

SUPREME COURT OF QUEENSLAND

CITATION: *Mentink v Registrar of the Australian Register of Ships*
[2012] QSC 380

PARTIES: **WILFRED JAN REINIER MENTINK**
(applicant)
v
REGISTRAR OF THE AUSTRALIAN REGISTER OF SHIPS
(respondent)

FILE NO/S: 8371 of 2012

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 30 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 15 and 25 October 2012

JUDGE: Peter Lyons J

ORDER:

- 1. The application for rectification under s 59 of the Shipping Registration Act 1981 (Cth) is refused.**
- 2. The respondent's application is refused.**
- 3. The parties are invited to make further submissions as to what other orders, if any, should be made in light of these reasons.**

CATCHWORDS: SHIPPING AND NAVIGATION – SHIPS – REGISTRATION – OF SHIPS – where the applicant was the registered owner of the ship *Larus II* until 11 August 2004 – where registration of the ship was permitted under s 14 of the Shipping Registration Act 1981 on the basis the ship was Australian owned – where on 6 August 2004, a third party provided to the respondent a bill of sale allegedly signed by the applicant which purported to transfer the ownership of the *Larus II* to the third party – where the applicant gave no notice of the transfer of ownership to the respondent and denies that ownership was transferred – where the third party was not an Australian national – where, upon the notice of the third party that the *Larus II* was no longer Australian owned, the respondent, under s 66 of the Shipping Registration Act 1981 closed the registration of the *Larus II* on the Register – where the ship was subsequently sold to a second third party – whether the notice given by the third party was a notice within the meaning of s 66 (2) such that the respondent was entitled to close the registration of the *Larus II* – whether an

order under s 59 of the Shipping Registration Act 1981 to rectify the Register should not be made in order to protect the integrity of the Register – whether orders to rectify the Register should be made in circumstances where the apparent current owner is not a party to the action

Shipping Registration Act 1981 (Cth), ss 3, 8, 12, 14, 14, 29, 34, 36, 37A, 45, 56, 57, 58, 59, 62, 66, 67, 74, 81
Shipping Registration Regulations 1981 (Cth), rr 23,29

Bluecorp Pty Ltd v ANZ Executors & Trustee Co Ltd (1995) 18 ACSR 566, cited

Dalgety and Co Ltd v Aitchison; the "Rose Pearl" [1957] 2 FLR 221, cited

General Credit (Finance) Pty Ltd v Registrar of Ships (1982) 61 FLR 329, cited

Household Financial Services Ltd v Island & River Trading Pty Ltd (1993) 6 BPR 13,312

Malick v Lloyd (1913) 16 CLR 482, cited

R v Young (1989) 46 NSWLR 681, cited

The Advertising Department Pty Ltd v Ship MV Port Philip & Ors (2004) 141 CLR 251, cited

Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (2005) 143 FCR 43, cited

Wentworth Securities v Jones [1980] AC 74, followed

COUNSEL: The applicant appeared in person
M Brennan for the respondent

SOLICITORS: The applicant appeared in person
Crown solicitor for the respondent

- [1] On 11 August 2004 an entry was made in the Australian Register of Ships in respect of the vessel 'Larus II' that its registration was closed. That entry was made in reliance on s 66 of the *Shipping Registration Act 1981 (Cth)* (*SRA*). The applicant has applied for an order under s 59 of the *SRA* that the Register be rectified by deleting the entry, with effect that it records him as the registered owner of the vessel (and the registered agent and master). He also sought related declaratory relief. The respondent opposed the application on the ground that the closure entry was lawfully made; and that in any event relief should be refused because the applicant has not established that he is, in truth, the owner of the vessel; nor are persons who are potentially affected by the relief sought, parties to the application. Reliance was also placed on the need to maintain the integrity of the Register.

Background

- [2] It would appear from an extract from the register that the *Larus II* was first registered in 1983. Its length is 10.14 metres.
- [3] Prior to 11 August 2004, the applicant was the registered owner of the vessel.

