

SUPREME COURT OF QUEENSLAND

CITATION: *Beadman v Lee & Ors* [2004] QSC 445

PARTIES: **TONY BEADMAN**
(applicant)
v
KENNETH JOHN LEE
(first respondent)
JENNIFER ANN LEE
(second respondent)
LYNETTE FISHERIES PTY LTD (ACN 065 307 566)
(third respondent)

FILE NO/S: S8827 of 2002

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 16 December 2004

DELIVERED AT: Brisbane

HEARING DATE 12 October 2004

JUDGE: Mullins J

ORDER: **It is ordered that:**

1. The first respondent forthwith procure the second respondent to execute a transfer in accordance with the *Shipping Registration Regulations 1981 (Cth)* (“the Regulations”) and all ancillary documents in order to effect the transfer of her registered joint interest in the vessel Ankh Cross Registration Number 374961 (“the vessel”) to the first respondent and deliver the transfer and ancillary documents to the applicant.

2. The first respondent forthwith execute a transfer of the vessel in accordance with the Regulations and all ancillary documents in order to effect the transfer of the vessel from the first respondent to the applicant and deliver the transfer, ancillary documents and the Australian Registration Certificate for the vessel to the applicant.

3. Liberty to apply to any party on two days’ notice in writing to the other parties.

CATCHWORDS: SHIPPING AND NAVIGATION – SHIPS – MORTGAGES, CHARGES AND EQUITABLE INTERESTS – where mortgagee was the holder of a bill of sale over vessel registered under *Shipping Registration Act 1981 (Cth)* that was not a registered

mortgage under that Act – where mortgagor assigned the vessel to the mortgagee under the bill of sale with equity of redemption – where mortgagor defaulted – where mortgagee sold vessel at auction to third party – where mortgagor refused to perfect the transfer of the vessel to the mortgagee – where mortgagee seeks a declaration that vessel transmitted by operation of law to third party – whether mortgagee had entitlement to sell the vessel to the third party – whether Court has the power under regulation 24 *Shipping Registration Regulations 1981 (Cth)* to make an order to facilitate transfer of vessel to third party without reflecting the intermediate dealings with the vessel – declaration not justified – injunction granted in favour of mortgagee against mortgagor to perfect transfer of vessel to mortgagee

Admiralty Act 1988 (Cth)

Shipping Registration Act 1981 (Cth)

Shipping Registration Regulations 1981 (Cth)

Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc (1992) 38 FCR 227

Saunders v Anglia Building Society [1971] AC 1004

COUNSEL: P J Davis for the applicant
A K H Cooper for the first respondent
R I M Lilley for the third respondent

SOLICITORS: Steindls Lawyers & Notary for the applicant
LyonSmith for the first respondent
Payne Butler Lang for the third respondent

- [1] **MULLINS J:** Although this proceeding was commenced by originating application filed on 25 September 2002, leave was given at the hearing on 12 October 2004 for the amendment of the application, so that Mr Tony Beadman (“the applicant”) could seek the following orders:
1. A declaration that all shares in the vessel “Ankh Cross” registration number 374961 (“the vessel”) were transmitted by operation of law to Lynette Fisheries Pty Ltd (“the third respondent”) on 21 June 2002; or alternatively
 2. A mandatory injunction directing Mr Kenneth John Lee (“the first respondent”) and Ms Jennifer Ann Lee (“the second respondent”) to:
 - a. execute an Australian Shipping Registration Transfer of the vessel from the first and second respondents to the third respondent;
 - b. deliver up to the third respondent the Australian Registration certificate for the vessel;
 - c. otherwise produce all documents and do all such things as is necessary to transfer the vessel to the third respondent.
- [2] At the hearing of the application there was no appearance by the second respondent, even though she had been served.

