the international maritime law community. Particularly now, with trading to the region steadily increasing.

1.4 Such trade will often depend on internationally flagged and owned vessels, foreign charterers and their respective foreign based P&I (i.e protection and indemnity) and H&M (i.e. hull and machinery) insurers. For example, consider the scenario of two vessels colliding in Fijian waters with a resultant oil spill incident and devastation to local reefs, fisheries and local tourism. If

Fiji's maritime laws in respect of collision law, salvage law, oil pollution law and limitation of liability were completely different to the norm in most other major maritime jurisdictions and were considered by owners' interests to be overtly prejudicial to their interests, a foreign vessel owner may decide that the potential liabilities it could incur in the event of a major incident far outweigh the potential commercial gains and decide not to trade the vessel in the region.

1.5 Alternatively, an owner or charterer otherwise willing to trade a vessel in the region may be prevented from doing so because owners are unable to obtain the necessary P&I insurance cover to protect in the event of an oil spill incident. Indeed, many of the International Group of P&I Clubs will not provide P&I cover to vessels in various geographical regions of the South Pacific.

1.6 Alternatively, if a foreign vessel is mortgaged to a foreign bank, the foreign mortgagee bank may decide that, because it considers that a mortgagee's rights are prejudiced in Fiji, it will not permit the mortgagor to trade the mortgaged vessel in the region.

1.7 Such potential decisions by foreign vessel owners, charterers, their insurers and mortgagees have the potential of limiting the number of "first class" vessels and operators trading in the region. As a result, there may be less competition for freight rates or vessel hire due to the lack of options for traders and the fact that larger owning interests with the ability to provide cheaper rates due to their economies of scale are not in the market. At the end of the day, South Pacific traders may therefore pay premium freight rates for services on sub-standard vessels that are not sufficiently insured to respond to claims from local communities that may have suffered losses as a result of an oil pollution incident. And all because either a foreign based vessel owner, charterer, their insurers or a mortgagee decided, from afar, that the legal risks (as they perceive them) associated with trading that vessel in the region outweigh the commercial gains that such trade might bring.

1.8 Accordingly, the development of maritime law in Fiji and the other South Pacific island nations is not taking place in a vacuum and the attention of the international maritime community on such development is ever increasing.

1.9 As a result of Fiji's commonwealth heritage and the basis of its admiralty jurisdiction (discussed below at section 4) and, in no small part, due to the obvious personal interest in maritime law exhibited by a number of the Fijian judiciary, most judgments handed down in admiralty actions in Fiji make reference to key English common law decisions. Australian, New Zealand and Canadian cases are also frequently referred to. While Fijian courts are not bound to follow such foreign judgments (relating to admiralty matters or otherwise), as is the case in other prominent maritime law jurisdictions, English common law decisions in particular that relate to questions of maritime law carry significant persuasive weight.

1.10 Nevertheless, cases such as *Fiji Fish Marketing Group Ltd.* v. *Great Pacific Seafood Ltd*[3] and a number of other cases highlighted in this paper serve to illustrate how complex certain maritime law topics can be for practitioners and the judiciary alike. This is particularly so, given the limited nature of the doctrine of precedent in Fiji and the dearth of secondary legal sources that focus on this area of law.

1.11 As a majority of the admiralty cases that have come before the Fijian courts in recent years have involved vessel arrests, in this paper I will focus on the law as it is relevant to such arrests and the claims that underpin the arrest itself. I will endeavour to:

(a) explain why vessel arrests are a useful tool for claimants;
(b) provide a short analysis of the basis of the Fijian courts' admiralty

jurisdiction;
(c) examine the necessary subject matter jurisdiction for an *In Rem* claim;
(d) examine the concept of a "*beneficial owner*";
(e) briefly look at "*sister ship*" and "*associated ship*" arrests;
(f) list some of the procedural requirements for commencing *In Rem* proceedings and seeking an arrest;
(g) look at the legal effect of a vessel arrest; and
(h) explain how a vessel under arrest may be released.

2. SETTING THE SCENE

2.1 Arresting a vessel is an efficient way of obtaining the absolute attention of a vessel owner in respect of a claim an arresting party may have against the vessel owner.

2.2 By way of example, consider the following scenario. You are a bunker supplier and have had a bunker supply contract with a particular vessel owner for some years. The vessel is owned by Greek interests and is registered in Liberia. The vessel is entered with an English P&I insurer. You supply the vessel with bunkers and the vessel's owners pay for such, if not always on time. However, the vessel's owners then encounter some financial difficulties and you find yourself in the position where you are owed tens of thousands, if not hundreds of thousands of dollars and more, with apparently little prospect of being paid. Furthermore, the very little you actually know about the vessel owner, is that they are domiciled on the other side of the world in a foreign legal jurisdiction. You know that, while the vessel's owners are avoiding their financial obligations to you, they are continuing to trade the vessel (or another in their ownership) in the region and the vessel often still calls at the Port of Suva. What do you do?

2.3 Prompt and decisive action delivers results and, very often, arresting a vessel is the best way to get the debtor/owner to take notice of you.

3. WHY ARREST?

3.1 There are two main reasons why a claimant would choose to arrest a vessel:

(a) To obtain some security for its claim[4] (i.e. satisfaction of a judgment *in rem*); and/or
(b) To potentially found jurisdiction over the claim in the Court that has granted the arrest, rather than a jurisdiction that may be provided for in a contract from which the debt or liability in dispute may have arisen, or the jurisdiction where the debtor has its principal place of residence etc.[5]

3.2 The security achieved by arresting a vessel is preferable to other forms of security such as Mareva Orders (or freezing injunctions) that may have been obtained over the vessel owner's assets. A Mareva Order is not security per se. Rather, it is an *In Personam* procedure that merely seeks to preserve a fund against which execution may be taken. Unlike a vessel arrest, however, a Mareva Order can be defeated by insolvency or by a prior execution creditor.[6]

3.3 In the eyes of a vessel owner, the arrest of a vessel is a major inconvenience because while the vessel is under arrest it is effectively taken out of operation and is therefore not making the vessel owner any money. Such losses could be considerable. For instance:

(a) to transport 30,000 tonnes of sugar from Fiji to London (as at end June 2006) would incur freight charges of approximately US$70.00 per tonne (i.e. a gross freight of approximately US$2.1 Million).
(b) the hire payable under a time charterparty for a 35/40,000 DWT bulker (as at end June 2006) could be in the vicinity of approximately US$15,000/18,000 per day.
(c) Finally, only a couple of years ago a "Capesize" bulk-carrier (eg. about 170,000/180,000 DWT) was able to command hire of approximately US$100,000 per day for certain trades

3.4 Accordingly, given the sums of money that could be at risk, most vessel owners (and, particularly, their Insurers) are unlikely to sit idly as a vessel is arrested.

3.5 Furthermore, when the vessel owning entity is a "*one ship company*"[7], that one vessel may effectively represent the livelihood of the company. Indeed, the continued profitable trading of the vessel may be the only way that the vessel's owners may stand a chance of getting on top of any financial difficulties that may have contributed to them not addressing a claimant's claim. Accordingly, a threat to arrest a vessel will often elicit a prompt response from the vessel's owner or insurers. If no such response was forthcoming, then at the least, the arresting party has security to the value of the vessel arrested.

