FEDERAL COURT OF AUSTRALIA

Programmed Total Marine Services Pty Ltd v The Ship “Hako Fortress” [2012] FCA 805

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| Citation: | Programmed Total Marine Services Pty Ltd v The Ship “Hako Fortress” [2012] FCA 805 |
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| Parties: | **PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476) v THE SHIP "HAKO FORTRESS"****PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476) v THE SHIP "HAKO ENDEAVOUR"****PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476) v THE SHIP "HAKO EXCEL"****PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476) v THE SHIP "HAKO ESTEEM"** |
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| File numbers: |  |
|  |  |
| Judge: |  |
|  |  |
| Date of judgment: | 1 August 2012 |
|  |  |
| Catchwords: | **ADMIRALTY** – interlocutory applications by four defendant ships to set aside writs and arrest warrants in *in rem* proceedings – construction of a tripartite deed between the plaintiff provider of manning services to the defendant ships, the demise charterer and a third party for whom the four ships were being used to carry work whereby the third party would receive an assignment of debt upon payment to the manning service provider – whether the plaintiff had a ‘maritime claim’ against the demise charterer within the meaning of s 4(3)(m) of the *Admiralty Act 1988* (Cth) - whether the manning services were ‘supplied to the vessels’ – whether the demise charterer had the necessary possession and control of the ships at time of the arrests – whether the charter of one vessel was terminated by the shipowner – whether plaintiff had a maritime lien pursuant to s 15(2)(c) of the *Admiralty Act 1988* (Cth) – whether by the operation of the deed and s 20 of the *Property Law Act 1969* (WA) the debt was assigned to the third party  |
|  |  |
| Legislation: | *Admiralty Act 1988* (Cth) ss 4(3)(1), 4(3)(m), 15(2)(c), 18(a), 18(b)*Property Law Act 1969* (WA) s 20  |
|  |  |
| Cases cited: | *Australasian United Steam Navigation Company Limited v Shipping Control Board* (1945) 71 CLR 508*ABC Shipbrokers v The ship “Offi Gloria”* [1993] 3 NZLR 576*Anderson's (Pacific) Trading Co Pty Ltd v Karlander New Guinea Line Ltd* [1980] 2 NSWLR 870*ASP Holdings Ltd v Pan Australia Shipping Pty Ltd* (2006) 235 ALR 554*Banque Financière de la Citè v Parc (Battersea) Ltd* [1999] 1 AC 221*Bofinger v Kingsway Group Limited* (2009) 239 CLR 269*CMC (Australia) Pty Ltd v Ship “Socofl Stream”* (1999) 95 FCR 403*Elbe Shipping SA v The Ship “Global Peace”* (2006) 154 FCR 439*Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch D 234*Foskett v McKeown* [2001] 1 AC 102*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125*“Guiseppe di Vittorio”, The* [1998] 1 Lloyd's Rep 136*James W Elwell, The* [1921] P 351*KMP Coastal Oil Pty Ltd v Owners of Motor Vessel “Iran Amanat”* (1997) 75 FCR 78*Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181*The Petone* [1917] P 198*Port of Geelong Authority v The “Bass Reefer”* (1992) 37 FCR 374*Opal Maritime Agencies Pty Ltd v Proceeds of Sale of Vessel MV “Skulptor Konenkov”* (2000) 98 FCR 519*Owners of Motor Vessel “Iran Amanat” v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130*Owners of the ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404*Sameiet Stavos (OH Meling Rederi) v The “Berostar” (owners)* [1970] 2 Lloyd's Rep 403*“Sparti”, The* [2000] 2 Lloyd's Rep 618  |
|  |  |
| Date of hearing: | 17 May 2012 |
|  |  |
| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 69 |
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| Counsel for the Plaintiff: | AM Stewart SC with JA Thomson |
|  |  |
| Solicitor for the Plaintiff: | Corrs Chambers Westgarth |
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| Counsel for the Defendants: | AW Street SC with TJ French |
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| Solicitor for the Defendants: | Hicksons Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 85 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO FORTRESS"Defendant |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 1 AUGUST 2012 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

1. The defendant’s interlocutory application filed 4 May 2012 is dismissed with costs, to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 87 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO ENDEAVOUR"Defendant |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 88 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO EXCEL"Defendant |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 1 AUGUST 2012 |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 89 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO ESTEEM"Defendant |

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| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 1 AUGUST 2012 |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
|  DISTRICT REGISTRY |  |
|  | wad 85 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO FORTRESS"Defendant |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
|  DISTRICT REGISTRY |  |
|  | WAD 87 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO ENDEAVOUR"Defendant |

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| IN ADMIRALTY |  |
|  DISTRICT REGISTRY |  |
|  | wad 88 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO EXCEL"Defendant |

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| IN ADMIRALTY |  |
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|  | wad 89 of 2012 |

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| BETWEEN: | PROGRAMMED TOTAL MARINE SERVICES PTY LTD (ACN 009 231 476)Plaintiff |
| AND: | THE SHIP "HAKO ESTEEM"Defendant |

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| : |  |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

# INTRODUCTION

1. Applications for dismissal and other relief are brought by the respective defendants in four *in rem* proceedings issued by the same plaintiff (**PTMS**). I propose dealing with all applications in the one set of reasons.