Facts

- [3] At all material times the vessel was registered pursuant to the *Shipping Registration Act* 1981 (Cth) (“the Act”), with all 64 shares in the vessel shown on the Australian Register of Ships (“the Register”) as being owned jointly by the first and second respondents.
- [4] The first and second respondents are divorced and finalised their property settlement in accordance with terms of settlement dated 12 August 1993. Clause 5 of the terms of settlement required the second respondent to transfer her interest in the vessel to the first respondent. The second respondent stated in her affidavit filed on 23 October 2002 that she recalled signing transfer documents at the time the terms of settlement were entered into, and that they were provided to the first respondent or his legal representatives, so that the first respondent could obtain finance over the vessel in his name solely. Confirmation of that is found in the letter from the first respondent’s then solicitors dated 22 March 1995 advising the first respondent that the transfer of the second respondent’s interest in the vessel had been declared totally exempt from stamp duty by the Commissioner of Stamp Duties. No such transfer has ever been registered.
- [5] It was common ground at the hearing of the application that, as a result of the terms of settlement between the first and second respondents, the equitable interest in the second respondent’s share of the vessel had been transferred to the first respondent, so that he became the beneficial owner of all 64 shares in the vessel.
- [6] In December 1998 the first respondent was suffering from depression. He was involuntarily hospitalised on 22 October 1999 suffering with a manic episode of a bipolar affective disorder, but was released on 18 February 2000. The first respondent exhibited to his affidavit a copy of a report from psychiatrist Dr Paul Pun dated 11 December 2000 who was the first respondent’s treating psychiatrist whilst in hospital. The report was prepared for the purpose of disputes between the first respondent and his creditors in respect of transactions that were entered into in August 1999. The applicant objected to the admission of that report on the basis of relevance. The medical history given in that report supports the history given by the first respondent in his affidavit which has marginal relevance in explaining why the first respondent entered into the transaction with the applicant. The report has no relevance whatsoever to the first respondent’s state of mind at the time of entering into the transaction with the applicant. It appears that the first respondent’s financial affairs were administered by the Public Trustee, as a result of his hospitalisation. The first respondent states that he was released from that regime by the Guardianship and Administration Tribunal in July or August 2000.
- [7] By October 2000 the first respondent owed to the Public Trustee of Queensland the sum of \$32,000. Through solicitor Mr Michael Wright whom he believed that he had retained, the first respondent granted a security in the form of a bill of sale (“the bill of sale”) over the vessel to the applicant to secure an advance of \$32,000 to enable the first respondent to discharge his liabilities to the Public Trustee. Mr Wright prepared

the bill of sale and witnessed the execution of it by each of the applicant and the first respondent. The bill of sale was dated 8 November 2000. The applicant asserts that Mr Wright was his solicitor for the purpose of the transaction involving the making and securing of the loan to the first respondent.

- [8] The first respondent asserts that Mr Wright informed him that the applicant was a personal friend of his and that Mr Wright could obtain the sum of \$32,000 from the first respondent for the applicant on the basis that the money would be paid back within 12 months with interest at 10% per annum payable at the end of the period of 12 months. The first respondent also asserts that Mr Wright told him that the bill of sale would never have to be stamped, unless something unforeseen happened and the bill of sale would sit in the draw and nothing would happen for the term of the bill of sale.
- [9] The first respondent also asserts that when he came to sign the bill of sale, he was trying to read the terms of the bill of sale and was having difficulty in understanding the first page and that Mr Wright said to him words to the effect “Don’t worry about reading it, it is all just a lot of hoo-ha, it is legal jargon. I prepared it myself it is alright. You can trust me”. The first respondent claims that Mr Wright was impatient and says that he was confused and did not get past the first page, other than flicking through the rest of the document. The first respondent admits that he signed the bill of sale, but asserts that he was not aware of the effect of the document, although it is clear from his affidavit that he was always aware that it was a bill of sale in the sense of intending to be a security granted by him over the vessel to secure a loan.
- [10] Although the bill of sale recited that the applicant had agreed to provide the grantor with the sum of \$32,000 for a period of 12 months to discharge the Public Trustee as creditor of the grantor, the applicant deposes to making a loan of the sum of \$20,000 only to the first respondent. Mr Wright has deposed to paying the applicant’s cheque of \$20,000 to the Public Trustee and advancing the balance of the funds of \$12,000 required to pay the first respondent’s debt to the Public Trustee and the funds required to pay the stamp duty assessed on the bill of sale. That stamp duty was paid on 22 January 2001.
- [11] The bill of sale is in the form of an old system mortgage and pursuant to clause 2 the first respondent assigned all his interest in the vessel to the applicant, subject to a right to obtain re-assignment of the vessel after repaying the loan, interest and other moneys secured by the bill of sale.
- [12] Under clause 4(i)(d) of the bill of sale, the applicant was required to insure the mortgaged property. The applicant enquired of Mr Wright by letter dated 2 February 2001, as to whether the first respondent had insured the vessel. By letter dated 13 February 2001 the applicant gave notice to Mr Wright that if the vessel remained uninsured at 12 noon on 14 February 2001, the applicant intended to exercise his rights under the bill of sale. The first respondent did not insure the vessel.
- [13] On 14 February 2001, as the vessel had not been insured, the applicant sent a further letter to Mr Wright advising that he required repayment of the principal and interest