3.6 The response from the vessel owner may be that it enters a formal appearance in the proceeding. In such a case, then the proceedings would continue, not simply as proceedings *In Rem* against the vessel, but also as proceedings *In Personam* against the vessel owner personally.[8] In such a case, all of the vessel owner's assets (i.e. not just the vessel under arrest) would be available to satisfy the claimant's claim.[9] In practice, however, executing any judgment in a foreign jurisdiction where such additional assets may be located may not be straight forward.

3.7 If, on the other hand, the vessel owner chooses not to enter a formal appearance, it would not be able to defend the proceeding and would risk judgment being entered against the vessel by default and the subsequent loss of the vessel via a judicial sale.[10] In such a case, as the proceedings would only be *In Rem* against the vessel, only the vessel would be available as security to satisfy any judgment debt.

3.8 These two reasons effectively underpin maritime law as it relates to the arrest of vessels. Nevertheless, such fundamentals are sometimes overlooked. Consider the Fijian High Court case of *Star Marine Ltd* v. *Nambuk Fisheries Company Ltd*[11].

3.9 In that case, the Court curiously discharged arrests that a foreign necessaries supplier had obtained over three Korean owned fishing vessels.[12] The report of the judgment indicates that the Court arrived at this decision because: (i) the Korean owners would be financially prejudiced by the arrests[13]; (ii) the supply of necessaries does not give rise to a maritime lien[14]; and (iii) apart from the presence of the Korean vessels in Suva, the dispute '*really has no connection with Fiji at all*'[15].

3.10 With respect to reason (i), a vessel owner will invariably suffer some financial inconvenience if its vessel is arrested. That is one of the principal advantages of a vessel arrest. In other words, the financial inconvenience (or the risk of such) will often result in the vessel owner making an appearance in the proceeding to challenge the arrest and/or to answer the substantive claim against it. Upon making an appearance the vessel owner is entitled to post adequate security for the claim and obtain the release of the vessel. If the vessel owner chooses not to enter an appearance, then the claimant at least has some security for its claim to the value of the vessel.

In this case, however, not only did the Court discharge the arrests, but it also rejected the reasonable request of the claimant for substituted security to be posted by the vessels owners prior to the arrests being discharged.[16]

3.11 With respect to reason (ii), a maritime lien is not necessary to found an action *in rem* and the arrest of a vessel.[17]

3.12 Finally, with respect to reason (iii), the fact that the vessels (significant trading assets) were fishing in Fijian waters and regularly called at the Port of Suva should have been a sufficient nexus to the jurisdiction to permit the foreign plaintiff recourse to relief in the Fijian courts.

3.13 Nevertheless, the foreign plaintiff was left without any recourse to the Fijian courts or any security for its claim whatsoever, with the Court stating that the plaintiff would likely see '... *an advantage in proceeding either where the goods were supplied or in Korea where the vessels are owned.*' [18]In the circumstances, it is more than likely that the plaintiff would strongly disagree.

4. JURISDICTION IN ADMIRALTY

4.1 A useful summary of the legal foundations of Fijian Admiralty jurisdiction is provided in the Fijian High Court case of *Captain & Crew of the MV "Voseleai"* v. *Owners of the MV "Voseleai".*[19] Fatiaki J. (now Chief Justice) therein explained that the relevant starting point is s.21 of the *High Court Act* (Cap 13) which provides:

> *The Supreme Court* (now High Court) *shall be a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, of the United Kingdom and shall have and exercise such admiralty jurisdiction as is provided under or in pursuance of sub-section 2 and section 56 of the Administration of Justice Act, 1956 of the United Kingdom, or as may from time to time be provided by any act, but otherwise without limitation, territorially or otherwise.*

4.2 In other words, s.21 of the *High Court Act* (Cap 13) had its origins in s.56(2) of the *Administration of Justice Act, 1956 (UK)* which gave the Queen of England the power, by Order in Council, to direct that the *Colonial Courts of Admiralty Act, 1890 (UK)* shall apply to any colony of England named by such Order in Council.[20]

4.3 By Order in Council dated 27 February 1962, the *Colonial Courts of Admiralty Act, 1890 (UK)* was applied to the Supreme Court (now High Court) of Fiji.[21]

4.4 As explained by Fatiaki J. in the *"Voseleai"*case [22], the relevant Admiralty Jurisdiction (Fiji) Order in Council applying the provisions of the *Administration of Justice Act, 1956 (UK)* to Fiji is reproduced in the subsidiary legislation to the *High Court Act* (Cap. 13) at page 85 of Volume 2 of the *Laws of Fiji* and provides in articles 2 and 3:

> *(2). The Colonial Courts of Admiralty Act; 1890 shall, in relation to the Supreme Court of Fiji, have effect as if for the reference in sub-section (2) of the section 2 thereof...there were substituted a reference to the Admiralty jurisdiction of that Court as defined by section 1 of the Administration of Justice Act, 1956...*
> *(3). The provisions of sections 3, 4, 6, 7 and 8 of Part 1 of the Administration of Justice Act, 1956, shall extend to Fiji...*

4.5 As discussed below in section 6, s.1 of the *Administration of Justice Act, 1956 (UK)* then provides for the subject matter jurisdiction of the High Court of Fiji and provides:

> *The Admiralty Jurisdiction of the High Court of Fiji shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims-*

4.6 Section 1 of the *Administration of Justice Act, 1956 (UK)* then lists eighteen claims in respect of which the High Court of Fiji has subject matter jurisdiction.

4.7 Accordingly, the High Court of Fiji has jurisdiction to entertain admiralty related claims and applications such as that for the arrest of a vessel.

5. JURISDICTION TO BE EXERCISED ***IN PERSONAM*** OR ***IN REM***

5.1 Admiralty jurisdiction may be exercised *In Personam*[23] or *In Rem*[24]. The exercise of *In Personam* jurisdiction is essentially no different to any claim against a person or corporate entity in a relevant commercial court. All cases within the jurisdictional limit of the relevant court are, in fact, brought *In Personam*.[25]

5.2 The distinguishing feature of admiralty jurisdiction, however, is that a Court may entertain *In Rem* proceedings against an asset (i.e. the res) situated within (or expected within) the jurisdiction. Consequently, an action *In Rem* usually presupposes a maritime asset within (or expected within) the jurisdiction of the relevant Court.

5.3 As Fatiaki J. stated in the penultimate paragraph of his judgment in *Donald Pickering & Sons Enterprises Ltd* v. *Karim's Lt*[26]:

> *This Court following the jurisdiction of the old Court of Admiralty, has not only the jurisdiction to arrest a ship in an action "in rem" without the support of a maritime lien and with the object of making the defendant put up bail or provide a fund for securing compliance with any judgment that the Court may give against him; but further, that this Court has a statutory jurisdiction pursuant to the Administration of Justice Act, 1956 to entertain any action "in rem" and to arrest a ship without there being a maritime lien, where the owner of the ship would have been liable had the claim been brought "in personam" and where such claim falls within any of the several categories enumerated in section 3(4) of the Act.*

5.4 Accordingly, while a vessel may be owned by Greek shipping interests and registered in Liberia, provided the claimant has a legitimate maritime claim and the vessel (or one in the same ownership - as discussed below in section 7) is either within (or expected within) the jurisdiction of the relevant court, a claimant may proceed to the Fijian High Court on an ex parte basis to seek an order for the arrest of the vessel.