- [4] An affidavit of the applicant exhibits what appears to be a note of a meeting between Mr Thackray, described as a “UK passport holder”; and Mr Giddings. Other material suggests that the meeting took place in about early August 2004; and that Mr Giddings was an Australian Embassy official based in East Timor. At the meeting, Mr Thackray produced a document, apparently the document referred to below as the sale receipt, and enquired about registration.
- [5] On 6 August 2004 a Mr Lee Thackray sent a facsimile to the respondent stating that he had purchased the Larus II on 30 August 2003 from the applicant. The vessel was to be delivered to him in Bali, Indonesia; but the applicant was deported to Australia, having been accused of child abuse crimes in Dili, East Timor, and of making false declarations on his visa applications in East Timor. The facsimile stated that Mr Thackray had travelled to Dili, where he found the vessel in the harbour. He stated that the applicant had failed to inform the respondent’s “department” of the change of ownership, and that the East Timor authorities would not permit him to depart until such time as the matter was resolved. He stated that he had the original registration certificate, but that he and the applicant had agreed “not [to] change the keeper of the vessel until [the applicant] met [Mr Thackray] in Bali so [the applicant] could gain the necessary documentation and sailing visas to sail the boat to Bali”. Mr Thackray stated he had completed the British registration certificate for the vessel and that it was “currently being transfused on to the English register”. He also stated that he had visited a number of people, including Mr Terry Giddings, at the Australian Embassy; and he said that Mr Jeff Cadwell, described as head of the Australian Federal Police, had offered assistance. Documents were attached. From the facsimile markings, they appear to have been the document which may be described as a sale receipt, and a document entitled, “HANDING OVER EPISTLE”.
- [6] The sale receipt is not fully decipherable. It appears to be dated 30 August 2003; and records that the applicant stated that the Larus II was sold to Mr Thackray of East Lodge, Great Saling, Essex, England, for the sum of \$5,800 on the date on the receipt; and that it was to be handed over to the Mr Thackray on 30 June 2004 in Sanur, Bali, “at the request of Mr Thackray”. Mr Thackray signed the document as the “new owner”; and a signature which purports to be that of the applicant appears as the “previous owner”.
- [7] The other document is dated 23 July 2004. It records that on that date a police agent, Ivo Magno, returned the Larus II to Mr Thackray. It bears the signatures of Mr Thackray, and Mr Magno; and that of a Mr Jorge Monteiro, as witness. It appears to be on the letterhead of the Criminal Investigation Department of the Timor Leste Police.
- [8] On 9 August 2009 Mr Kevin Cross, who then held the office of the respondent, sent an email to Mr Thackray referring to the letter of 6 August 2009. The email stated that the vessel was currently registered in the applicant’s name, and was unencumbered. It stated that because Mr Thackray was not an Australian national, the vessel ceased to be entitled to be registered on the Australian register. It identified an internet link which states the requirements to close a ship’s registration.
- [9] On 11 August 2004, Mr Thackray sent an email to Mr Cross making further enquiries about the change of ownership of the Larus II. Mr Cross replied the same

day, stating that he needed the return of the original registration certificate for the Larus II; lodgement of the original or a certified true copy of the transfer documents; and a notice that Mr Thackray wished to close the Australian registration as he was not an Australian national. A certificate confirming that this had occurred could be provided on the payment of a fee.