within 24 hours. By letter of 6 July 2001 to Mr Wright, the applicant advised that he was aware that judgment had been awarded against the first respondent in favour of Brisbane Shiplifts, which was another breach of the bill of sale (clause 5 (i)(d)), and gave the first respondent a further 7 days for repayment of the loan with interest and costs, after which time the applicant would take possession of the vessel in order to sell it.

- [14] By letters dated 1 and 19 October and 12 November 2001 and 19 February 2002 to Mr Wright, the applicant's solicitors, Beckett Lawyers, raised various matters in respect of the proposed sale of the vessel.
- [15] The applicant entered into an agency agreement with the Pickles Group for the sale of the vessel. They organised an auction with Hassall Auctions to take place on 20 June 2002. The first respondent sent a copy of the auction advertisement to Mr Rodney Brown who was a fellow fisherman with whom the first respondent had been acquainted for some 15 years prior to the auction. The auction advertisement showed that Hassall Auctions was auctioning the vessel "on behalf of mortgagee in possession".
- [16] It is common ground between the first respondent and Mr Brown that on the day of the auction they reached an agreement to the effect that if Mr Brown purchased the vessel, he would sell it to the first respondent for the price that he paid for it. Where Mr Brown and the first respondent are at odds is that Mr Brown states that the first respondent had to buy the vessel from him on the day of the auction, whereas the first respondent states that Mr Brown told him that he could buy the boat back from him at any time for the price that he had paid for it.
- [17] The vessel was sold at the auction to the third respondent which is a company of which Mr Brown is the sole director for the sum of \$86,625 (which comprised the purchase price of \$82,500 plus a buyer's premium of \$4,125).
- [18] Mr Brown told the first respondent shortly after the auction that he was no longer prepared to sell the vessel to him. In any case, it does not appear that, before the third respondent commenced repairing the vessel, the first respondent ever offered to purchase the vessel from the third respondent for the amount for which the third respondent had paid for it at the auction. It was conceded by Mr Cooper of Counsel on behalf of the first respondent that any agreement that the first respondent alleges he had with Mr Brown is irrelevant to the issues that are raised by the application.
- [19] After the auction the applicant received a payout of the moneys owing to him under the bill of sale of \$22,000.
- [20] In August 2002 the applicant's solicitor requested Mr Wright to procure the first and second respondents to sign a transfer of the vessel to the third respondent. Mr Wright conveyed to the applicant's solicitor that the first respondent would not commit himself to signing the transfer. It was common ground at the hearing of the

application that no transfer of the vessel had yet been signed by the first and second respondents.