6. SUBJECT MATTER JURISDICTION

6.1 A vessel may be arrested where a claimant has a:[27]

(a) maritime lien;[28] or
(b) proprietary maritime claim;[29] or

(c) general maritime claim.[30]

6.2 Claims in respect of (a) and (b) are commonly referred to as "truly" *In Rem* claims and may be brought against a vessel irrespective of the vessels present ownership and irrespective of any link with any liability *In Personam* on the part of the owner of the vessel at the time the claim was commenced.[31] Included in this category are claims in respect of maritime liens and mortgages and claims relating to possession and ownership of the vessel. In other words, these are claims where, in essence, there is a claim in respect of the very ownership of the vessel.[32]

Maritime Liens

6.3 The law in respect of maritime liens is complex and, despite being one of the cornerstones of admiralty law, there is some uncertainty and little uniformity internationally as to the creation, nature and scope of maritime liens.[33]

6.4 For the purposes of this paper, it is sufficient to note that a maritime lien is a charge upon maritime property, arising by operation of law and binding the property even in the hands of a bona fide purchaser for value and without notice,[34] but which can only be enforced by an admiralty claim *In Rem*.[35]

6.5 One fundamental difference between a claim secured by a maritime lien and one that only gives right to a statutory right of action *In Rem*, is that the former has a higher priority.[36] This results from the fact that the priority of a maritime lien dates from the moment the claim arises, for that is when the maritime lien would attach to the vessel.[37]

6.6 Under English law, the following five categories of claim are recognised as giving rise to maritime liens:[38]

(a) Damage done by a vessel;[39]
(b) Salvage;[40]
(c) Seamen's wages;[41]
(d) Bottomry and respondentia;[42] and
(e) Master's wages and disbursements.[43]

6.7 In respect of claims arising under (a) to (d), the maritime lien arises as a matter of general maritime law,[44] whereas in respect of claims arising under (e), the maritime lien arises by way of a statutory right *In Rem*[45])

6.8 Fijian law appears to recognise the creation of maritime liens in respect of (a) to (d) above.[46] While Scott J in the *Jeyang* case recognised the creation of maritime liens under English law in respect of (a) to (e) above and held that, under Fijian law, a claim in respect of (c) would have priority over a claim by a mortgagee, there was no express pronouncement in the written judgment following the "*Halcyon Isle*".[47] Nevertheless, one learned Fijian practitioner that represented a party in the *Jeryang* case has stated that Scott J '*accepted the priority classification by Lord Diplock in the* "*Halcyon Isle*"'.[48]

6.9 However, it is somewhat unclear whether Fijian law recognises the creation of a maritime lien in respect of a claim for Master's wages and disbursements. In the report of the judgment in the "*Voseleai*" case, it is stated that[49]:

> **Section 3(2)** of the **Administration of Justice Act 1956** however impliedly excludes a "*claim for wages*" from an action *In Rem* against a

> ship **unless** the person "...**liable on the claim ... was, when the cause of action arose, the owner of the ship**." In this case it is undisputed that the "*owners of the **Voseleai***" were the persons ultimately liable on the plaintiffs claim [See: **Section 3(4)**]; **or** where the claim gives rise to a "**maritime lien**" [See: **Section 3(3)**].
> (NB. All emphasis as per the printed judgment at HBG0006j.1994s (28 October, 1994)).

6.10 Focussing, as it does, on whether the vessel owners would have been liable for the claim *In Personam*, the statement appears to suggest that a maritime lien will not arise in respect of claims by either the crew or a Master for wages. As the judgment is then restricted to an examination of whether the Fijian Court had jurisdiction to hear the claims of the Master and crew (i.e. a completely separate question) and nothing turned on the existence or otherwise of a maritime lien for the claims of either the crew or Master, the Court did not have cause to address the question further (and did not). Nevertheless, the decision of Scott J in the *Jeyang* case has now confirmed that a claim by crew for wages will give rise to a maritime lien.[50]

6.11 In the Fijian case of *Donald Pickering*[51], however, Counsel for the defendant submitted that, among others, claims for the wages of the crew and Master and the Master's disbursements would attract maritime liens. While it was not necessary for the Court to confirm or deny that position (and it did not), the defendant's assertion was quoted in the judgment of Fatiaki J at the beginning of his analysis of maritime liens and the Fijian Court's inherent admiralty jurisdiction to hear claims in respect of which maritime liens arose and in respect of claims where they did not. One may postulate that, had Fatiaki J disagreed with the defendant Counsel's assertion, he would not have used such as a cornerstone of his analysis.

6.12 Finally, however, in the Fiji High Court case of *Fiji Fish Marketing Group Ltd.* v. *Great Pacific Seafood Ltd*[52] , the Court was tasked with prioritising claims against a fund constituted by a judicial sale of a vessel. In the judgment, Pathik J. held that the Master's claim for wages ranked '*... immediately ... after Admiralty Marshall's claims...*' which would only be the case if the Court accepted that a maritime lien arose in respect of the Master's claim for wages.

6.13 Accordingly, it would appear that the better view, is that Fijian law does recognise that a Master's claim for wages and disbursements (as well as a wages claim by the crew) will give rise to a maritime lien. In this regard, it will be interesting to note the judgment that the Court of Appeal will ultimately deliver in the appeal of the *Fiji Fish Marketing* case (i.e. the appeal has yet to have been heard at the time of writing). Various issues will be before the Court of Appeal. In particular, whether under Fijian law a mortgagee's claim survives a judicial sale[53], whether a maritime lien arises under Fijian law in respect of particular emoluments due to the Master[54] and how the various classes of claims should be ranked in priority[55].

General Maritime Claims

6.14 General maritime claims as per paragraph 6.1(c) above (i.e. not giving rise to a maritime lien and not truly *In Rem* claims as per paragraph 6.2 above) depend upon establishing a link with the liability of the owner *In Personam*.[56] The claim suggested in our fact scenario is such a general maritime claim.

6.15 At this point, it is useful to revert to s.1(1) of the *Administration of Justice Act, 1956 (UK)* which provides that the Fiji High Court shall have subject matter jurisdiction to hear and determine questions in respect of any of eighteen "*maritime claims*" therein listed.

6.16 Section 1(1)(m) of the *Administration of Justice Act, 1956 (UK)* is applicable to the facts of our suggested scenario. That is, pursuant to s.1(1)(m), the Fiji High Court shall have subject matter jurisdiction to consider '*... any claim in respect of goods or materials supplied to a ship for her operation or maintenance*'.