# BACKGROUND

1. The proceedings arise in consequence of the arrest for PTMS of four vessels. The Hako Esteem was arrested on 3 April 2012 with the first notice to the Shipowners of the arrest of the Hako Esteem being on 5 April 2012.
2. The Hako Excel was arrested on the next day, 6 April 2012. Without prejudice negotiations between the parties ensued until 26 April 2012, during which time amended writs were filed on 10 April 2012.
3. The Hako Fortress was arrested on 11 April 2012.
4. The Hako Endeavour was arrested on 16 April 2012.
5. PTMS had supplied manning services including crew to those vessels. It claims it has not been paid for those services. The amount claimed is in the order of $7.5 million. Further amounts are said to have accrued since the proceedings have commenced. PTMS has foreshadowed amending the writs to claim the increased amounts. The manning services and crew have been supplied under a Deed of Continuing Services and Assignment of Debt (**the Deed**) which was executed on or about 7 April 2011. The parties to the Deed are PTMS, Hako Offshore Pte Ltd (**Hako Offshore**) and Boskalis Australia Pty Ltd (**Boskalis**).
6. In the Deed (by both recital A and cl 21), Hako Offshore warranted and agreed that it was the demise charterer of the four vessels. PTMS was to supply its services to the vessels and Hako Offshore was to be primarily liable. All the vessels were being used for work being carried out by Boskalis. Boskalis also agreed that it would pay the amounts due by Hako Offshore for the services on the basis that it would receive an assignment of the debt due by Hako Offshore to PTMS on payment of the amount due to PTMS. The assignment, however, would only occur if and when payment was received by PTMS from Boskalis.
7. PTMS relied upon two grounds to support the arrest. The first was that it has a claim in respect of services supplied to the vessels. This was a general maritime claim pursuant to s 4(3)(m) of the *Admiralty Act 1988* (Cth) (**the Act**). A maritime claim within the meaning of s 4(3)(m) will be enforceable by an action *in rem* pursuant to s 18 of the Act. Secondly, PTMS supports the ground of arrest on the basis that it has the benefit (by reason of subrogation) of a statutory maritime lien of the type described in s 15(2)(c) of the Act for wages of crew members.
8. The owners of the defendant ships (**the Shipowners**) have entered a conditional appearance challenging the validity of the arrest. Insofar as the maritime claim is concerned, the Shipowners contend that:
9. PTMS has no claim under the Deed against Hako Offshore. Rather, it is Boskalis which has a claim against Hako Offshore by reason of the assignment of the debt due from Hako Offshore under the Deed.
10. The second ground advanced is that as a matter of fact, Hako Offshore was not in possession and control of the vessels so as to be a demise charterer at the time of the arrest.
11. The third ground in relation to the maritime claim is that a claim under the Deed should be characterised as a claim in respect of services supplied to Hako Offshore as a party to the Deed rather than as a claim in respect of services supplied to the vessels. (As to the maritime lien argument, the Shipowners contend that as a matter of law, no maritime lien could arise for wages paid to crews supplied to the vessels. Further, PTMS cannot, it is argued, have a maritime lien within the meaning of s 15 of the Act in respect of amounts which it was obliged by the Deed to pay its employees).
12. Interlocutory orders are sought that the writs issued by the Court on 2 April 2012 and any other amended writs be set aside, that service be set aside and arrest warrants concerning the ships be set aside as well as an order that any security provided to PTMS be returned to the defendant. Alternatively, orders are sought that the proceeding be dismissed in whole or in part.

# STATUTORY FRAMEWORK

1. The provisions of the Act arising in this dispute provide (relevantly):

**4 Maritime claims**

…

(3) A reference in this Act to a general maritime claim is a reference to:

…

(m) a claim in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance; or

…

(w) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.

**15 Right to proceed *in rem* on maritime liens etc.**

…

(2) A reference in subsection (1) to a maritime lien includes a reference to a lien for:

(a) salvage;

(b) damage done by a ship;

(c) wages of the master, or of a member of the crew, of a ship; or

(d) master’s disbursements.

**18 Right to proceed *in rem* on demise charterer’s liabilities**

Where, in relation to a maritime claim concerning a ship, a relevant person:

(a) was, when the cause of action arose, the owner or charterer, or in possession or control, of the ship; and

(b) is, when the proceeding is commenced, a demise charterer of the ship;

a proceeding on the claim may be commenced as an action *in rem* against the ship.

# THE DEED

1. It is necessary to consider the arguments, having regard to certain provisions under the Deed which relevantly provide:

5 Marine Manning Services

**5.1 Description**

Marine Manning Services means the supply of personnel by TMS to Hako in accordance with the terms of this document and during the Term.

**5.2 Time and place of supply**

TMS will supply the Personnel listed in the Proposal.

**5.3 TMS to use qualified Personnel**

TMS must ensure that all Personnel are suitably qualified and experienced.

**5.4 Removal and replacement**

**Hako may (acting reasonably) issue a written request to TMS to remove from a Hako Vessel any Personnel who in the reasonable opinion of Hako**:

(a) has engaged in actions amounting to serious and/or wilful misconduct in the performance of his duties; or

(b) is incompetent or negligent in the performance of his duties.

Any decision to remove the Personnel from a Hako Vessel and/or to counsel the Personnel shall be at the absolute discretion of TMS.

**If TMS decides not to remove the Personnel from a Hako Vessel but Hako insists on such removal, then TMS will comply With Hako's request provided** that Hako indemnifies TMS for any and all costs and liabilities incurred by TMS or arising out of or in connection with the removal of the Personnel, including in relation to any alleged unfair dismissal or other employment-related claim.

**TMS may at any time substitute** any of the Personnel with other Personnel who are appropriately qualified and experienced. **Such substitution shall be subject to the consent of Hako which consent shall not be unreasonably withheld**.

**5.5 Personnel are TMS employees or contractors**

**Hako acknowledges that all Personnel are and will remain at all times employees or contractors of TMS**.

…

**5.7 Direction of personnel**

**The Personnel will work under direction and supervision of Hako and Hako will direct such work in a reasonable and lawful manner**.

The Personnel will perform only the duties and functions of the positions and the tasks, if any, set out in the Proposal or other work for which they are qualified and have adequate training.

**Where the Personnel are working on board a Hako Vessel, Hako will maintain operational responsibility for the Hako Vessel at all times**.

**5.8 Provision of facilities and equipment**

**Hako must provide all accommodation, plant and equipment** (including safety clothes and equipment, personal tools, specialised tools and test equipment) and facilities necessary• for the work to be performed by the Personnel other than any which TMS must provide.