- [21] The first respondent filed a debtor's petition and became bankrupt on 20 March 2003. He remained undischarged at the hearing of this application and his trustee in bankruptcy indicated to him that it did not intend to be represented at the hearing of the application and had no objection to the first respondent appearing and being represented on the application.
- [22] By proceeding commenced by claim and statement of claim filed in this court on 5 March 2003 ("the specific performance proceeding") the third respondent seeks specific performance of its contract to purchase the vessel against the applicant and damages pursuant to the *Trade Practices Act 1974* or the *Fair Trading Act 1989* or for negligent misrepresentation or breach of contract against the applicant and Australian Auctions Pty Ltd which traded under the name of Hassall Auctions. The third respondent alleges that it has been unable to use the vessel as an income producing trawler/fishing vessel and has suffered loss and damage comprising refurbishment costs of \$300,667.94 (including the purchase price of the vessel), estimated loss of catch of \$3,000 net per day from 1 November 2002 and mooring fees from 1 November 2002 at \$20 per week. Hassall Auctions has issued a third party notice in the specific performance proceeding against the applicant, Mr Beckett, Mr Wright and the Industrial Auction Group Pty Ltd. The applicant has issued a third party notice in the specific performance proceeding against Mr Wright and Mr Beckett. The first respondent is not a party to the specific performance proceeding.
- [23] Some of the pleadings in the specific performance proceeding have been included in the material relied upon by the applicant for this application. The most recent document in that bundle of pleadings is particulars of Mr Beckett's defence to Mr Wright's third party notice and statement of claim that were provided on 28 January 2004. Neither the applicant nor the third respondent provided information as to the current stage of the specific performance proceeding, although it was apparent from the submissions that were made that the specific performance proceeding is still continuing.

Issues

- [24] On the hearing of this application the applicant and the third respondent supported the making of the orders sought in the amended application. That course was opposed by the first respondent who wished to have a trial of his claims against Mr Wright. The issues raised by the application are:
- (a) whether the applicant had an entitlement to sell the vessel;
 - (b) the extent of the power of the court that is contemplated under regulation 24 of the *Shipping Registration Regulations 1981* (Cth) ("the Regulations") for making an order for the transmission of the ownership of the vessel;
 - (c) whether it is appropriate in the circumstances either to make the declaration or grant the injunction sought by the applicant.

Relevant legislation

- [25] The means by which the transfer of the ownership of a registered ship is effected is set out in section 36 of the Act:

“36 Transfer of ship etc.

- (1) Subject to section 37, a ship or a share in a ship shall be transferred by a bill of sale made in accordance with the regulations.
- (2) Where a ship or a share in a ship is so transferred, the bill of sale and a declaration of transfer made by the transferee under subsection (3) shall be lodged by the transferee with the Registrar within 14 days after execution of the bill of sale or within such longer period as the Registrar, in special circumstances, allows.
- (2A) The Registrar shall, as soon as practicable after the lodgment by the transferee of a bill of sale relating to the transfer of a ship or a share in a ship together with a declaration of transfer, register the bill of sale by entering in the Register the name of the transferee as owner of the ship or share and shall endorse on the bill of sale the fact of the entry having been made, together with the date and time of the making of the entry.
- (3) A declaration of transfer for the purposes of subsection (2) shall be made in accordance with the regulations and, where the transferee is not the Commonwealth or a State or Territory, shall include:
 - (a) in the case of the transfer of a ship, or a share in a ship, other than a small craft:
 - (i) a statement specifying the nationality of the transferee or, where the transferee is a body corporate, the country in which it was incorporated; and
 - (ii) a statement that, to the best of the knowledge and belief of the person making the declaration, the ship concerned will not cease to be an Australian-owned ship by reason only of the transfer; or
 - (b) in the case of the transfer of a ship, or a share in a ship, being a small craft:
 - (i) a statement specifying the nationality of the transferee or, where the transferee is a body corporate, the country in which it was incorporated;
 - (ii) a statement specifying the normal place of residence of the transferee or, where the transferee is a body corporate, the principal place of business of the body corporate; and
 - (iii) a statement that, to the best of the knowledge and belief of the person making the declaration, the ship concerned will not cease to be an Australian-owned ship or a ship referred to in paragraph 14(b) or (c) by reason only of the transfer.
- (4) Subsection (3) applies in relation to ships on demise charter to Australian-based operators as if the statement required by subparagraph (3)(a)(ii) or (3)(b)(iii) were a statement that, to the best of the knowledge and belief of the person making the declaration, the ship concerned will not cease to be a ship on demise charter to an Australian-based operator by reason only of the transfer.
- (5) Bills of sale lodged under this section shall be registered in the order of their lodgment.”