6.17 Other common claims provided for in s.1(1) of the *Administration of Justice Act, 1956 (UK)* over which the Fiji High Court would have subject matter jurisdiction include any claim: -

(a) to possession or ownership of a vessel: s.1(1)(a);
(b) in respect of a mortgage over a vessel: s.1(1)(c);
(c) for damage done by a vessel: s.1(1)(d);
(d) for loss of life or personal injury: s.1(1)(f);
(e) for loss or damage to goods carried on a vessel: s.1(1)(g);
(f) in the nature of salvage: s.1(1)(j),
(g) in the nature of towage: s.1(1)(k)
(h) in the nature of pilotage: s.1(1)(L);
(i) in respect of the construction, repair or equipment of a vessel or dock charges or dues: s.1(1)(n);
(j) by a Master or a member of the crew of a vessel for wages: s.1(1)(o).

6.18 In examining whether the court has subject matter jurisdiction, care must be taken in analyzing whether there is a valid maritime claim.

6.19 A general maritime claim cannot be brought *In Rem* against a vessel unless:-[57]

(i) the claim arose in connection with a vessel;[58] and
(ii) the person or entity who would be liable on the claim in a claim *In Personam* is the Owner[59] or the Charterer[60], or in possession or control of the vessel when the cause of action arose; and
(iii) at the time when the claim is brought, the person or entity who would be liable on the claim in a claim *In Personam* is the beneficial (or equitable)[61] Owner of all of the shares in the ship or the charterer off it by demise.[62]

7. THE "BENEFICIAL OWNER"

7.1 In the scenario described above, consider that the relevant vessel required bunkers and was either proceeding into the Port of Suva or was otherwise within Fijian waters. The Master of the vessel would contact the vessel's agents in Suva to arrange for the purchase of bunkers for the vessel.

7.2 The bunkers would be purchased on behalf of the vessel (whether for the immediate benefit of the vessel's owner or a charterer). Assume that the owners then defaulted on the supply contract by failing to pay (or to pay in full) for the bunkers. From that point on, the bunker supplier would have a cause of action. In respect of any such default, owners would otherwise be liable *In Personam* to the bunker supplier. Accordingly, the first two prerequisites above would be met. The third prerequisite, however, will often have the effect that a change in ownership in the vessel prior to the commencement of legal proceedings will defeat a claim from this category.

7.3 Whether there has been a change in ownership will often be difficult to establish at the time that knowledge of the ownership in the vessel is needed the most (i.e. on seeking the arrest of the vessel). Among others, a claimant would obviously not be privy to negotiations a vessel owner may have with respect to its sale of the vessel.

7.4 Nevertheless, care should be taken when considering an arrest of a vessel, as a mistake could result in the claimant facing a claim for considerable damages if the arrest was subsequently proven to have been wrongful. Whether a vessel owner in such circumstances may recover its losses from the arresting party who improperly detained the vessel will depend on the arresting party's intentions in having proceeded with the arrest.[63] If the arresting party was found guilty of mala fides, then the vessel owner would be entitled to recover its losses.[64]

7.5 A arrest may be improper (though not entitle the vessel owner to damages) where there:

(a) Has been outright mistake as to the identity of the vessel's owner as at the time of the arrest;[65]
(b) Mistake of fact or law as to the identity of the party that would be liable for the claim in respect of which the vessel has been arrested;[66]
(c) No arguable case on the merits of the claim;[67]
(d) Legitimate arrest but excessive demand for security;[68] or
(e) Wrongful continuation of the vessel's detention where adequate security unreasonably refused.[69]

7.6 When considering the concept of ownership, it should be noted that beneficial ownership is not the same as registered ownership.[70]

7.7 The first thing any party contemplating commencing *In Rem* proceedings should do is refer to a register of ships such as the Lloyd's Register of Ships. The hard copy version of the Lloyd's Register of Ships is updated monthly and the online records of the same are updated even more so (i.e. www.shipfinder.org). Online searches can also be conducted through the following: www.equasis.org and www.seasearcher.com. However, as the information contained within these products is largely dependent on information from numerous sources that include the vessel's owners and managers, it is not prudent to rely solely on the information contained therein.

7.8 What such registers are useful for, however, is to obtain details of the vessel's alleged port of registration. The registry of the relevant alleged port of registration should then be contacted and requested to confirm the ownership particulars of the particular vessel. That is, to provide a certified copy of the current entry for the vessel from the actual Ship Register. There will usually be a small fee charged for this service.

7.9 While registration should follow a transfer of ownership, that is not always the case. In other words, while the current registration particulars of a vessel will be some evidence of the vessel's ownership, they will not be conclusive of the fact.

7.10 An example of the difficulties a claimant may face attempting to identify the correct beneficial owner can be found in the Fiji High Court decision of *Wasawasa Fisheries Ltd* v. *Karim's Ltd No. 1* [71]. In that case, a vessel owner entered into a contract for the sale of a vessel with another party and granted such party possession and control of the vessel during which time various debts against the running and maintenance of the vessel were incurred. However, as the purchaser defaulted in payment of the purchase price, the purchaser never acquired legal title to the vessel. Accordingly, Pathik J appropriately held in the Court's judgment that the unpaid seller remained the beneficial owner of the vessel.

7.11 Another situation that may cast doubt on the identity of the beneficial owner is where the claim is in respect of loss or damage to goods during transit where a freight forwarder has been involved. For example, a freight forwarder may issue a bill of lading for carriage of goods on a vessel

owned by "X". If those goods are lost or damaged, it will not automatically follow that the carrying vessel may be arrested because there is evidence to suggest that the goods were lost or damaged during transit on that vessel. While it will depend on the true construction of the contract contained in the bill of lading, if the contracting carrier and *In Personam* defendant under the bill of lading was the freight forwarder, the cargo interests in such a case would not be entitled to proceed *In Rem* against the carrying vessel.

7.12 A further complication for claimants, is that when a foreign vessel owner anticipates that considerable claims are likely to be made against it or the vessel, it is not uncommon for the vessel owner to arrange for the sale of the vessel, thereby potentially defeating certain maritime claims. The sale of a vessel in such circumstances can often be a sham.

7.13 It has been commonplace for decades now for vessel owning interests to set up "*one ship companies*" where the particular vessel is the only asset belonging to the company.[72] The rush to "*one ship companies*" was fuelled by the realisation of the potentially vast oil pollution liabilities which the loss of the MT "*Torrey Canyon*" in the late 1950's generated[73]. Thus maritime creditors found themselves:

> *... stone-walled against the evasive mechanisms of the one ship operation with bearer shares, registry of convenience, registered 'brass plate' office care of Panamanian or Liberian lawyers, and a sole asset of ever-diminishing value attracting ever-increasing debts*.[74]

7.14 Nevertheless, while the existence of a "*one ship company*" has the potential to frustrate the efforts of a party with a valid maritime claim from the second class of claim mentioned above, in the absence of any particular fraud, maritime courts in jurisdictions such as England[75], Australia and Hong Kong[76] have recognised the "*one ship company*" as a legitimate business arrangement. Accordingly, the courts in such jurisdictions will not tolerate any attempt to lift the corporate veil in an attempt to identify the true beneficial owner of the relevant vessel where there is no evidence of a sham.[77]

7.15 The sale of a vessel in the shadow of a significant claim against the vendor may therefore simply amount to one "*one ship owning*" company simply transferring ownership in the vessel to another "*one ship owning"* company largely, if not entirely, under the same corporate control as the former owning company.