- [10] On 11 August 2004, Mr Thackray sent a facsimile to Mr Cross, agreeing to surrender the Australian certificate of registration for Larus II to the Consulate of the Australian Embassy when confirmation of the termination of its entry on the Australian register had been received. The letter stated that, at Mr Cross's request, Mr Thackray had had the sale receipt countersigned by another person, and asked that confirmation be provided that the Larus II was no longer on the Australian register, and that "your department" accepted that Mr Thackray was the owner of the vessel. The facsimile transmission included a copy the sale receipt, endorsed on which was a handwritten statement by Sarah Jane Davy, whose British passport number was provided, verifying that "this is the original copy of the sale receipt between Mr L Thackray and Mr W Mentink on the 10/08/04 – for the sailing vessel Larus II", bearing the signature "S. Davy" and dated 10 August 2004.
- [11] The facsimile included a copy of the registration certificate for the Larus II. On the second page, where the applicant was recorded as the registered agent, owner and master of the vessel, Mr Thackray's name and address had been added by hand. In a box intended for the date and signature of the delegate of the respondent, adjacent to the entry recording the master of the vessel, the date 30 August 2003 had been entered by hand, and a signature was included which appeared to be that of Mr Thackray.
- [12] Closure of the registration was recorded later on the same day.
- [13] The applicant has produced a document which appears to be a certificate of clearance from the Port of Dili for the Larus II, bearing Mr Thackray's name as its captain, and dated 27 August 2004. He has also produced a document which appears to be a clearance approval from Indonesian Territory for the Larus II (*Indonesian clearance approval*). This document identified the owner as Mr Thackray, and Ms Sarah Jane Davy as crew, and recorded ports of call in Indonesia for the period from 16 September to 16 December 2004. In it, the nationality of the vessel is said to be Australian.
- [14] The applicant gave evidence that on 9 September 2004, he was informed that the Larus II had left Dili Harbour. On 18 September 2004, he wrote to the Director of Consular Operations in Dili, among other things to request that the authorities in East Timor be notified that the Larus II was missing, presumed stolen. The reply of 23 September 2004 stated that, before the Australian Embassy in Dili would take action, the applicant should contact the Australian Maritime Organisation to ascertain if the vessel was still registered in his name; and that the department's records indicated that a citizen of the United Kingdom had approached the Embassy in Dili, produced a bill of sale dated 30 August 2003 for the Larus II, and requested information as to the transfer of ownership of an Australian registered vessel.
- [15] On 19 September 2004, the applicant sent an email to the office of the respondent, stating that he was the sole owner of Larus II, which had disappeared, and which he was reporting as stolen. The email asked for advice as to further steps to be taken.

- On 1 October 2004, the applicant sent a facsimile to the office of the respondent stating that his vessel had been stolen, and enquiring as to whether it remained registered.
- [16] On 5 October 2004, the person then holding the respondent's office advised the applicant of the closure of the registration, following sale of the vessel to Mr Thackray. On 7 October, the applicant was given a copy of the sale receipt. He gave evidence that, at this point, he realised the vessel had been stolen; and he was advised to file a complaint at a police station. On 12 October 2004 he sent an email attaching a letter to the respondent, stating that he had reported the theft of the vessel to the Minister in charge of the Australian Federal Police, and making further enquires about the events which occurred in August that year. He also wrote on the same date to the Commonwealth Minister for Justice, complaining about his deportation, which resulted in his leaving the *Larus II* in Dili Harbour. This letter stated that an Australian Police officer had told him on his arrest that he would lose the vessel, and later said to him in respect of it, "Looks like its gone". The letter asserted that the vessel had been illegally entered and documents bearing the applicant's signature and other details had been found; and that the sale receipt was entirely fraudulent. It also complained of the theft of the vessel.
- [17] The person then holding the office of the respondent replied to the applicant on 13 October 2012, stating that the registration of the *Larus II* was closed under s 66 of the *SRA*, as he was obliged to act under that section on notice from a person other than the registered owner. The writer declined to answer other queries which had been raised in the applicant's letter of 12 October 2004. On 1 November 2004 the applicant sent a letter to the person holding the respondent's office, requesting that the *Larus II* be restored to the register. Attached was a statutory declaration which included a statement that the applicant was the owner of the *Larus II*, that he had not signed any document transferring the ownership of the vessel, and that on 30 August 2003 (the date of the sale receipt) he was alone at sea on the vessel off the North Coast of Eastern Flores, Indonesia; and that he had never met a person named Thackray.
- [18] On 5 November 2004 the person then holding the office of the respondent sent an email, apparently to an agency of the Australian Federal Police, setting out some of the applicant's allegations, and stating that the Australian registration of the *Larus II* had been closed. The letter enquired what assistance the Australian Federal Police could provide. That resulted in a telephone conversation with a Mr Don Craill, team leader, Transnational Sexual Exploitation Team. Mr Craill advised that the normal response time was 28 days, but that he would find out what had happened in relation to the enquiry. There is no evidence of further contact between the respondent's office and the Australian Federal Police, about the applicant's allegations.
- [19] On 15 November 2004 the applicant wrote to the person then holding the respondent's office reciting some of the history of events since September 2004. The letter identified a number of matters said to be anomalies in the sale receipt. In particular, attention was drawn to the fact that payment was said to have occurred in August 2003 with handover to take place some ten months later; and to the price. It also complained that the closure occurred on the basis of inadequate documents, and without reference to the applicant. The letter asserted that the document on the basis of which the registration had been closed was fraudulent.