TMS must provide all equipment specified in the Proposal as to be provided by TMS.

**5.9 Training**

**Hako must provide any necessary induction and training** which relates to the work place, whether or not it is on board a Hako Vessel, or prior to or upon the Personnel first working for Hako, and TMS will use reasonable endeavours to ensure that the Personnel attend any such induction and training as part of the Services.

Any further or specialist training which may be required is to be conducted at Hako's cost unless otherwise specified in the Proposal.

**5.10 Roster**

The standard duty/leave roster and working hours of the Personnel will be as set out in the Proposal. The Personnel will work in accordance with this roster.

**5.11 Industrial disputes**

TMS acknowledges that it is responsible for maintaining good industrial relations with respect to its Personnel.

In the event of an actual or threatened industrial dispute, ban, limitation of work or denial of facilities or services involving its Personnel, TMS will:

(a) advise Hako and update Hako from time to time;

(b) take reasonable action(s) to bring the dispute to an end in the shortest practicable time; and

(c) endeavour to ensure that its Personnel conform to the provisions of any dispute settling procedure provided for in any applicable industrial award or instrument.

**5.12 Rates for Marine Manning Services**

Hako is liable to TMS for the Marine Manning Services at the rates set out in the Proposal (Rates) for each person for each day, or part day, that such persons are provided to Hako, taking into account their roster, and calculated as set out in the Proposal in the manner and at the times set out in this clause 5.

**5.13 Invoicing**

TMS will invoice Hako fortnightly, copied to Boskalis for the Marine Manning Services provided in that past fortnight. For the avoidance of doubt, each of TMS and Hako agrees and acknowledges that **Boskalis does not assume any liability to TMS, Hako or any other third party under any invoices for Marine Manning Services**.

…

Save as provided above, **TMS will not increase any Rates without the consent of Hako** (such consent not to be unreasonably withheld or delayed) provided that if Hako gives any increase in the rate of pay or loadings or allowances payable to any of Hako's employees which could reasonably be said to have a flow on effect then Hako shall consent to any equivalent increases which TMS (at its discretion) gives to its personnel.

…

6 Catering Services

**6.1 Description**

Catering Services means the supply of provisions and related items for consumption and use by TMS to Hako on the Hako Vessels demise chartered by Hako and operating in Australian waters during the Term.

**6.2 Time and manner of supply**

TMS will supply the Catering Services at the times and in the manner set out in the Proposal.

**6.3 Rates for Catering Services**

Hako is liable to TMS for the Catering Services as set out in the Proposal.

**6.4 Invoicing**

TMS will invoice Hako monthly, copied to Boskalis, for the Catering Services provided in that month, unless the Proposal provides otherwise. For the avoidance of doubt, each of TMS and Hako agrees and acknowledges that **Boskalis does not assume any liability to TMS, Hako or any other third party under any invoices for Catering services**.

…

7 Other Services

**7.1 Description**

…

**7.3 Rates for Other Services**

**Hako is liable to TMS for the Other Services** as set out in the Proposal.

**7.4 Invoicing**

TMS will invoice Hako monthly, copied to Boskalis, for the Other Services provided in that month, unless the Proposal provides otherwise. For the avoidance of doubt, each of **TMS and Hako agrees and acknowledges that Boskalis does not assume any liability to TMS, Hako or any other third party under any invoices for Other Services**.

…

9 Assignment

(a) **In consideration of the receipt by it of each part of the Assignment Fees**, TMS as legal and beneficial owner of the Hako Debt shall be deemed by reason of this clause to assign in law and equity to Boskalis all of its legal and beneficial right, title and interest in the Hako Debt limited in each instance to the amount of debt purchased by Boskalis at that time, with the effect that all such rights, title and interest in the entire Hako Debt will have been assigned by TMS to Boskalis upon receipt by TMS of the full amount of the Assignment Fees (**the Assignment**). **Each Assignment takes place when each part of the Assignment
Fees is paid to TMS**.

(b) TMS agrees and undertakes to take such steps and action as is reasonably required by Boskalis to give full effect to the Assignment including but not limited to:

(i) taking such steps and action as is necessary or expedient to perfect such interest, including but not limited to:

(A) applying to the Court for the transfer of any such interest to Boskalis and/or consenting to such transfer for the purpose of any such proceeding or otherwise and Boskalis agrees to indemnify TMS for such costs (including any adverse costs order) and expenses incurred by it in taking such steps and action; and

(B) giving notice to Hako [Offshore] in accordance with section 20 of the Property Law Act 1969 (WA), which Hako [Offshore] hereby acknowledges and agrees shall constitute due and effective notice to it of the Assignment when such notice is given in accordance with **clause 25.1**; and

(ii) such steps and action in TMS’ own name and/or on the direction of Boskalis as is necessary or expedient to protect or enforce the rights, title and interest of Boskalis under each Assignment and Boskalis agrees to indemnify TMS for such costs (including any adverse costs order) and expenses incurred by it in taking such steps and action. For the avoidance of doubt, Boskalis may under this clause 9(b), require TMS to take such steps as are necessary to arrest any or all of the Hako Vessels including to commence legal proceedings for that purpose, should there for any reason be any restriction or impediment on Boskalis taking such action in its own name or otherwise after any Assignment.

(c) The parties acknowledge and agree that the Assignment is intended to take effect as both a legal and equitable assignment.

(d) During the Assignment Period, each of TMS and Boskalis agrees that it shall not take any steps whatsoever to make demand under, claim, initiate any legal proceedings in any jurisdiction, and/or take any recovery of any kind in respect of the Hako Debt without first providing the other with fourteen (14) days written notice of such action and thereafter participating in good faith in any subsequent discussions with the other in relation to the proposed action. For the avoidance of doubt, **after the payment of the Assignment Fees in full, Boskalis may take any such action at its absolute discretion and without the need to provide any notice to TMS**. This clause does not restrict the rights of TMS under **clauses 22.1 and 22.4** and Boskalis under **clauses 22.3 and 22.4** to terminate this document.