7.16 In this regard, it is interesting to note s.193 (13) of the draft *Pacific Maritime Legislation and Regulations* (i.e. the "*Shipping Act 2001*") which provides:

> *Except with leave of the Court, a warrant for the arrest of the foreign ship shall not be issued in an action In Rem until notice of the action has been sent to the Consul or to the Government of the State in which the vessel is registered*.

7.17 Section 193(14) provides that such notice will be deemed to have been received on having been sent (i.e. one does not have to prove that the relevant Government actually physically received the notice). Section 193(14) therefore somewhat defeats the purpose of making the claimant give notice in the first place.

7.18 Nevertheless, s.193(13) has the potential to defeat a claimant's ability to arrest a vessel either within (or expected within) the jurisdiction of the Courts. For example, consider a scenario where a foreign State owned vessel is either on its way into Fijian waters, is at anchorage or at

berth in the Port of Suva and a claimant is preparing to have the vessel arrested as security for a maritime claim.

7.19 If s.193(13) had to be complied with before an arrest could be obtained, the following could be the result:

(a) notice is sent to the relevant foreign State by the potential arresting party (eg. via facsimile);
(b) on receipt of the notice, the identity of the vessel is immediately recognised and the foreign State informs the vessel's managers (eg. by telephone, fax or email) that a party is taking preliminary action to have the vessel arrested in Suva;
(c) the vessel's managers then immediately contact the Master of the vessel (either by telephone, fax or email), inform him that the vessel may be arrested in Suva and instruct him to either avoid entering Fijian waters, or pull up anchor and depart the Port of Suva and Fijian waters as quickly as possible to avoid arrest.

7.20 Accordingly, a provision similar to s.193(13) could prove detrimental to the interests of claimants seeking to arrest a vessel in Fiji.

8. "SISTER SHIP" ARRESTS AND "ASSOCIATED SHIP" ARRESTS

8.1 Another benefit to a party with a maritime claim is that, in certain circumstances, a claim may be brought not only against the vessel in connection with which the claim arose, but also against other vessels in the same ownership as that vessel[78]. Such alternative targets for one's maritime claim are commonly referred to as "*sister"* or *"surrogate"* vessels.

8.2 It should be noted, however, that if the maritime claim is one that has attracted a maritime lien, such a claim can not be instituted against any vessel other than the vessel in respect of which the maritime lien arose.[79]

8.3 In any potential claim against a sister ship, it is of particular importance for the Court to identify the beneficial owner of the vessel which is sought to be proceeded against *In Rem*, in order to determine whether the claim may be brought against that vessel. As discussed above, this can often be a difficult burden to meet.

8.4 In South Africa, the relevant maritime legislation permits the arrest of an "*associated ship*" rather than a "*sister ship*".[80] The South African legislation was enacted in 1983, after the use of the "*one ship company*" had become commonplace. In essence, to combat this phenomenon, the South African legislators adopted an innovative approach to sister ship arrest. Namely, in addition to the common form of sister ship arrest, they extended the concept of lifting the corporate veil so that where two vessels are owned by "*one ship companies*", if there is a sufficient association between the two vessels, an arrest of one can be effected in relation to a claim that has arisen in respect of the other. In other words, the associated ship must, at the time of the arrest, be owned by a person who then controlled the company which owned the offending ship when the maritime claim arose.[81]

8.5 This innovative legislation has made South Africa a relatively cargo friendly jurisdiction. That is, it is considerably easier for a claimant to obtain jurisdiction for its claim in South Africa, as the number of potential targets for an arrest has been considerably increased.

9. PROCEDURAL REQUIREMENTS FOR A VESSEL ARREST

9.1 The starting point for determining the practice and procedure for instituting vessel arrest proceedings in Fiji is Order 1 Rule 7 of the *Rules of the High Court (Fiji)* which provide: -

> *Where no express provision is made by these Rules with respect to the practice or procedure in any circumstances arising in any cause or matter, then the jurisdiction of the High Court shall be exercised in conformity with the practice and procedure being adopted in the like circumstances in her majesty's High Court of Justice in England.*

9.2 Accordingly, Order 1 Rule 7 of the *Rules of the High Court (Fiji)* in conjunction with Part 61.2 of the English "White Book" and the Practice Directions associated with Part 61.2 set out the procedural requirements for arresting a vessel.

9.3 The principal requirement is that a Claim Form (or writ) *In Rem* is issued. In most of the Fijian judgments cited in this paper that relate to vessel arrests, the defendant has been named *'The Owners of the vessel ...'* However, if the vessel was on demise charter at the time the alleged liability or debt arose, then the demise charterer will be responsible for such as it has effective control over the vessel. As there will invariably be some uncertainty on the part of the claimant as to whether the vessel is on demise charter or not, it is therefore always prudent for the admiralty action to be commenced against *'The Owners and/or demise charterers of the vessel ... '* as defendants.

9.4 The Claim Form will set out the nature of the claim and that it has not been satisfied, the name of the ship and its port of registry and the amount of the security sought, if any. The rules go on to provide the manner in which an admiralty Claim Form is to be served upon a vessel and the procedure for issue and execution of a warrant of arrest.

9.5 The six documents commonly required to commence proceedings and obtain the arrest of a vessel are as follows: -

(i) the Claim Form;
(ii) an acknowledgement of service;
(iii) an application to arrest;
(iv) the solicitor's undertaking as to arrest expenses;
(v) an affidavit for leave to arrest;
(vi) a warrant for the arrest.

9.6 In addition, under Fijian law, a party seeking the arrest of a vessel will usually be required to post a cash bond of approximately F$2,500.00 in court.[82] The party seeking the arrest will also usually be required to pay a fee of approximately F$300 to the Admiralty Marshall to cover his costs of executing the warrant.[83]

9.7 The affidavit contemplated by (v) above would either be provided by the claimant or, more commonly, his solicitors, and should contain the following particulars[84]: -

(i) the nature of the claim and that it has not been satisfied;
(ii) the name of the ship and her port of registry;
(iii) the amount of security sought; and
(iv) in relation to claims giving rise to a statutory right of arrest;

(a) the name of the person who would be liable on the claim

> if it were commenced *In Personam*;
> (b) that such person was, when cause of action arose the owner or Charterer of the vessel in connection with which the claim arose; and
> (c) that at the time the claim form was issued, that person was the beneficial owner of all of the shares in that ship, or the bareboat charterer of the ship.

9.8 Provided the affidavit complies with these requirements, there is no scope for a challenge to the arrest warrant based on material non-disclosure.

9.9 Irrespective of these requirements, however, the court has the discretion to grant leave to issue the warrant notwithstanding that the affidavit might not contain all of these particulars.

9.10 With regard to the solicitor's undertaking as to the arrest costs, by such an undertaking, the solicitor accepts personal responsibility for all of the associated arrest costs. Solicitors will usually ask their clients for funds on account so that the Admiralty Marshall's demands for payment in the care and upkeep of the vessel while under arrest can be met promptly.