- [20] On 28 July 2005, apparently in the context of a freedom of information request, the person then holding the office of the respondent provided to the Australian Federal Police, copies of the entries on the register relating to the applicant's ownership of the *Larus II*, no doubt recording the closure of registration. On 14 February 2007, the respondent's office sent a facsimile to the Australian Federal Police stating the *Larus II* was sold to an Englishman in 2004.
- [21] The applicant obtained, as a result of an application under the freedom of information legislation in 2012, a certificate of deletion of the registration for the *Larus II* dated 30 August 2007. He obtained in the same fashion an extract from the register, also dated 30 August 2007, recording, amongst other things, the closure of the registration. The circumstances in which these documents had been issued were not identified in the evidence.
- [22] In May 2007, the applicant travelled to Kupang, in Indonesia, having heard the *Larus II* was there. He saw it some time later in a small concealed cove. On 1 June 2007 he wrote to the respondent stating that he had located the vessel and sought to claim it. He requested that it be restored to the register in his name. He enclosed copies of the registration certificate, and the Indonesian clearance approval. He stated that the clearance approval (which described the nationality of the vessel as Australian) was inconsistent with the letter of 6 August 2004 from Mr Thackray, which stated that he had completed the British registration certificate. The letter also stated that he had made enquires of the British registry, and that there was no reference to "Lee Thackray" on its register. The letter stated that the registration certificate had not been surrendered by Mr Thackray as promised; and that it had been unlawfully altered and unlawfully used to persuade the respondent that Mr Thackray owned the vessel. The letter asserted that the registrar had unlawfully failed to secure the registration certificate before closing the registration. The letter sought further disclosure of information about the vessel. The applicant then had to depart from Indonesia as his visa was about to expire.
- [23] On 18 July 2007, the applicant travelled to Kupang, in Indonesia, and from there to Semaui Island, where he inspected the *Larus II* and told a person named Adrianus Adu, that he was the true owner of the vessel and that he would return with documentation to claim it. The evidence does not make clear what relationship, if any, Mr Adu had with the vessel.
- [24] On 19 July 2007, the applicant sent an email to the respondent, again requesting registration of the *Larus II*. The reply, dated 2 August 2007, provided formal information, and stated that the applicant would be required to provide acceptable verification of ownership of the vessel, or a court order, before registration could take place. The reply also said that other matters raised by the applicant were police matters which could not be investigated by the Australian Maritime Safety Authority (*AMSA*).
- [25] A short time later, the applicant was informed that the vessel had been sold to a Mr Robert Arrand. In late August 2007, the applicant made telephone contact with this person, who provided an email address. The applicant sent an email to this address, informing Mr Arrand of the problems associated with the acquisition of the *Larus II*, and claiming title to the vessel. The applicant received an SMS reply, to the effect that Mr Arrand had been advised by the respondent that the applicant had sold the

vessel to Thackray, and refusing to identify the person from whom Mr Arrand had purchased the vessel.

- [26] In 2009 the applicant commenced proceedings in the Federal Court seeking, amongst other things, an order that the register be rectified by restoring the registration of the *Larus II*. The respondents were the present respondent; the Director of Consular Operations, Department of Foreign Affairs; and the Commissioner of the Australian Federal Police. A successful application was made by them for security for costs. In his reasons, Rares J included observations about the strength of the applicant's case. His Honour noted that the statement of claim alleged that Mr Arrand had possession and claimed ownership of the *Larus II*. His Honour expressed the view that, Mr Arrand not being a party to the proceedings, there was almost no prospect that the applicant would be able to succeed in having the register rectified, because of the effect of such relief on the rights of Mr Arrand.
- [27] The applicant gave evidence that he was unable to comply with the order for security for costs. He also gave evidence that, in the course preparing for the present application, he had sent an email to Mr Arrand at an email address provided to him by the office of the Harbourmaster, Tenau, Kupang, on 19 September 2012. Delivery of the email did not fail, but he received no reply. He also gave evidence that the respondent had informed him that the respondent had attempted to contact Mr Arrand in relation to the freedom of information applications, but that Mr Arrand had not replied.
- [28] There is no, more recent, evidence as to the whereabouts of the *Larus II*; whether it appears on the register of any country; or in whose possession it might be.
- [29] At this point, it is convenient to make reference to some provisions of the *SRA*.