(e) During the Assignment Period, TMS agrees and undertakes not to:

(i) forgive, discharge or release the Hako Debt or any part of it;

(ii) apply any monies in satisfaction or extinguishment of the Hako Debt or any part of it;

(iii) vary, modify or amend the terms and conditions of the Hako Debt including but not limited to granting any extension for repayment of the Hako Debt or any part of it; or

(iv) transfer, assign, encumber or create any other rights in relation to the Hako Debt or any part of it other than in accordance with this document. For the avoidance of doubt, this clause 9(e)(iv) shall not prevent any of TMS and/or Boskalis from applying for and causing the arrest of any or all of the Hako Vessels.

(f) Hako [Offshore] agrees and acknowledges that Boskalis has no liability, responsibility or obligation for any of the debts of Hako [Offshore] and/or Hako Australia and does not by reason of this document assume any such liability, responsibility or obligation.

10 Hako’s [Offshore] continuing debt obligations

(a) **Hako** [Offshore] acknowledges and agrees to TMS and Boskalis that to the extent:

(i) Debt is acquired by Boskalis in accordance with **clause 8(a) and 9**, Hako [Offshore] **remains liable** to Boskalis for that amount; and

(ii) Debt is not acquired by Boskalis, Hako [Offshore] remains liable to TMS.

(emphasis added)

# EVIDENCE ON THE APPLICATIONS

1. The substance of the affidavit evidence is more in the nature of background and I will describe it only briefly. I will refer to the cross-examination when discussing the arguments advanced for the Shipowners. The Shipowners also tendered various financial statements to demonstrate that beneficial ownership of the vessels were held by them.
2. The Shipowners relied on three affidavits of M/s Marjorie Wee, general counsel of Otto Marine Limited (**Otto**), the defendant ships’ managing agent, and an affidavit of Mr Tannie Kwong, solicitor in the employ of Hicksons Lawyers.
3. In his affidavit, sworn on 3 May 2012, Mr Kwong deposes to the ownership of the Hako vessels by reference to the Singaporean registration certificates. The certificates demonstrate that the registered owners of each of the Hako vessels are as follows:
* Eagle 1 Pte Ltd – for the vessel Hako Esteem
* Eagle 2 Pte Ltd – for the vessel Hako Excel
* Eagle 3 Pte Ltd – for the vessel Hako Endeavour
* Dolphin 2 Pte Ltd – for the vessel Hako Fortress
1. Mr Kwong’s affidavit also annexes correspondence between the parties’ legal representatives throughout the period 24 April - 3 May 2012. The correspondence establishes, inter alia:
* Hicksons Lawyers was engaged to act for the Shipowners;
* the Shipowner’s position in relation to the Hako Fortress was that the bareboat charter was terminated two months previously and therefore there was no jurisdiction to arrest the ship at the time of the arrest; and
* negotiations between the parties occurred in relation to the provision of a letter of undertaking by First Capital Insurance on behalf of the Shipowners in return for releasing the vessels from arrest.
1. M/s Wee, in her first affidavit, sworn on 8 May 2012, deposes that Otto and PTMS engaged in serious negotiation for the release of the vessels from arrest. In her second affidavit, also sworn 8 May 2012, she deposes that on 27 April 2009, a standard bareboat charter was entered into for the Hako Fortress between the shipowner, Dolphin 2 Pte Ltd, and Hako Offshore. On 20 October 2011, the shipowner sent Hako Offshore a ‘Notice of Default’ by facsimile. On 1 March 2012, the shipowner sent Hako Offshore a facsimile entitled ‘Notice of Termination and Withdrawal of Vessel’.
2. In her third affidavit, sworn 10 May 2012, M/s Wee deposes that on 26 April 2012, in her capacity as general counsel of Otto, the defendant ships’ managing agent, she had a meeting in Fremantle, Western Australia with PTMS’s legal representative from Corrs Chambers Westgarth.
3. PTMS relied on affidavit and statement evidence of four witnesses going mainly to the question of whether there had been termination of the charterparty for the Hako Fortress. Despite the Shipowners contending that the issues, the subject of the application were ‘ripe’ for determination, each of those deponents was cross-examined.
4. Mr Carsten Pedersen was a Ship’s Master on board the Hako Fortress at the time of making his statement but was not the Master of that vessel at 1 March 2012. At that stage the Master was Mr Robert Edward Friend who was relieved as Master of the vessel by Mr Gary Robert Morrison who in turn was relieved as Master of the vessel by Mr Pedersen. Mr Pedersen confirmed that operational instructions for the vessel were sent to the vessel by way of email. Emails were held in the vessel’s computer. He had access to those emails and control of them. He produced a copy of operational instructions received by the Hako Fortress by way of email in the period of 1 March 2012 to 11 April 2012, 11 April 2012 being the date the vessel was arrested by order of the Court. Those emails, he contended, indicated that Hako Offshore gave operational instructions to the vessel throughout the period 1 March 2012 to 11 April 2012. He confirmed that there was nothing in the daily reports, the vessel deck log or the vessel management visit log to state that the Shipowner’s representative boarded the vessel on or after 1 March 2012 in order to repossess the vessel or for any other reason. He confirmed that the only persons who were not crew who boarded the vessel in that period were Mr Colin Baxter of Hako Offshore on 1, 6, 7 and 8 March 2012 and Mr Nick Hanson of PTMS on 7 March 2012. In that period, the vessel was only alongside Henderson from 6 March 2012 to 9 March 2012.
5. PTMS also rely upon an affidavit of Mr Glenn Phillip Triggs, Chief Executive Officer of PTMS who produced in his first affidavit the Deed and, in his second affidavit, exchanges of emails with Mr Kenneth Loh of Hako Offshore and others on which little of the argument turned.
6. PTMS also relied upon an affidavit of Mr Friend, who described the processes of communications and confirmed that he did not receive in his capacity as Ship’s Master of the Hako Fortress at any of the relevant times any communication from any Hako entity about any change to the ownership, operation, or control of the vessel. Nor did he receive at any time any notification that Hako Offshore was no longer the operator of the vessel or that he was to possess the vessel for, or take instructions from, any party other than Hako Offshore.
7. Mr Morrison was also called for PTMS to give similar evidence.