10. LEGAL EFFECT OF THE ARREST

10.1 Upon arrest, the vessel is placed into the custody of the Admiralty Marshall, though the Admiralty Marshall does not take the vessel into its possession and thereby avoids the onerous duties of a bailee.[85]

10.2 It is not just the vessel that is under arrest, but also all of the machinery, bunkers and any other property on board the vessel, except that owned by the Master and crew[86]. If this were not the case, then an unscrupulous Owner could simply strip the vessel of all of its expensive bunkers, equipment, navigational systems etc., resulting in an asset valued at a fraction of what it was valued at prior to having been stripped down. The respective ends of the spectrum are therefore a vessel as a going concern and a vessel ready for scrapping (i.e. only worth the scrap metal value of its hull).

10.3 Once under arrest, it is the duty of the Admiralty Marshall, as the Court's officer, to retain safe custody of the vessel and preserve it and any crew on board that the vessel's owners may have turned their back on. The rationale being that, as best as possible, the value of the asset should be maintained. Nevertheless, some degree of deterioration is, for all practical purposes, unavoidable.[87]

10.4 The Admiralty Marshall's costs can often be significant. The Admiralty Marshall may be required to remove and store cargo from the vessel that is under arrest, remove, store or dispose of cargo that is under arrest or that is on the ship that is itself under arrest, or move a ship that is under arrest[88].

10.5 The last consideration is important in any port, but particularly in a port the size of Suva. This is because without the Admiralty Marshall being able to move a vessel under arrest, the arrest could prove a hindrance to the continued operation of the port. For example, imagine if a vessel was arrested at the container terminal, or a product or sugar specific berth or terminal, or at a significant bunkering terminal.

10.6 Must the vessel remain where it has been arrested? Clearly not. In a situation where there is even the perception that the presence of the arrested vessel might cause financial loss, commercial

difficulty or danger to persons or property, in many jurisdictions, the courts will permit a third party to intervene and apply to the court for some mitigation of the hardship or risk. The result of a successful intervention would be that the Admiralty Marshall would be ordered to move the vessel to an alternative location.[89]

11. HOW CAN THE VESSEL BE RELEASED?

11.1 A vessel may only be released from an arrest if:[90]

(a) The arresting party consents; or
(b) The Court orders its release because:

(i) The basis for the arrest is successfully challenged in Court;
(ii) Security for the claim is provided in an acceptable form and for an acceptable amount; or
(iii) The vessel is sold by order of the Court.

11.2 The security required before a Court will release the vessel under (b) may be in the form of either a "*Bail Bond*" or a "*Letter of Undertaking*". Both forms of security were succinctly discussed by Fatiaki J. in the "*Voseleai*" case.[91]

Bail Bonds

11.3 Pursuant to a "*Bail Bond*", a surety submits to the jurisdiction of the court and consents to execution being levied in a sum not exceeding a specified amount in the event that the defendant party is found liable and does not otherwise satisfy the judgment in the proceeding.[92]

11.4 In practice, "*Bail Bonds*" are now rarely used, as the prevailing view is that they are a comparatively cumbersome and inflexible arrangement which is no longer suited to the needs of modern commerce.[93]

Letters of Undertaking

11.5 The preferred method of security is provided by way of a "*Letter of Undertaking*". Essentially, such a letter provides that in return for the claimant agreeing not to arrest the vessel or agreeing to release the vessel if it has already been arrested, the party that has issued the letter will undertake to do certain things in certain circumstances. Principally, to meet any judgment debt against the party on behalf of whom the letter of undertaking was provided, up to the limit agreed in the letter of undertaking.

11.6 The form and content of a letter of undertaking and the financial viability and reputation of the party providing it are therefore paramount. Because the letter of undertaking will be offered on behalf of the vessel's owners to either avoid a vessel being arrested or to get a vessel released, the claimant will largely have the upper hand in negotiating the form and content of the required letter of undertaking.

11.7 With regard to the form of the letter of undertaking, the most acceptable form will be a letter issued by the vessel's P&I Club (i.e. Protection and Indemnity Insurers). Claimants should insist that the letter of undertaking is issued by one of the International Group of P&I Clubs and not simply an insurer that happens to underwrite P&I risks. The reason being, that one is almost assured that a P&I Club within the International Group will stand by its letter of undertaking, whereas one will not necessarily have that comfort if a foreign insurance company, not in this

reputable group, has issued the letter of undertaking.

11.8 While the content of the letter of undertaking will need to be assessed on a case by case basis, ideally, it should include the following:

(a) A warranty that the relevant vessel was not demise chartered at the relevant time;
(b) An undertaking that, usually within 14 days of receipt of a request to do so, the party issuing the undertaking will instruct solicitors in the relevant jurisdiction to accept service of proceedings;
(c) Confirmation that the vessel's owners consent to the exclusive jurisdiction of the particular court; and
(d) Confirmation that the letter of undertaking shall be construed in accordance with the law of a particular country.

11.9 With regard to (a), as noted above at 9.3, if there is any uncertainty as to whether the vessel is on demise charter or not, then the Admiralty action should be commenced against '*the Owners and/or demise charterers of the vessel XYZ*' as defendants, rather than simply '*the Owners of the vessel XYZ*'.

11.10 With regard to (c) and (d) above, it is common for letters of undertaking to deal with jurisdictional aspects in addition to simply undertaking that any judgment obtained may be executed against the letter of undertaking. Frequently, there will also be considerable argument as to the maximum liability of the party giving the undertaking. The general approach is that the claimant is entitled to security in an amount sufficient to cover his reasonably arguable case together with interest and costs.[94] That liability can be expressed as a certain sum inclusive of interest and costs, or a certain sum plus interest and costs. Most institutions prefer the former, because it provides an express maximum liability figure.

Judicial Sale

11.11 Where no, or insufficient security has been provided and the vessel has remained under arrest, subject to the claimant proving its case and obtaining execution in its favour, the court will then have the vessel appraised with a view to the vessel being sold in an admiralty sale. This usually involves the Admiralty Marshall obtaining a number of valuations of the vessel from international shipbrokers on an "*as-is, where-is*" basis, and then conducting a sealed bid auction, with the Admiralty Marshall reserving its right to accept any (or no) bid.[95]

11.12 The purchaser then receives clean title to the vessel, free of any charge or claim.[96]

11.13 The proceeds of sale then effectively take the place of the vessel, becoming a fund which is subsequently allocated according to the proof of claims and the determination of priorities.

11.14 The 2001 Fijian High Court case of *Fiji Fish Marketing Group Ltd.* v. *Great Pacific Seafood Ltd*[97] raises some interesting issues in this regard. While it is not clear from the reported judgment, it would appear that on 1 February 2002, with the "*consent*" of the owner of the vessels that were under arrest, the Court ordered that the vessels be sold by the vessels' owner '*... by transparent public tender*.' However, a subsequent order dated 17 April 2002 was worded such that the vessels be '*... sold by the High Court of Fiji free and clear of any and all encumbrances*." Under the section headed '*Conclusions (a)*' in the judgment, however, it is stated that *'[t]here cannot be any dispute that the vessels were sold by the defendants themselves ...'*.