Shipping Registration Act

- [30] Registration of the *Larus II* was permitted, but not required, by s 14. However, it qualified for registration either because it was "Australian-owned" (in the present case, because it was owned by an Australian national or Australian nationals, and no other person¹);² or it was owned by residents of Australia, or residents of Australia and Australian nationals³.
- [31] A registered ship is taken, for all purposes, to be of Australian nationality⁴.
- [32] By virtue of s 36 (read with s 34), a ship is to be transferred by a bill of sale⁵ made in accordance with the regulations. It would seem that strict compliance is required⁶. The relevant regulation, reg 23 of the *Shipping Registration Regulations 1981 (Cth) (SR Regulations)*, requires the bill of sale to include certain particulars, and to be "duly signed" by the transferor. Section 36(2) then requires that when a

¹ See s 8 of the *SRA*.

² See s 14(a) of the *SRA*.

³ See s 14(b) of the *SRA*.

⁴ See s 29(1) of the *SRA*.

⁵ The expression is not defined in the *SRA*; but see *Malick v Lloyd* (1913) 16 CLR 483, 489-490.

⁶ See *Dalgety and Co Ltd v Aitchison; the "Rose Pearl"* [1957] 2 FLR 219; discussed in *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton* (2005) 143 FCR 43, [173]-[175].

ship is “so transferred”, the bill of sale and declaration of transfer made by the transferee shall be lodged with the Registrar. Section 37A requires, where a ship is transferred to a person by a bill of sale, that the person who has possession or control of the ship’s registration certificate is to deliver it to the person to whom the ship is transferred, who is then required immediately to deliver it to respondent. The respondent is then required to endorse the registration certificate with the particulars of the change of ownership of the ship, and cause it to be returned to the registered agent of the ship.

[33] Section 45 of the *SRA* is of some importance. It is in the following terms:

“45. Powers of disposal by owner

The owner of a ship or of a share in a ship has power, subject to this 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.”

[34] In this section, the reference to the owner is a reference to the registered owner⁷.

[35] The Register is established by s 56 of the *SRA*. Under s 57, it is available for inspection. Under s 58, where, in relation to a particular ship, no entry or amendment has been made in the Register for a prescribed period (thirty days⁸) and the Registrar has reason to suspect that particulars are incorrect, or any information or document in relation to which an entry in the Register is required to be made, has not been lodged within that period, the Registrar may, by notice in writing to the agent or any owner of the ship, require information or documents relating to the ship. A failure to respond requires the Registrar to inform the AMSA. That Authority may then, by notice in writing, give the Registrar directions with respect to the closure of the registration or with respect to any entry or amendment of an entry in the Register.

[36] The applicant’s application is made under s 59, which is as follows:

“s 59 Rectification of Register

(1) If:

- (a) an entry is omitted from the Register;
- (b) an entry is made in the Register without sufficient cause;
- (c) an entry wrongly exists in the Register; or
- (d) there is an error or defect in an entry in the Register;

whether or not by reason of a decision of an officer (including a decision that the officer was empowered by this Act to make) a person aggrieved or the Registrar may apply to the Supreme Court of a State or Territory for rectification of the Register, and the Court

⁷ See the definition of “owner” in s 3 of the *SRA*.

⁸ See reg 29 of the *SR Regulations*.

may make such order as it thinks fit directing the rectification of the Register.

