

DISTRICT COURT OF QUEENSLAND

CITATION: *Fodico Pty Ltd v The Ship "Intermezzo"* [2019] QDC 64

PARTIES: **FODICO PTY LTD (ACN 010 122 433)**
(Plaintiff)

v

THE SHIP "INTERMEZZO"
(Defendant)

FILE NO/S: D31/18

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court at Mackay

DELIVERED ON: 3 May 2019

DELIVERED AT: Mackay

HEARING DATE: 29 April 2019

JUDGE: Smith DCJA

ORDER: **1. The application is dismissed.**

2. I will hear the parties on the question of costs.

CATCHWORDS: SHIPPING AND NAVIGATION – ADMIRALTY JURISDICTION, LAW AND PRACTICE – extent of admiralty jurisdiction – content of admiralty jurisdiction – actions *in rem* – whether an action *in personam* can be joined

Admiralty Act 1988 (Cth) s 9, s 10

Admiralty Rules 1988 (Cth) r 17, r18

Uniform Civil Procedure Rules 1999 (Qld) r 62, r 74

Explanatory Memorandum to Admiralty Bill 1988 (Cth)

ALRC, *Civil Admiralty Jurisdiction* 33 (1986)

Administración Nacional de Combustibles Alcohol y Portland (ANCAP) v Ridgley Shipping Inc [1996] 1 Lloyd's Rep 570

Brisbane Slipways Operations Pty v Pantaloni and others (2010) 270 ALR 13; [2010] FCA 654

Geraldton Port Authority v Ship "Kim Heng 1888" and Others (No 2) (2012) 291 ALR 471; [2012] FCA 353

Sealawn Pty Ltd v Andirina Pearle [2000] WASC 54

COUNSEL: Dr A. Marinac for the Plaintiff
Solicitors for the Defendant

SOLICITORS: Pacific Maritime Lawyers Pty Ltd for the Plaintiff
Thynne & Macartney for the Defendant

Introduction

- [1] The plaintiff is applying to the Court to join Graham Baker and Melanie Baker as defendants in these proceedings pursuant to rule 62(2) of the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR).

Background

- [2] On 21 December 2017, the plaintiff issued a writ against the ship *Intermezzo* claiming \$41,855.00 together with interest, costs and admiralty marshal's fees and expenses for salvage and recovery services performed on the ship by the plaintiff in or about Shute Harbour between 26 May and 7 June 2017; mooring fees and inspection services rendered to the ship by the plaintiff from 7 June 2017 to the date of the writ.
- [3] Also an application for an arrest warrant was filed.
- [4] The affidavit in support of the arrest warrant¹ affirmed by John Richard Kavanagh stated that the plaintiff was a marine services firm based in Gladstone. The salvage services were performed pursuant to an agreement dated 19 May 2017.² The plaintiff successfully removed the ship from its location stranded ashore in the mangroves at the western end of Shute Harbour where the ship was driven by tropical cyclone Debbie on or about 27 March 2017. The ship was stranded approximately 200 metres from the water. The ship was towed to a safe mooring at Shute Harbour and the plaintiff ensured the ship remained afloat and was not at risk of sinking. The affidavit swore that the relevant person had not paid the moneys owing.
- [5] The arrest warrant was issued on 21 December 2017.³
- [6] A statement of claim was filed on 20 February 2018.⁴ The statement of claim alleges that which is referred to in the affidavit.
- [7] On 9 April 2018, the defendant filed a conditional notice to defend⁵ alleging that the court had no jurisdiction to entertain the claim because the proceedings were subject to an arbitration agreement to have the dispute referred to arbitration in Cairns pursuant to cl 18 of the Vessel Removal Agreement dated 19 May 2017. The defendant sought for the matter to be referred to arbitration in accordance with the Vessel Removal Agreement and that the proceeding be permanently stayed. Further, an application for a stay of the proceedings was filed on 9 April 2018.⁶

¹ Document 3.

² Document 3.

³ Document 4.

⁴ Document 10.

⁵ Document 12.

⁶ Document 11.