# THE SHIPOWNERS’ ARGUMENTS

## 1. Not a demise charterer

1. The dominant argument for the Shipowners as developed orally was that Hako Offshore was not the demise charterer. Although the vessel was purportedly in the possession of Hako Offshore Australia Pty Ltd (**Hako Australia**), the Shipowners say that the Master and crew were not in the employ of Hako Offshore. The Shipowners rely on *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181 (at 192); *Anderson's (Pacific) Trading Co Pty Ltd v Karlander New Guinea Line Ltd* [1980] 2 NSWLR 870 (at 872-873); Australian Law Reform Commission Report 33 (at [117], fn 4) (**the ALRC Report 33**) and *Australasian United Steam Navigation Company Limited v Shipping Control Board* (1945) 71 CLR 508 (at 521).
2. The essential argument for the Shipowners is that to be a demise charterer for s 18(b) of the Act, there must be possession and control of the vessel given to an entity so as to be in the position of being the employer of the crew. In the language of Professor Crawford in a footnote in para 117 of the ALRC Report 33 ‘a “demise charterer” … is a person to whom the whole operation and management of the ship has been delegated, who appoints the master and employs the crew’. Alternatively, as expressed by Mr Stuart Hetherington in his book *Annotated Admiralty Legislation* (The Law Book Company Limited, 1989 (at p65)) demise charterers are persons in ‘full control of the commercial operation and navigation of a ship’. In effect, a demise charter is a lease of the ship.
3. Senior counsel for the Shipowners, Mr Street SC, stressed that the cross-examination had made it clear that the Master and crew were not employed by Hako Offshore. Rather, he contended that the cross-examination established that relevant control was effectively by a combination of Hako Offshore, Boskalis and PTMS. That, he contended, deprived PTMS of the benefit of the argument that Hako Offshore held the whole of the possession and control necessary to be a demise charterer. The Shipowners also relied on the acknowledgement in the Deed by Hako Offshore that all personnel ‘are and will remain at all times employees or contractors of [PTMS]’.
4. Although there is a confirmation in the Deed under the heading Background that Hako Offshore was at all material times and remains the demise charterer for the Hako vessels, the Shipowners themselves were not a party to the Deed. Whether the admission in the Deed is true is a question of fact for the Court. The question of whether it is a demise charterer within s 18(b) of the Act will be determined not by what appears in the Deed so much as by what is the true factual position. Nevertheless the content of the Deed is one feature of the factual matrix.
5. In relation to the Hako Fortress, the Shipowners also relied upon the fact that the bareboat charter to Hako Offshore was terminated by notice on 1 March 2012 so that the requirements of s 18(b) of the Act could not be made out as it was no longer a demise charterer. The Shipowners accepted that there is an apparent difference in view on the authorities as to whether or not it is necessary to actually retake possession for the demise charter to be terminated. It is clear in this case, on the evidence, that possession of the Hako Fortress was not retaken.

## 2. Not a maritime claim

1. The Shipowners advanced additional arguments to the effect that PTMS’ claims arise out of a specialty contract, namely, the Deed. They are not therefore claims within s 4(3)(m) of the Act. There was no claim ‘in respect of’ services ‘supplied … to a ship’ nor were there contracts of services within s 4(3)(m). The claim identified in the writ under the Deed was a specialty debt that did not fall within s 4(3)(m) of the Act. The invoices, it was contended, were all consistent with the specialty debt, being pursuant to the Deed. They did not reflect the character of a claim within s 4(3)(m) of the Act. Reliance is placed on the distinction between services supplied to a ship and services supplied to another entity. The Shipowners drew on the distinction made by Foster J in *Port of Geelong Authority v The “Bass Reefer”* (1992) 37 FCR 374 (at 387) which his Honour said ‘Such a facility must be supplied to a ship in a reasonably direct sense and not merely supplied *to* the owner or demise-charterer *for* the ship’.
2. In addition, the Shipowners drew on the observations of the Full Court (Black CJ, Cooper and Finkelstein JJ) in *Opal Maritime Agencies Pty Ltd v Proceeds of Sale of Vessel MV “Skulptor Konenkov”* (2000) 98 FCR 519 (at [119]-[121]) in which, after noting that the question of supply to a ship was a question of fact, their Honours rejected an argument by *Opal* on s 4(3)(m) of the Act as to the absence of any distinction between supply to a ship and supply to a shipowner. Their Honours said (at [121]):

On the contrary, the ALRC affirms that the claim was to cover goods, materials or services supplied or to be supplied to a ship and the language used confirms the existence of a relevant distinction between supply to the ship and supply to the shipowner.

1. There is, it is argued, therefore no maritime lien within s 15 of the Act: see *The Petone* [1917] P 198 (at 208); *The James W Elwell* [1921] P 351 (at 363); *Sameiet Stavos (OH Meling Rederi) v The “Berostar” (owners)* [1970] 2 Lloyd's Rep 403. Accordingly, the proceedings are not ‘on a maritime lien’ within s 15: see *Elbe Shipping SA v The Ship “Global Peace”* (2006) 154 FCR 439 (at [133]) per Allsop J.
2. PTMS made the payments because they had an employment liability. They were discharging that liability. Satisfaction of the crews’ liability in terms of the payment of their wages by PTMS did not create a lien under s 15 of the Act as a matter of principle based on *The Petone*.
3. Further, the Shipowners argued that there is no evidence of any assignment of the lien. The law has set itself against the notion of such assignment for public policy reasons. If the lien cannot be assigned, it cannot be the subject of subrogation for the same public policy reason. See *The “Sparti”* [2000] 2 Lloyd's Rep 618 (at 618); *ABC Shipbrokers v The ship “Offi Gloria”* [1993] 3 NZLR 576 (at 581).