- (2) Without limiting the generality of paragraph (1)(a), the reference in that paragraph to an entry omitted from the Register shall be read as including a reference to a matter that is required or permitted by this Act to be entered, or to remain, in the Register, but is not entered in, or is removed from, the Register.
- (3) A Court may, in proceedings under this section, decide any question that it is necessary or expedient to decide in connection with the rectification of the Register.
- (4) Notice of an application under this section by a person aggrieved shall be served on the Registrar, who may appear and be heard, and shall appear if so directed by the Court.
- (5) An office copy of an order under this section shall be served on the Registrar, and the Registrar shall, upon receipt of the order, rectify the Register accordingly.”

[37] The section relied upon for the closure of the registration is s 66, which includes the following:

“s 66 Ships lost etc. or ceasing to be entitled to be registered

- (1) if:
 - (a) a registered ship is lost (whether actually or constructively), taken by an enemy, burnt or broken up or ceases to be entitled to be registered; and
 - (b) the owner of the ship knows of the event mentioned in paragraph (a);

the owner of the ship must give notice in writing to the Registrar.

- (1A) Subsection (1) does not apply if written notice has already been given to the Registrar.
- (2) Where the Registrar receives a notice under subsection (1) relating to a ship, he or she shall make an entry in the Register of the event to which the notice relates.
- (3) Where an entry has been made in the Register under subsection (2) in respect of a ship:
 - (a) if the entry is in respect of a ship that has been lost (whether actually or constructively), taken by an enemy, burnt or broken up—the registration of the ship shall be deemed to be closed

except so far as it relates to any unsatisfied mortgage of the ship; and

- (b) if the entry is in respect of a ship that has ceased to be entitled to be registered—the registration of the ship shall, subject to this section, be deemed to be closed.
- (4) Where a ship, in relation to which the Registrar has received notice under subsection (1) of an event referred to in paragraph (1)(a) or (b), is subject to an unsatisfied mortgage or mortgages:
 - (a) the registration of the ship, so far as it relates to the mortgage or mortgages, shall, subject to subsections (5) and (6), not be deemed to be closed; and
 - (b) the Registrar shall give notice in writing to the mortgagee, or each mortgagee, as the case may be, that he or she has received notice under subsection (1) of the event so referred to.
- ...
- (10) Where the registration of a ship is closed or deemed to be closed under this section, the person having possession of the registration certificate or provisional registration certificate relating to the ship shall deliver the certificate to the Registrar or a proper officer in accordance with the regulations.”

[38] The reference to the owner of a ship in s 66 is a reference to the registered owner⁹.

[39] Under s 67, the AMSA, if it has reason to suspect the registered ship is not entitled to be registered, may, by notice given to the registered agent, require the furnishing of evidence of the ownership of the ship. If the registered agent fails to furnish evidence to the satisfaction of the AMSA that the ship is entitled to be registered, the authority may direct the registrar to close the registration, and on receipt of such notice, s 66 applies “as if the ship had ceased to be entitled to be registered and the notice were a notice under subsection 66(1) stating that fact”¹⁰.

[40] By virtue of s 74(1A), a person who contravenes s 66(1) is, in respect of each day on which the contravention occurs, guilty of an offence. Under s 74(2) the offence is also committed by the registered agent. A fine is imposed in respect of an offence against s 66(1), by s 74(4B).

[41] Finally, jurisdiction in respect of a grant of relief under s 59 is conferred on this Court by s 81 of the *SRA*.

Was the closure of the registration of the *Larus II* authorised under s 66 of the *SRA*?

[42] For the respondent, it was submitted that the entry made in the register on 11 August 2004 was authorised by s 66 of the *SRA*. Under s 66(3), the making of an

⁹ See s 62 of the *SRA*.

¹⁰ See s 66(2) of the *SRA*.

entry under s 66(2) in respect of a ship that has ceased to be entitled to be registered has the effect that the registration of the ship is deemed to be closed. The direction in s 66(2) to make the entry, in terms, depends on a notice under s 66(1). Section 66(1) refers only to a notice to be given by the registered owner. The respondent's submission is contrary to the natural reading of s 66.