- [8] Melanie Baker, the registered owner of *Intermezzo*, affirmed an affidavit on 5 April 2018.⁷ She stated that cl 18 of the Vessel Removal Agreement provided the parties would refer any dispute to arbitration in Cairns in accordance with the arbitration rules of the Maritime Law Association of Australia and New Zealand.⁸ This was the basis for the application for stay.
- [9] The plaintiff filed a cross-application on 17 April 2018⁹ seeking that the defendant's application be dismissed and claiming default judgment, or alternatively, a trial without pleadings, or further in the alternative, that the defendant provide security for the release of the vessel.
- [10] Further, on 17 April 2018, Dennis Toy, a director of the plaintiff applied for a valuation for sale of the ship.¹⁰
- [11] On 16 May 2018, Crow J ordered that the defendant's application be dismissed; the plaintiff's cross-application be dismissed; and that the Marshal engage a yacht broker to value the defendant's yacht in writing and advise as to the method of sale, and to provide each party (as soon as practicable) the recommendations of the yacht broker as to the method by which the yacht should be sold. It was further ordered that the yacht be sold by that method as soon as practicable. No order as to costs were made.¹¹
- [12] A defence and counter-claim was filed by the defendant on 4 June 2018.¹² The following is alleged in the defence:
- (a) That contrary to that alleged by the plaintiff, the Bakers (Melanie and Brian Baker) did not approve the salvage plan in accordance with cl 1 of the Salvage Agreement;
 - (b) That there was not a successful completion under the salvage agreement;
 - (c) That the salvage was not carried out in accordance with the salvage plan because the plaintiff failed to secure the lifting slings which resulted in the slings slipping which caused damage to the hull, including a hole in the portside of the deck rail;
 - (d) That the mast to the deck during salvage was compressed, which overloaded the rigging;
 - (e) That the plaintiff failed to pump the water from the vessel prior to winching;
 - (f) That the plaintiff failed to pump the fuel from the vessel prior to winching;
 - (g) That the plaintiff cut off the rudder of the vessel without notifying the Bakers;

⁷ Document 13.

⁸ Document 13.

⁹ Document 14.

¹⁰ Document 16.

¹¹ Document 18.

¹² Document 19.

- (h) That the failure to remove the water and fuel resulted in further damage to the vessel which necessitated the removal of the rudder;
- (i) That there was a failure by the plaintiff to carry out the salvage agreement in a proper and workmanlike manner and the defendant sought to set off the amount claimed in the counter-claim against the claim of the plaintiff; and
- (j) That the vehicle was not safely re-delivered as alleged by the plaintiff.

[13] In the circumstances it was alleged that the plaintiff breached implied terms of the Salvage Agreement that the work would be rendered with due care and skill and would be reasonably fit for purpose. Alternatively, it was alleged the plaintiff owed a duty of care to the defendant to conduct the salvage at the standard of a reasonably competent marine salvage and recover operator, and carry out the salvage in a workmanlike manner. The implied terms and the duty of care were breached as a result of which the defendant has suffered loss and damage in the amount to be assessed.

[14] The allegations made were denied by the plaintiff by way of reply and answer filed 19 June 2018.¹³

[15] A return of sale was filed on 3 September 2018.¹⁴

[16] The *Intermezzo* was sold pursuant to Supreme Court Orders. The purchase price was \$52,200.00. The balance to be transferred to the Suitors' Fund was \$42,036.74.¹⁵

[17] On 17 December 2018, the plaintiff filed an application to join Graham Baker as a defendant in the proceedings.¹⁶

[18] On 18 February 2019, an amended application was filed by the plaintiff to also join Melanie Baker as a defendant in the proceedings.¹⁷

[19] On 6 February 2019, Dick SC DCJ adjourned the application to be heard on 29 April 2019 and made orders that the parties file submissions.¹⁸

Plaintiff's submissions¹⁹

[20] It is submitted by the plaintiff that proceedings in the admiralty jurisdiction may be commenced *in rem* or *in personam*. The current matter was commenced *in rem* against the ship *Intermezzo*, which has since been sold. The plaintiff submits by commencing the action *in rem*, the plaintiff was barred under rule 18 of the *Admiralty Rules* from commencing any actions against Mr or Mrs Baker *in personam*. However, it is submitted that UCPR rule 62(2) allows the court to join a

¹³ Document 21.