## 3. An assignment

1. Finally, the Shipowners contend that it is clear that there has been an assignment under s 20 of the *Property Law Act 1969* (WA) by the parties to the tripartite agreement through the work done by cll 8, 9 and 10 of the Deed. That section provides:

**20. Assignment of debts and choses in action**

(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim that debt or chose in action, is effectual in law (subject to equities having priority over the right of the assignee), to pass and transfer from the date of the notice —

(a) the legal right to that debt or chose in action;

(b) all legal and other remedies for the debt or chose in action; and

(c) the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.

(2) Where the debtor, trustee, or other person liable in respect of the debt or chose in action referred to in subsection (1) has notice —

(a) that the assignment so referred to is disputed by the assignor, or any person claiming under him; or

(b) of any other opposing or conflicting claims, to the debt or chose in action,

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the debt or chose in action, or pay the debt or other chose in action into court, under the provisions of the *Trustees Act 1962*.

(3) For the purposes of this section ***any debt or other legal chose in action*** includes a part of any debt or other legal chose in action.

 (emphasis in original)

1. Invoices were sent to Hako Offshore (regardless of the fact that it was addressed to Hako Australia) and at the same time to Boskalis. On the expiry of 14 days, Boskalis had to purchase the debt and the invoice was payable by Boskalis to PTMS under the agreement. By purchase of the Hako Offshore debt, Boskalis did not assume any obligation for the invoices issued by PTMS to Hako Offshore. Nothing in the Deed, according to the Shipowners, makes the assignment anything other than absolute in terms of the requirements of s 20 of the *Property Law Act 1969* (WA).
2. Section 20, it is argued, would therefore vest the legal right to sue in the assignee. There was an absolute assignment effected to Boskalis of all the legal and beneficial right, title and interest in the Hako Offshore debt.

## Remaining points

1. The Shipowners accept that there are a number of other issues that will arise in any event, even if the Shipowners were unsuccessful at this stage. This will include matters such as the proper characterisation of expenses and whether they can give rise to a title against the *res*. They emphasise that the position in relation to the Hako Fortress in connection with termination is particularly strong.

# RESOLUTION OF THE ARGUMENTS

1. To the extent I have been required to reach (or not reach) a determination on the demise charter question on the balance of probabilities at this stage, in order to be satisfied that the Court has jurisdiction, at least as the evidence presently stands, I consider that a demise charter has been established. The demise charter debate was the main focus of attention. The argument went directly to the Court’s jurisdiction (see *Owners of the ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 (at 426), *KMP Coastal Oil Pty Ltd v Owners of Motor Vessel “Iran Amanat”* (1997) 75 FCR 78 (at 84A-85E) and *Owners of Motor Vessel “Iran Amanat” v KMP Coastal Oil Pte Ltd* (1999) 196 CLR 130 (at [17]-[18])).
2. Having concluded, on the balance of probabilities, in favour of PTMS on that point (and therefore against the Shipowners) the other arguments are more appropriately dealt with as summary judgment arguments. This is so whether they raise jurisdictional points such as the existence of a maritime claim under s 4(3)(m). There was, as I perceived it, a debate between the parties as to whether the demise charterparty argument was the only argument going to jurisdiction (as PTMS appeared to contend). The Shipowners appeared to contend that all arguments except the assignment argument went to jurisdiction. I accept the submission for PTMS (although I understood it to be advanced in relation to the demise charter argument as well), that the remaining matters should not be determined in a summary manner at a relatively short interlocutory hearing. (‘Short’ having regard to the complexity of the evidentiary and legal issues.)
3. I accept that the more appropriate forum would be within a trial of a preliminary issue as to any outstanding jurisdictional point, where proper relevant discovery has been exchanged enabling more comprehensive presentation of the evidence, including cross examination and arguments.
4. As such, I have reached the demise charterparty conclusion on the balance of probabilities. The other arguments I have treated as being such that it would be necessary to reach the *General Steel* level of confidence as to their correctness (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125). I was not satisfied to the requisite level.
5. I deal with the arguments in the order in which they were first listed by the Shipowners.

## Assignment

1. As to the assignment to Boskalis, pursuant to the Deed, it is clear that Hako Offshore is primarily liable to PTMS for payment for the provision of various types of different manning services. That debt is not assigned by PTMS to Boskalis at any time unless and until Boskalis pays to PTMS the equivalent of the amount due from Hako Offshore. Assignment is effected only when the debt has been paid.
2. On the evidence of Mr Triggs there has been no payment by Boskalis of the amount claimed in the proceedings. As a consequence, Hako Offshore remains liable for the amounts claimed. It cannot be said, therefore, that it is Boskalis rather than Hako Offshore which is liable for the debt by reason of the assignment provision in the Deed.