[26] Section 37 of the Act provides:

“37 Transmission of ship etc. by operation of law

- (1) Where a ship or a share in a ship is transmitted to a person by any lawful means other than by a transfer under section 36, a declaration of transmission made by that person under subsection (2) together with such evidence of transmission as is prescribed shall be lodged by that person with the Registrar within 14 days of that transmission taking place or within such longer period as the Registrar, in special circumstances, allows.
- (1A) The Registrar shall, as soon as practicable after the lodgment by a person of a declaration of transmission of a ship or a share in a ship together with such other evidence of transmission as is prescribed, enter in the Register the name of that person as owner of the ship or share.
- (2) A declaration of transmission for the purposes of subsection (1) shall be made in accordance with the regulations and, where the person entitled under the transmission is not the Commonwealth or a State or Territory, shall include:
 - (a) in the case of the transmission of a ship, or a share in a ship, other than a small craft:
 - (i) a statement specifying the nationality of the person entitled under the transmission or, where the person is a body corporate, the country in which it was incorporated; and
 - (ii) a statement that, to the best of the knowledge and belief of the person making the declaration, the ship concerned will not cease to be an Australian-owned ship by reason only of the transmission; or
 - (b) in the case of the transmission of a ship, or a share in a ship, being a small craft:
 - (i) a statement specifying the nationality of the person entitled under the transmission or, where the person is a body corporate, the country in which it was incorporated;
 - (ii) a statement specifying the normal place of residence of the person entitled under the transmission or, where the person is a body corporate, the principal place of business of the body corporate; and
 - (iii) a statement that, to the best of the knowledge and belief of the person making the declaration, the ship concerned will not cease to be an Australian-owned ship or a ship referred to in paragraph 14(b) or (c) by reason only of the transmission.
- (3) Subsection (2) applies in relation to ships on demise charter to Australian-based operators as if the statement required by subparagraph (2)(a)(ii) or (2)(b)(iii) were a statement that, to the best of the knowledge and belief of the person making the declaration, the ship concerned will not cease to be a ship on demise charter to an Australian-based operator by reason only of the transmission.”

[27] The mortgage of a ship is dealt with by section 38 of the Act:

“38 Mortgage of ship etc.

- (1) A ship or a share in a ship may be made a security for the discharge of an obligation by way of a mortgage under this Act.
- (2) The instrument of such a mortgage shall be made in accordance with the regulations.
- (3) As soon as practicable after the lodgment of a mortgage instrument so made, the Registrar shall register the mortgage by entering particulars of the mortgage in the Register and shall endorse on the instrument the fact of the entry having been made, together with the date and time of the making of the entry.
- (4) Mortgage instruments lodged under this section shall be registered in the order of their lodgment.”

The definition of “mortgage” for the purpose of the Act is found in s 3(1) of the Act and means a mortgage registered under s 38 of the Act.

[28] It is expressly provided in section 47 of the Act that equities are not excluded:

“47 Equities not excluded

Subject to sections 41, 45 and 46, beneficial interests may be enforced by or against the owner or mortgagee of a ship or of a share in a ship in respect of his or her interest in the ship or share in the same manner as in respect of any other personal property.”

[29] Section 41 of the Act deals with the power of the mortgagee to dispose of a ship or a share in a ship. Pursuant to section 45 of the Act, the owner of a ship or of a share in a ship has power, subject to the Act and to any rights and powers appearing in the Register to be vested in any other person, absolutely to dispose of the ship or share and to give effectual receipts in respect of the disposal. Section 46 of the Act expressly provides that notice of a trust (whether express, implied or constructive, shall not be entered on the Register or be receivable by the Registrar.

[30] Section 47A of the Act provides for the lodgment of a caveat by a person claiming an interest in a ship or in a share in a ship under any unregistered instrument or by operation of law or otherwise. While the caveat remains in force, that has the effect of forbidding the entry in the Register of any instrument relating to any dealing with that ship or share without the consent in writing of the person entitled to withdraw the caveat: see s 47D of the Act.