- [43] However, for the respondent it was submitted that s 66(2), notwithstanding its language, extends to a notice given to the registrar from someone else, recognised in s 66(1A). This was said to be the consequence of a purposive of approach to the construction of this section.
- [44] Reliance was also placed on the Explanatory Memorandum for the amendment to s 66 which introduced subsection (1A). That amendment substituted a reworded version of s 66(1) and introduced s 66(1A). The Explanatory Memorandum indicates that the amendment “redrafts s 66(1) to make clear that *knowledge* is the fault element for the physical element of *circumstance*.”
- [45] It might be observed that the Explanatory Memorandum does not explain the introduction of s 66(1A). It is directed to the redrafting of s 66(1). Before the amendment, s 66(1) identified the time when the owner was required to give notice of an event specified in the subsection as “immediately after obtaining knowledge of the event”. The redrafting appears to have been intended to make clear that knowledge was the “fault element”, and not merely a temporal trigger for the obligation to give notice. Before the amendment, s 66(1) created the obligation to give notice “unless notice has already been given to the registrar under this subsection”. That part of the subsection was omitted, and s 66(1A) was introduced, by the amendment.
- [46] As previously mentioned, a failure by the registered owner to comply with the obligation created by s 66(1) is an offence, liable to punishment by a fine. The purpose of s 66(1A), so far as it is apparent in the text of the *SRA*, is to limit the circumstances in which the registered owner would commit an offence. It is not supportive of the respondent's submission.
- [47] The effect of the respondent's submissions is that s 66(2) is to be read as if the words “or under subsection (1A)” were to be added after the reference to subsection (1). It is a relatively strong thing to read into legislation, words which do not appear in it. Further, three conditions which are to be satisfied before words are read into a statute were identified in *Wentworth Securities v Jones*¹¹. Those three conditions are that it must be possible to determine from a consideration of the provisions of the Act read as a whole, precisely what the mischief was that it was the purpose of the Act to remedy; that it was apparent that the draftsman and the legislature had by inadvertence overlooked, and so omitted to deal with, an eventuality that was required to be dealt with if the purpose of the Act were to be achieved; and that it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission.

¹¹ [1980] AC 74, 105-107, cited in *R v Young* (1989) 46 NSWLR 681 at [9]-[10] (*Young*); see also [288]-[294]; [124]; [217].

[48] As will have been apparent, I do not accept that there is a purpose, whether of s 66(1A) or of s 66(2), which would justify reading the latter subsection as if it included a reference to s 66(1A). The purpose of s 66(1A) has previously been discussed. The purpose of s 66(2) is to identify circumstances where the Registrar might make an entry in the Register, the consequence of which is that the registration of a ship should be deemed to be closed. The language of these provisions does not identify a purpose which would support the respondent's submission. Nor does the purpose stated in the Explanatory Memorandum. Thus the first condition is not satisfied, at least in a way which would have the consequence that the second condition is fulfilled. It is not possible to say that there has been an inadvertent omission; nor that some change to the text of the statute has to be adopted if the purpose is to be achieved. Indeed, the other mechanisms found in s 58 and s 67 make this unlikely. Between them, they deal with the circumstances of which notice is to be given under s 66(1)¹². It is a feature of each provision that, before action may be taken in relation to the entry in the Register, notice must be given to the registered agent or the owner. Moreover, these sections effectively place the decision resulting in closure in the hands of the AMSA, not the respondent. It would be inconsistent with the scheme of these provisions that the Registrar would be authorised to act under s 66(2) on notice from any person. Indeed, if the respondent's submission were correct, the language of s 66(2) indicates that the respondent would be compelled to do so.

[49] The *SRA* places the registered owner in the position of considerable power in respect of a ship; the registered owner has the power "absolutely to dispose of the ship...". In view of the benefits of registration, in particular to the owner, it seems to me that s 66 should not be read broadly in a way which would permit that benefit to be lost to the owner, as a result of a notice from some other person.

[50] More generally, the legislation relating to registration of ships reflects a long-held view that there are public policy reasons favouring registration¹³. It does not seem appropriate to give a wider construction to the provisions relating to the closure of registration than the language of the statute requires. Indeed, s 66 applies equally in respect of ships for which registration is required¹⁴ as in cases, like the present case, where registration is permitted¹⁵. Where a ship is required to be registered but is not registered, the owner commits a continuing offence¹⁶. It is not surprising that registration might be closed as a consequence of the receipt of notice from the owner; and equally it is not surprising the legislation only permits closure on receipt of a notice from that person.