## Demise charter

1. In my view, on the balance of probabilities and on the evidence as it is presently known, Hako Offshore remained the demise charterer of the vessels (subject to the question of termination of the bareboat charterparty in relation to the Hako Fortress which is discussed separately below). The description of a demise charterer in *“Guiseppe di Vittorio”, The* [1998] 1 Lloyd’s Rep 136 (at 156) was approved by Moore J in respect of s 18(b) of the Act in *CMC (Australia) Pty Ltd v Ship “Socofl Stream”* (1999) 95 FCR 403 (at [28]) where his Honour said:

The expression "demise charterer" should, in s 18(b) of the Australian legislation, be approached on the same footing as the expression "a charterer of the vessel under a charter by demise" in s 21(4) of the UK legislation: see *The "Iran Amanat"* at 563 [20]; 434 [20]. That is, **it should not be narrowly construed and should be construed in a way that enables, in appropriate circumstances, a maritime claim to be pursued by recourse against the vessel and not simply the charterer**. However, even if the expression "demise charterer" in s 18(b) is to be treated as referring to the status of the party, as appears to have been the approach adopted in the *The "Guiseppe di Vittorio"* (see also *The "Tychy"* [1999] 2 Lloyd's Rep 11 at 23 for a consideration of the status of a charterer), **it is a status usually deriving from the contractual relationship between the owner (or a person who is to be treated as the owner) and the charterer**. In my opinion, consistent with the approach of Tamberlin J in *The "Turakina"* and Evans LJ in *The "Guiseppe di Vittorio"*, **it is necessary to ascertain from the terms of the charterparty whether continuing physical possession of a vessel by the charterer (pending the taking of physical possession by the owner either by redelivery or some other means) is coextensive with continuing possession and absolute control of the vessel of the type characteristic of a demise charter**. (emphasis added)

1. The totality of the evidence (notwithstanding the cross-examination), established that the Shipowners put up bareboat charters on The Baltic and International Maritime Council (BIMCO) 2001 form for each of the vessels. In express terms, Hako Offshore was the bareboat charterer in each instance. Hako Offshore warranted and agreed that it was a demise charterer in the Deed in recital A and cl 21. Hako Offshore was, as a matter of fact, contracting for the employment of the crew and the further provisioning of the vessels pursuant to the Deed. Rather than detracting from the existence of Hako Offshore’s demise charter, those actions were consistent only with Hako Offshore being the owner or demise charterer.
2. Clause 2 of the Deed spelt out that PTMS was appointed as exclusive provider of the services to Hako Offshore in accordance with the terms of the Deed. It is a common practice for manning or crewing agents to provide the crew. It is a complicated regulatory environment aboard the vessel, thus the need for specialist crewing agents who provide crew to the vessels which are being operated commercially and navigationally by another entity. Clause 5.5, as noted by the Shipowners, does confirm that the personnel are employees or contractors at all times of PTMS, but in terms of relevant ‘control’, I would give greater weight to the content of cl 5.7, stipulating that the personnel were to work under the direction and supervision of Hako Offshore and Hako Offshore would direct such work in a reasonable and lawful manner and maintain operational responsibility of the Hako Offshore vessels at all times. There are other features of the Deed which support the conclusion as to the demise charter such as the reference to catering services at cl 6 and cl 6.1 which means the supply of provisions and related items for consumption and use by PTMS to Hako Offshore on the Hako Offshore vessels and spelling out that the vessels are demise chartered by Hako Offshore during the term.
3. In relation to insurance, Hako Offshore was to procure and keep in force throughout the life of the Deed with responsible insurance carriers insurance set out in the Deed. Insurance, including marine, hull and machinery insurance is typical for a bareboat charterer. Providing insurance was not the duty of the owner.
4. All of these features of the Deed as well as the practical operation of the vessels lead to a conclusion that Hako Offshore remained a demise charterer but subcontracted a part of the vessels’ services to PTMS.

## The Hako Fortress

1. The Shipowners contend that they terminated the bareboat charter on 1 March 2012 and withdrew the vessel from Hako Offshore on that date. This followed a notice of default given approximately four to five months earlier, on 20 October 2011. There is no light thrown on why it took so long between giving the notice of default and the termination notice. There is no indication or evidence as to whether there were any acts of waiver or acquiescence in the meantime. There is no evidence of any act giving effect to the withdrawal of the vessel such as giving directions to the Master. All of the evidence is to the contrary and it is quite detailed.
2. It was open (in an appropriate circumstance) to the owner to repossess the vessel by its representative boarding the vessel for that purpose.
3. While there is a difference of views on the authorities (see *ASP Holdings Ltd v Pan Australia Shipping Pty Ltd* (2006) 235 ALR 554 (at [12]-[15] on the one hand), compared with *“Socofl Stream”* (at [28]-[30] on the other), it is not appropriate at this stage to attempt to determine which of the approaches is to be preferred. Jurisdiction depends upon particular factual questions, in this case, whether Hako Offshore is a demise charterer and in possession and control of the vessel. That is an issue to be determined on the balance of probabilities (*“Shin Kobe Maru”* (at 426), *“Iran Amanat”* (1997) 75 FCR 78 (at 84A-85E) and *“Iran Amanat”* (at [17]-[18])). It is not appropriate in light of the delay between the notice of default and the termination notice, the absence of evidence as to what occurred in the meantime, the absence of evidence of any act giving effect to the withdrawal of the vessel and the conflict of authorities on the question of whether giving effect to the termination is required, that the no termination submission should be determined in a summary manner at an interlocutory hearing.
4. That said, I consider that for present purposes, there is a deal to be said, with respect, for preferring the analysis by Finkelstein J in *ASP Holdings* (at [12]-[15]) where his Honour said:

12 The second question, whether termination was effected, gives rise to several difficult issues. The first is whether a notice of termination will bring the charter to an end or whether the charter remains on foot until the vessel is repossessed. Unfortunately this is still a controversial topic. In *Patrick Stevedores No 2 Pty Ltd v MV “Turakina”* (1998) 154 ALR 666 (“*The Turakina*”), Tamberlin J held that a demise charter, under which possession and control of the ship had been given to the charterer, could not be terminated by notice alone. He said termination would only occur when the owner retook possession of the ship. In *The “Rangiora”, “Ranginui” and “Takitimu”* [2000] 1 Lloyd's Rep 36, the New Zealand High Court followed that decision, stating that the principle was a rule of the common law. None the less, there is a view that the rule established in *The “Turakina”* may be avoided by careful drafting. In *CMC (Aust) Pty Ltd v Ship "Socofl Stream"* (1999) 95 FCR 403; [1999] FCA 1419 (The “*Socofl Stream*”) it was held that the question whether a demise charter could be terminated without repossession depended upon the terms of the charterparty. The judge, Moore J, said (at 419):

… [I]t is necessary to ascertain from the terms of the charterparty whether the continuing physical possession of a vessel by the charterer (pending the taking of physical possession by the owner either by redelivery or some other means) is co-extensive with continuing possession and absolute control of the vessel of the type characteristic of a demise charter.