[31] Regulation 24 of the Regulations provides:

“24 Transmission of ship etc by operation of law

- (1) For the purposes of subsection 37 (1) of the Act the following evidence of lawful transmission is prescribed evidence:
 - (a) in the case of transmission upon the death of a joint owner:
 - (i) a certificate of death or of burial of the deceased person, or probate or letters of administration of the estate of that person, or an office copy of any such document; and

- (ii) a statutory declaration by a person well acquainted with the facts of the case to the effect that the person referred to in subparagraph (i) is the same person as the joint owner named in the Register;
 - (b) in the case of transmission upon the death of a sole owner or an owner in common:
 - (i) an instrument constituting a person the legal personal representative, or constituting persons the legal personal representatives, of the deceased person or an office copy of such an instrument; and
 - (ii) an instrument identifying the person who is to become, by reason of the transmission, the owner, or one of the owners, of the ship or share; and
 - (c) in the case of transmission upon the making of an order by a court — an office copy of the order.
- (2) A declaration of transmission under subsection 37 (2) of the Act shall:
- (a) be in writing;
 - (b) specify:
 - (i) the name and official number of the ship;
 - (ii) the name and address of the person who has ceased, by reason of the transmission, to be the owner, or one of the owners, of the ship or share; and
 - (iii) the name, address and nationality of the person to whom the ship or share is transmitted; and
 - (c) be duly signed by the person to whom the ship or share is transmitted.”

Whether applicant had entitlement to sell

[32] The arrangement between the applicant and the first respondent was entered into outside the statutory regime for the granting of a security by way of mortgage registered under the Act. Although the document that was used by the parties is described by them as a bill of sale and is in the form of a bill of sale that is commonly used for the purpose of the *Bills of Sale and Other Instruments Act 1955*, that Act does not apply to the transfer of any ship that is registered under the Act and therefore had no application to the security granted by the first respondent to the applicant which incorporated an assignment of the first respondent’s interest in a vessel to the applicant: see paragraph (k) of the definition of “bill of sale” in s 6 of the *Bills of Sale and Other Instruments Act 1955*.

[33] A submission was made on behalf of the first respondent that the vessel could not be transferred, unless the bill of sale was in accordance with s 36 of the Act. Submissions were then made as to why the bill of sale dated 8 November 2000 did not comply with s 36 of the Act. Section 36 of the Act is concerned with transfer of ownership. The instrument of transfer is described in s 36 of the Act as a bill of sale. That term is used in s 36 in a different sense than the expression “bill of sale” used to describe the agreement made by the applicant and the first respondent for the purpose of securing the loan made by the applicant to the first respondent.

- [34] Another argument put forward on behalf of the first respondent was that there was evidence that showed that the bill of sale was capable of being impugned on the grounds of *non est factum*, undue influence of Mr Wright over the first respondent or the misrepresentations made by Mr Wright to the first respondent as to the effect of the bill of sale and arising from the failure of Mr Wright to advise the first respondent of the contribution made by him of the sum of \$12,000 towards the funds required to be advanced by the applicant under the terms of the bill of sale.
- [35] The defence of *non est factum* is open when a defendant who is sued on an instrument can prove that he or she did not know the nature or quality of the instrument when it was signed by him or her: *Saunders v Anglia Building Society* [1971] AC 1004, 1015-1016, 1019, 1021, 1026, 1034. Although the first respondent complains about what he says that Mr Wright said to him about the bill of sale and that he did not get an opportunity to understand the terms of the document, the first respondent acknowledges that he was aware that it was a bill of sale and that he signed it. This does not permit the first respondent to claim *non est factum*.
- [36] The allegation against Mr Wright of misrepresentations and undue influence have no relevance in the dispute between the applicant and the first respondent, as the material suggests no factual basis that would support a claim by the first respondent that any undue influence of or misrepresentations made by Mr Wright could be attributed to the applicant.
- [37] It was submitted on behalf of the first respondent that the Act provides for a scheme of title by registration and that as the applicant had an equitable interest only in the vessel, he never had an entitlement to sell the legal title to the vessel.
- [38] Although the Act does provide for a scheme of title by registration, it clearly contemplates equitable interests. This is expressly recognised by s 47 of the Act and supported by the provision permitting the lodgment of a caveat with the registrar. It is consistent with the recognition of equitable mortgages or charges in relation to a ship or a share in a ship in the definition of “mortgage” in s 3 of the *Admiralty Act 1988* (Cth). See also *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1992) 38 FCR 227, 243 and 17 *Halsbury’s Laws of Australia* at para [270-410].
- [39] The issue then is whether the applicant as the assignee of the beneficial ownership of the vessel could sell the vessel and procure the transfer of the registered ownership of the vessel. By the date of the auction, the first respondent had not attempted to redeem the bill of sale and the auction of the vessel took place with the knowledge of the first respondent.
- [40] The applicant could therefore rely on his entitlement as the assignee of the beneficial ownership of the vessel, in order to sell the vessel. Clause 2 of the bill of sale carries with it an implied obligation on the part of the first respondent to perfect the assignment of the ownership of the vessel to the applicant by perfecting the first respondent’s title to the vessel and transferring the registered ownership of the vessel to the applicant. But for the complication of the failure of the first respondent to perfect the transfer to himself of the second respondent’s interest in the vessel, the