¹⁴ Document 22.

¹⁵ Document 22.

¹⁶ Document 24.

¹⁷ Document 33.

¹⁸ Document 31.

¹⁹ Document 28.

party whose presence is necessary. It is submitted that this rule gives the court the power to join a party.

Submissions of the defendant

- [21] The defendant submits that this is an *in rem* action and Melanie Baker was named in the writ as a “relevant person” within the meaning of that term contained in the *Admiralty Act* 1988 (Cth).
- [22] It is submitted that rule 18 of the *Admiralty Rules* 1988 (Cth) applies and an action *in personam* cannot be joined with the action *in rem*.

Discussion

- [23] Section 9 of the *Admiralty Act* 1988 (Cth) provides:

“Admiralty jurisdiction in personam

- (1) Jurisdiction is conferred on the Federal Court, the Federal Circuit Court and on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of proceedings commenced as actions *in personam*...”

- [24] Section 10 of the *Admiralty Act* 1988 (Cth) provides:

“Jurisdiction of superior courts in respect of Admiralty actions in rem

Jurisdiction is conferred on the Federal Court and on the Supreme Courts of the Territories, and the Supreme Courts of the States are invested with federal jurisdiction, in respect of proceedings that may, under this Act, be commenced as actions *in rem*.”

- [25] Rule 18 of the *Admiralty Rules* 1988 (Cth) provides:

“Separate commencement of in rem and in personam actions

A proceeding commenced as an action *in personam* must not be commenced by the same initiating process as the process by which a proceeding is commenced as an action *in rem*.”

- [26] Rule 17 of the *Admiralty Rules* 1988 (Cth) provides:

“Amendment of process

- (1) The powers of a court in relation to amendment of process and joinder of parties extend to making an order, on such terms as are just:
- (a) substituting for a defendant identified in accordance with subrule 15(2) another person; and
- (b) substituting for a ship another ship.

- (2) If process in a proceeding is amended by substituting for a ship another ship, the proceeding is taken to have been commenced against the other ship at the time specified in the order or, if no time is so specified, at the time when the order was made.”

- [27] Both parties have relied on *Brisbane Slipways Operations Pty v Pantaloni and Others*, which is a decision of Greenwood J in the Federal Court.²⁰
- [28] In *Brisbane Slipways*, the *Aremiti 4* docked in Brisbane in early January 2009. Mr Pantaloni entered into a contract with the plaintiff by which the plaintiff agreed to provide work and labour and supply materials to the ship. The plaintiff demanded payment of \$71,013.60 but this was not paid. On 2 April 2009, the plaintiff commenced proceedings against Mr Pantaloni alleging he breached the contract by failing to pay the money. It also commenced an action *in rem* against the ship on the basis that Mr Pantaloni was a relevant person for the purposes of the *Admiralty Act* 1988 (Cth). The amount of money was paid into court on 7 April 2009 to secure the release of *Aremiti 4*. It was noted at [35] that although Mr Pantaloni had entered an appearance in the proceeding and delivered a defence describing himself as a second defendant, he was not formally a party.²¹ Dowsett J on 31 August 2009 ordered Mr Pantaloni be joined as a defendant in the proceeding and made further consequential orders.
- [29] The plaintiff relies on this decision as justifying the conclusion that the defendants may be joined. The defendant, on the other hand, submits that there does not appear to be any reported judgment with respect to Dowsett J’s decision and one must suspect that neither Dowsett J, nor Greenwood J, had the benefit of submissions referring to rule 18 of the *Admiralty Rules* 1988 (Cth).
- [30] For the reasons which follow, I agree with the defendant’s submission.
- [31] First, there is no reference to rule 18 in the judgment.
- [32] Second, in *Geraldton Port Authority v Ship “Kim Heng 1888” and Others (No 2)*,²² McKerracher J specifically considered rule 18.
- [33] In the *Geraldton Port Authority* case, between 30 September 2005 and 1 October 2005, three ships collided with berths at the Geraldton Port. The port authority commenced proceedings *in rem* against the three ships. The authority then commenced a separate proceeding *in personam* against the charterer. That proceeding was in substance identical to the *in rem* proceedings. The authority applied to discontinue the *in rem* proceedings. The defendants contended the dismissal of those proceedings by virtue of it being out of time would have the effect of dismissing the *in personam* proceedings. An application was made in that regard to the court. McKerracher J noted at [16] that the authority argued there was no abuse of process in commencing two sets of proceedings because of the operation of rule 18. It was submitted the authority could not combine its claims *in rem* and *in personam* in the one proceeding, but had to commence separate proceedings.