[51] In my view, the entry made on the register on 11 August 2004 was not authorised by the Act.

Integrity of register

[52] The respondent relied on this consideration for a submission that relief should be refused, Mr Mentink not having sought to prove that he was the true owner of the *Larus II*. In my view, it is difficult to give weight to this consideration. Prior to the

¹² See s 58(1)(b)(iii) and s 67(1) of the *SRA*.

¹³ See *The Advertising Department Pty Ltd v Ship MV Port Philip & Ors* (2004) 141 FCR 251, 255.

¹⁴ Under s 12 of the *SRA*.

¹⁵ Under s 14 of the *SRA*.

¹⁶ See s 12(3) of the *SRA*.

closure of the registration, the applicant was the only person who under the *SRA* could have transferred title in the vessel to another person; and the only person who could have given a notice which would have permitted the respondent to make an entry resulting in the closure of the registration. The applicant did not give such a notice; and he denies that he transferred title in the vessel. It not having been proven that ownership in the vessel had been transferred, there is no reason to think that the integrity of the register is better protected by refusing relief than granting it.

Absence of parties

- [53] Under Australian law, title to a ship which is unregistered passes in accordance with the general principles relating to the transfer of title in chattels¹⁷. However, as has been mentioned, for a ship which is registered, the registered owner has the power “absolutely” to dispose of the ship¹⁸. The provisions of the *SRA* in a number of respects displace the rules of common law and equity relating to the transfer of ownership of a registered ship¹⁹. If the orders sought by the applicant under s 59 of the *SRA* were made, that could have a significant effect on any other person claiming the ownership of the *Larus II* on the basis of title said to be derived ultimately from Mr Thackray.
- [54] Courts have regularly refused to grant a declaration inconsistent with a status or right which might be asserted by someone who is not a party to the proceedings, even in cases where that person might not technically be bound by the declaration²⁰. While s 59 of the *SRA* identifies only the respondent as a person to be served with notice of an application made under its provisions, it seems to me that there is no reason to think that this was intended to identify exhaustively the necessary parties. Nor does there seem to me to be good reason not to apply the principles that have been adopted in relation to the granting of declaratory relief; and, at least on one occasion, in relation to an application under s 59²¹.
- [55] Accordingly, I am not prepared to grant relief under s 59.

Respondent’s application

- [56] The respondent has applied for an order that the applicant’s originating application be set aside or permanently stayed. At the commencement of the hearing, I invited submissions as to the order in which the applications should be dealt with. Counsel for the respondent submitted that the applicant’s application should be dealt with first. The submission was made, recognising that the determination of the applicant’s application made it unlikely that the orders sought by the respondent would be granted. Accordingly, I propose to dismiss the respondent’s application.

Declaratory relief

¹⁷ See *Bluecorp Pty Ltd v ANZ Executors & Trustee Co Ltd* (1995) 18 ACSR 566, 577.

¹⁸ See s 45 of the *SRA*.

¹⁹ See *General Credits (Finance) Pty Ltd v Registrar of Ships* (1982) 61 FLR 329, 334; see also *Household Financial Services Ltd v Island & River Trading Pty Ltd* (1993) 6 BPR 13, 312 at [15].

²⁰ See PW Young QC, *Declaratory Orders* (2nd ed) at [1002] and cases there cited; see also Woolf and Woolf, *Zamir & Woolf, The Declaratory Judgment* (3rd ed) at [6.06] and [6.07], and cases there cited.

²¹ *General Credits*; and see the judgment of Rares J on the application for security for costs, referred to earlier.

- [57] I propose to invite submissions from the parties whether, in light these reasons, any declaratory relief sought by the applicant should be granted.

Conclusion

- [58] I propose to refuse the applicant's application for rectification under s 59 of the *SRA*; and to dismiss the respondent's application. I shall hear submissions from the parties as to what other orders, if any, should be made in light of these reasons.