applicant may have been able to make use of the power of attorney provision in the bill of sale to perfect the transfer of the vessel from the first respondent to the applicant.

Whether power to make orders sought

- [41] The first form of order sought by the applicant seeks to bundle up a number of the transactions which have occurred and for the court to make a declaration that all shares in the vessel were transmitted by operation of law from the first and second respondents to the third respondent, rather than dealing with the separate steps that occurred, before the final transaction between the applicant and the third respondent.
- [42] This raises the question of what type of transactions are contemplated as transmission of a ship to a person “by any lawful means” that can be the subject of an order by a court for the purpose of regulation 24(1)(c) of the Regulations.
- [43] The transmission of ownership of property would include transactions such as the transmission of a bankrupt’s property to the trustee in bankruptcy or transmission of trust property, as a result of a vesting order made pursuant to the *Trusts Act* 1973.
- [44] What the applicant is asking the court to do is to make a declaration which does not reflect the various dealings with the vessel. There is no justification for making a declaration that would imply that the vessel was transferred from the first and second respondents to the third respondent.

Appropriate relief

- [45] The issues between the applicant and the third respondent in respect of the ownership of the vessel have been raised in the specific performance proceeding. This application has been concerned primarily with the applicant’s dispute with the first respondent which brings in the second respondent. There is no suggestion in the material that the second respondent would refuse to sign a transfer of her interest in the vessel in favour of the first respondent.
- [46] The material does not disclose any good reason as to why the first respondent should not take steps to perfect the assignment of the vessel to the applicant which the first respondent was obliged to do under the bill of sale.
- [47] Various arguments are put forward on behalf of the first respondent to prevent the transfer of the vessel to the applicant being perfected, including delay and balance of convenience. This is an application for final relief which means balance of convenience is not an issue. Some of the delay has been caused by the first respondent’s bankruptcy.

- [48] I am therefore disposed to grant an injunction in favour of the applicant against the first respondent that will have the effect of procuring the transfer of the vessel into the applicant's name.

Orders

- [49] I will therefore make the following orders:
1. The first respondent forthwith procure the second respondent to execute a transfer in accordance with the *Shipping Registration Regulations* 1981 (Cth) ("the Regulations") and all ancillary documents in order to effect the transfer of her registered joint interest in the vessel Ankh Cross Registration Number 374961 ("the vessel") to the first respondent and deliver the transfer and ancillary documents to the applicant.
 2. The first respondent forthwith execute a transfer of the vessel in accordance with the Regulations and all ancillary documents in order to effect the transfer of the vessel from the first respondent to the applicant and deliver the transfer, ancillary documents and the Australian Registration Certificate for the vessel to the applicant.
 3. Liberty to apply to any party on two days' notice in writing to the other parties.
- [50] I will hear submissions on costs.