²⁰ (2010) 270 ALR 13; [2010] FCA 654.

²¹ (2010) 270 ALR 13, 21.

²² (2012) 291 ALR 471; [2012] FCA 353.

[34] His Honour noted at [18]:

“Similarly it does not appear to be argued and could not be, in light of rule 18 that the existence of concurrent proceedings (one *in rem* the other *in personam*) amounts to an abuse of process.”²³

[35] His Honour then referred to a decision of *Sealawn Pty Ltd v Andirina Pearle*,²⁴ where Bredmeyer M stated:

“I consider it was also not wrong for the plaintiff to have brought two admiralty actions *in rem* in this court... it was not possible to sue Long Cape Investments Pty Ltd *in personam* in the admiralty actions because, by rule 18 of the Admiralty Rules (Cth), a proceeding commenced as an action *in personam* cannot be commenced by the same initiation process as the process by which a proceeding is commenced as an action *in rem*. If it is desired to bring an action *in rem* and an action *in personam*, each action must be begun by separate writs. It is not vexatious or an abuse of process to start an action *in personam* and then later an action *in rem*: Halsbury’s Laws of Australia vol. 17 para 270 – para 2170:²⁵...the vessels could not be arrested in a District Court action and the *in personam* claim for \$26,480.76 could not have been added as a separate cause of action against Long Cape Investments Pty Ltd in the two admiralty actions.”²⁶

[36] It is my opinion that the *Geraldton Port Authority* case answers the question here. It is my view that for an action *in personam* to be brought, it is necessary for the Plaintiff to issue separate proceedings.

[37] An action *in rem* and one *in personam* are quite different. The *Admiralty Act* 1988 (Cth) was passed as a result of the Australian Law Reform Commission’s (ALRC) report into the Civil Admiralty Jurisdiction.²⁷

[38] The ALRC noted that an action *in personam* is unlike one *in rem*, as an action *in personam* confers no security interest in the defendant’s property pending judgment.²⁸ Admiralty proceedings *in personam* are like usual Supreme Court actions.

[39] At [144] of the ALRC’s report it was noted:

“**Separate Actions?** Although an *in rem* action can give rise to *in personam* liability, there remain important substantive and procedural differences between actions *in personam* and actions *in rem*. To take one example, it is not possible to serve a writ *in rem* outside the jurisdiction, whereas a writ or other initiating process *in*

²³ (2012) 291 ALR 471, 475.

²⁴ [2000] WASC 54.

²⁵ Citing *Administration Nacional de Combustibles Alcohol y Portland (ANCAP) v Ridgley Shipping Inc* [1996] 1 Lloyd’s Rep 570, 573.

²⁶ [2000] WASC 54, [5].

²⁷ Explanatory memorandum to the *Admiralty Bill* 1988 (Cth) at page 2, [3]. Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, 33 (1986).

²⁸ ALRC, *Civil Admiralty Jurisdiction*, 33 (1986), [142].

personam will often need to be so served. To avoid confusing the two kinds of proceeding, it is necessary to stipulate in the proposed legislation that an action *in rem* in respect of a particular claim is to be commenced by a separate writ and not joined with an action *in personam* on the same claim in the same originating process.”

- [40] I accept the defendant’s submissions in light of the clear wording of rule 18. The plaintiff will need to issue separate proceedings if it wishes to pursue the natural defendants.
- [41] I dismiss the application.
- [42] I will hear the parties on the question of costs.