11.15 If the Court did permit the defendant shipowner to advertise for and sell the vessels as opposed to the Court (via the Admiralty Marshall), then it would be a departure from the practice adopted by other major maritime law jurisdictions internationally. In this regard, it should be noted that once the vessel is placed under arrest, the vessel is in the custody of the Admiralty Marshall. In these circumstances, as far as a judicial sale of the vessel is concerned, it is therefore somewhat immaterial who the owners are. Furthermore, in circumstances where the appraisement and, or sale of a vessel under arrest has been entrusted to the vessel's owner, doubt will invariably be cast over the bona fides of the sale process. While there was no suggestion in the written judgment of the *Fiji Fish Marketing Group* case that the sales were not genuine or did not realise the maximum that could otherwise have been achieved at the time for the vessels, by permitting the vessel owner to broker the sale, there was a risk that the integrity of the sale process could have been tarnished.

11.16 In other words, if an unscrupulous vessel owner was given the power to sell his own vessel under arrest, it could sell the vessel under a sales contract not objectively considered at arm's length and achieve a sale amount less than that the Court may otherwise have been able to achieve. For instance, consider the "*one ship company*" scenario discussed above at 7.13 and the reluctance of most jurisdictions to lift the corporate veil. An unscrupulous vessel owner tasked with selling his own vessel under arrest could simply sell the vessel at a 'discount' rate to another company effectively in the same control as the selling company. In such a way, the proceeds of sale, and therefore the readily available security for the claims would be reduced effectively to the benefit of the unscrupulous debtor.

11.17 Under English law, at least, if a vessel owner identified a party willing to purchase the arrested vessel before the Court had made an order for a judicial sale, then the vessel owner and the potential purchaser could seek the approval of the Court. In such a case, however, the Court would order that the Admiralty Marshall to sell the vessel to the suggested buyer (not the vessel owner) at a price to be negotiated after an independent appraisal. If the defendant vessel owner did sell the vessel, then the purchaser would not receive clean title to the vessel and it would remain under arrest.[98]

12. CONCLUSION

12.1 A claimant's ability to seek the arrest of a vessel to obtain some security for its claim or in an effort to found jurisdiction in the country where the subject vessel may be located is a concept widely recognised by legal jurisdictions internationally. Furthermore, such a concept is becoming increasingly important, given the proliferation of international trade and the resultant increased levels of transportation via sea. In circumstances where contracting parties may be on opposite sides of the world, the ability of a party to arrest a vessel to obtain some security for a claim and possibly found jurisdiction in the country in which the arrest is obtained provides some peace of mind for various participants in international trade. The ability to arrest a vessel is of particular significance for cargo interests that face the often vagaries of carriage by sea on a daily basis and for those parties that provide goods and services to foreign flagged and owned vessels with little or no means or inclination to bring legal proceedings in the debtor's country when it has not been possible to settle a claim commercially.

12.2 Historically, given its commonwealth ties and the manner in which its early development as a legal jurisdiction was so closely aligned with developments in England, Fiji was well placed to benefit from the plethora of English common law with respect to maritime law related matters.

12.3 Since the abolition of appeals to the English Privy Council, it has become increasingly important for the Fijian judiciary to understand the underlying concepts of maritime law that are the

cornerstone of the many maritime related cases that the Fijian courts face each year.

12.4 While the Fijian courts recognise the concept of vessel arrest and the number of cases dealing with such is steadily increasing, so too is the international maritime law community's attention being focussed on the development of maritime law in the region. While entitled to forge its own unique maritime laws, it would be in Fiji's best interests to attempt to ensure that the development of maritime law in both Fiji and the South Pacific island region as a whole generally moved in step with the like development of maritime law in other major maritime law jurisdictions (eg. such as England), particularly those in the immediate geographical region (eg. Australia and New Zealand).

12.5 In that regard, the early efforts of the Regional Maritime Programme and the committee that has been tasked with drafting proposed unifying maritime legislation for the South Pacific nations' consideration is to be applauded. Furthermore, the writer understands that the Fijian legislature may soon commence a review of its *Marine Act, 1986* (and ancillary legislation and regulations) and potentially its fisheries laws as well. Such steps to contemporise Fiji's maritime legislation in light of international developments in maritime law is a prudent step towards ensuring that the international maritime law community may note that the development of maritime law in Fiji is moving with the general ebb and flow of international developments in maritime law.

12.6 It may be some time before (if at all) a majority of Pacific Nations embraces the concept of harmonisation of its maritime laws and enacts unifying legislation. Similarly, it may be some time before the Fijian legislature is tasked with and produces and enacts contemporary maritime law legislation. In the interim, the development of Fiji's maritime jurisprudence rests with the judiciary. In that regard, the obvious personal interest in maritime law that some members of the Fijian judiciary clearly appear to have, coupled with the ability of Fijian courts' and the willingness of the judiciary to consider, by way of supplement, maritime law related judgments from other countries is notable. This commitment to keeping abreast with the development of maritime law internationally should ensure that the body of maritime common law emanating from the Fijian courts is of a well considered standard that can be appreciated by international entities wanting to do business in the region. International shipping interests observing from afar (eg. foreign based owners, operators, charterers, insurers, mortgagees and traders) will appreciate that Fiji and its neighbours recognise and appreciate that, in part at least, economic development of commercial opportunities in the region is assisted by the confidence that sound, contemporary legislation and a strict adherence to the rule of law engenders.

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* LLB (Bond), LLM (Shipping) (UCT, South Africa), LLM (Admiralty)(Tulane, USA), Special Counsel, Holman Fenwick & Willan. Email:&#[1]Maurice.thompson@hfw-aus.com.au

1 [2005] FJHC 3

[2] Peter Heathcoate, *Maritime Law in the South Pacific – Towards Harmonisation* (PhD Thesis, University of the South Pacific, 1997).

[3] [2005] FJHC 3

[4] Nigel Meeson, *Admiralty Jurisdiction & Practice*, (3rd ed, LLP 2003) at 78

[5] Meeson, above, note 4

[6] Meeson, above note 4, at 17

[7] Discussed below at paragraph 7.13

[8] *Republic of India v. India Steamship Co. Ltd* (No. 2) [1998] AC 878, 908

[9] Martin Davies, *Shipping Law*, (3rd ed, Lawbook Co. 2004) at 101

[10] Davis, above note 9, at 100; *Caltex Oil (Aust) Pty Ltd v. Dredge Willemstad* (1976) 136 CLR 529, 538-539

[11] [2002] FJHC 16
[12] [2002] FJHC 16 at paragraph 9
[13] [2002] FJHC 16 at paragraph 8
[14] [2002] FJHC 16 at paragraph 7
[15] [2002] FJHC 16 at paragraph 9
[16] [2002] FJHC 16 at paragraph 8
[17] *Donald Pickering & Sons Enterprises Ltd* v. *Karim's Ltd* [1997]FJHC 21
[18] [2002] FJHC 16 at paragraph 10
[19] [1994] FJHC 4
[20] *ASD Marine proprietary Ltd*. v. *Pacific Navigation Ltd*. HC [1992] 38 FLR 4
[21] *ASD Marine proprietary Ltd*. v. *Pacific Navigation Ltd*. HC [1992] 38 FLR 4. See also Legal Notice No.36, Laws of Fiji 1962, at 169
[22] [1994] FJHC 4
[23] *Supreme Court Act, 1981 (UK)*, c.54, s.21(1) and (7), 22(1) and (2); William Tetley, *International Maritime and Admiralty Law* (1st ed, ISP, 2002) at 407
[24] *Supreme Court Act, 1981 (UK)*, c.54, s.21(2), (3), (4)(b) and (8); Tetley, above note 23, at 407
[25] Meeson, above note 4, at 73
[26] [1997] FJHC 21
[27] [1997] FJHC 21
[28] The "*Anna H*" [1995] 1 Lloyd's Rep 11 at 19
[29] The "*Anna H*" [1995] 1 Lloyd's Rep 11 at 19
[30] The "*Anna H*" [1995] 1 Lloyd's Rep 11 at 19
[31] Meeson, above note 4, at 73
[32] Meeson, above note 4, at 73
[33] *The "Indian Grace"* [1998] 1 Lloyd's Rep. 1, 7
[34] Meeson, above note 4, at 12
[35] *The "Bold Buccleugh"* (1851) 7 Moo. P.C. 267
[36] Tetley, above note 23, at 481; The "*Halcyon Isle*" [1980] 2 Lloyd's Rep 325 at 329
[37] Davis, above note 9, at 101; *The "Bold Buccleugh"* above note 35
[38] Tetley, above note 34, at 482: David C. Jackson, *Enforcement of Maritime Claims*, (3rd ed, LLP, London, 2000) at paras. 2.35 and 18.1; Meeson, above note 4, at 14
[39] *The "Bold Buccleugh",* above note 35
[40] *The "Two Friends"* (1799) 1 C. Rob. 271, 277
[41] *The "Sydney Cove"* (1815) 2 Dods. 11
[42] *Barnard v. Bridgeman* (1614) Hob. 11
[43] *Merchant Shipping Act, 1995 (UK),* s.41
[44] *The "Bold Buccleugh",* above note 35
[45] *The "Sydney Cove"* (1815) 2 Dods. 11
[46] *Jeyang International Company Ltd* v. *Owners of the M.V. "Kao Ya No.1" & "Kao Ya No.137*" [2002] FJHC 33
[47] *Jeyang International Company Ltd* v. *Owners of the M.V. "Kao Ya No.1" & "Kao Ya No.137*" [2002] FJHC 33
[48] Viren Kapadia, '*Maritime Law – Ship Arrests: Practice Procedure and Recent Developments'* (Paper presented at the Fiji Law Society Conference, 2005) at para. 5.2
[49] [1994] FJHC 4
[50] *The "Bold Buccleugh"* (1851) 7 Moo. P.C. 267
[51] [1997] FJHC 21
[52] [2005] FJHC 3
[53] Under English law, at least, prima facie, it would. Meeson, above note 4, at 333; Graeme Bowtle & Kevin McGuinness, *The Law of Ship Mortgages* (1st ed, LLP, 2001) at 152
[54] Under English law, at least, various emoluments fall under the definition of "wages". Section 313(1) *Merchant Shipping*

Act, 1995 (UK); Meeson, above note 4 at 52

[55] Under English law, at least, as the usual order of priorities is only a prima facie order, in certain circumstances a court may deprive a claimant of his priority on equitable grounds. For example, where there has been unconscionable conduct or where there has been gross delay in a party pursuing its claim and prejudice has been caused to another claimant as a result. *The "Helgoland"* (1859) Swa. 491; Meeson, above note 4, at 208

[56] Meeson, above note 4, at 78

[57] Section 21(4), *Supreme Court Act, 1981 (UK)*; Meeson, above not 4 at 85

[58] Meeson, above not 4 at 85

[59] This means the registered owner; Meeson, above note 4, at 85; *The* "*Tian Sheng No. 8*" [2000] 2 Lloyd's Rep. 430 (HK Court of Final Appeal)

[60] The word "*charterer*" is not restricted to "*demise*" charterers and may include "*time*" charterers; Meeson, above note 4, at 85; *The* "*Span Terza*" [1982] 1 Lloyd's Rep. 225

[61] Meeson, above note 4, at 85

[62] Meeson, above note 4, at 85

[63] Meeson, above note 4, at 133

[64] *The "Evangelismos"* (1858) 12 Moo. P.C. 352 (NB. Though nearly 150 yrs old, this Privy Council decision remains the leading case on the principal).

[65] *The "Kommunar" (No. 3)* [1997] 2 Lloyd's Rep. 22

[66] *The "Kommunar" (No. 3)* [1997] 2 Lloyd's Rep. 22

[67] *The "Cheshire Witch"* (1864) Br. & L. 362

[68] *The "Moschanthy"* [1971] 1 Lloyd's Rep. 37

[69] *The "Kommunar" (No. 3)* [1997] 2 Lloyd's Rep. 22

[70] *Wasawasa Fisheries Ltd.* v. *Karim's Ltd No. 1* [1998] FJSC 88; Meeson, above note 4, at 87

[71] [1998] FJSC 88

[72] Meeson, above note 4, at 90-92

[73] John Hare, *Shipping law & Admiralty Jurisdiction in South Africa* (1st ed, Juta, 1999) at 77.

[74] Hare, above note 73, at 77

[75] *The* "*Maritime Trader*" [1981]2 Lloyd's Rep. 152; Meeson, above note 4, at 90

[76] *The "Neptune"* [1986] H.K.L.R. 345 (High Court)

[77] Meeson, above note 4, at 90

[78] Section 21(4) of the *Supreme Court Act, 1981 (UK)*; Meeson, above note 4, at 86

[79] *The "Beldis"* [1936] P.51

[80] Section 3(6), *Admiralty Jurisdiction Regulation Act 105 of 1983* (South Africa)

[81] Hare, above note 73, at 80

[82] Kapadia, above note 48, at para. 3.2

[83] Kapadia, above note 48, at para. 3.2

[84] English "*White Book*" Practice Direction 61.5.3.

[85] *The "Arantzazu Mendi"* [1939] A.C. 256 (House of Lords)

[86] *The "Silia"* [1981] 1 Lloyd's Rep. 534

[87] *Dick* v. *The Percy & Jean* [2000] TASSC 140

[88] *The "Mardina Merchant"* [1975] 1 W.L.R. 147, 149

[89] *The "Mardina Merchant"* [1975] 1 W.L.R. 147, 149

[90] Meeson, above note 4, at 143; English C.P.R. Part 61.5(10)

[91] The *"Voseleai"*, above note 19

[92] Damien Cremean, *Admiralty Jurisdiction Law and Practice in Australia*, (1st ed, Federation Press, 1997) at 131.

[93] Meeson, above note 4, at 146.

[94] *The "Moscanth*" [1971] 1 Lloyd's Rep. 37.

[95] Meeson, above note 4, at 152

[96] *The "Cerro Colorado"* [1993] 1 Lloyd's Rep. 58 at 60, 61.

[97] [2005] FJHC 3
[98] *The "APJ Shalin"* [1991] 2 Lloyd's Rep. 62, 67