He went on to say (at 520) that it:

... is difficult to avoid a conclusion that if a charterparty expressly provided for its termination and the power to terminate was exercised, then the charterer ceased to be a demise charterer from the time of termination at least in the absence of provisions in the charterparty that suggested some other result.

13 Comity requires me to apply *The Socofl Stream* and thus hold that in the case of this charterparty, in particular because of cll 28 and 29, the charter can be terminated on written notice. Clause 28 provides for termination by notice and cl 29 says that when the charter is at an end the charterer is the "gratuitous bailee" of the vessel.

14 If I may say so, this is a troubling conclusion. It is troubling because until the owner actually withdraws the vessel not only does the charterer retain possession, it still mans and supplies her. The problem becomes acute if the notice of termination is served while the vessel is at sea. Applying *The Socofl Stream*, she is not under demise while returning to port. If that be true it may surprise the owner to learn that the master now has ostensible authority to bind it. There is also the possibility that the owner may decide to retake possession at the next port of call or at a convenient port or place, as contemplated by cl 29. The result of the application of *The Socofl Stream* is that the owner has control of the vessel during the voyage. The true position is probably different.

15 I prefer the view that it is not until the vessel has been withdrawn that the demise comes to an end for it is only then that the charterer has lost exclusive possession of the vessel. That the charterparty describes the charterer's possession before delivery as that of "gratuitous bailment" is not to the point. The real relation between the charterer and the vessel cannot be disguised by the use of an inapposite label or description. I appreciate, however, that others take a different view.

1. Essentially this case throws up those practical difficulties to which his Honour directs consideration. Further, it seems that *“Socofl Stream”* was, as a matter of precedent, confined to the drafting of the charterparty terms in that particular case.

## The characterisation of the claim in respect of services

1. The Shipowners contend that the claim under the Deed should be characterised as a claim in respect of services supplied to Hako Offshore as a party to the Deed rather than as a claim in respect of services supplied to the vessels within the meaning of the Act. It is necessary to examine the relevant provisions of the Deed, as set out above (at [12]).
2. The Shipowners’ argument has been raised in a number of different ways but I am unable to accept that the character of the claim is affected by contending that it is a claim in respect of services supplied to Hako Offshore as a party to the Deed.
3. A similar argument was run before Foster J in *The “Bass Reefer”*. His Honour considered the argument and rejected it. While the argument was slightly different, his Honour emphasised (at 385) that the matter must be looked at as at the time when services were supplied. The question is to be determined as at that time as a question of fact, namely, whether was there supply to a ship within the meaning of the subsection. At 387, his Honour said (and I respectfully agree):

In my view, it may be regarded as plain that the use of the term "services" is indicative of an intention by the legislature to cover a wider field of activity than that previously covered by the concept of the supply of "necessaries", although, clearly enough, claims previously held as being for necessaries such as dock dues, canal dues, custom house and immigration service fees, telegrams and disbursements for quay rent would fall within the concept (see Hetherington, *Annotated Admiralty Legislation*, p 47).

I approach the matter, then, in the context that **there is an obvious legislative intent to provide a more expansive area of claim than that comprehended in the supply of goods and materials or "necessaries"**. It is both unnecessary and unwise to essay a comprehensive definition of the term. In my view, it embraces the supply of facilities to a ship not comprehended in the supply of "goods" and "materials" and the other services expressly provided for in the other subsections. The provision of fuel and water may well be obvious examples, unless they can be regarded as goods or materials. Painting and anti-fouling may well qualify. However, I do not see any reason why a service to a ship need be confined to relatively simple matters of this kind. **The making available to a ship of any facility which it needs may well amount to the supplying of a service. Such a facility must be supplied to a ship in a reasonably direct sense and not merely supplied *to* the owner or demise-charterer *for* the ship. Moreover, it must be supplied to the ship "for its operation"**. Both these requirements must influence, in any given situation, the decision as to whether a particular matter can properly be regarded as a "service". (emphasis added)

1. The characterisation of the services requires an assessment of the connection of the services to and with the operation of the vessel. I accept the submission by senior counsel for PTMS, Mr Stewart SC, that it is difficult to conceive of any services more closely or directly connected with the operation of a vessel than the services for manning it in terms of cl 5 of the Deed and for catering and other services supplied under cl 6 and cl 7 of the Deed.

## A maritime lien in relation to wages paid to crew supplied to the vessels in respect of which amounts PTMS was obliged by the Deed to pay its own employees

1. The contention for the Shipowners is that no maritime lien can arise in respect of a payment made by a third party for the wages of crewmembers. Further, it is argued in the alternative, that even if such a lien can arise as a matter of principle, the operation of any such lien was impliedly excluded in this case by reason the obligations under the Deed.
2. Crewmembers have a maritime lien enforceable *in rem* against the ship for unpaid wages (s 15(c) of the Act). The different question arising in this case is whether PTMS, which paid the crewmembers, may be subrogated to the security of the crews’ maritime lien. PTMS emphasise that the effect of the payment of the wages of the ship’s crew is that the ship has benefited from the services provided by the crew. Without this, the ship would not have earned any hire and would not have been protected from damage. However the argument for the Shipowners is particularly driven by the judgment of Hill J in *The Petone* (at 208-209). I am not persuaded that the decision in *The Petone* is now binding authority in Australia almost 100 years later, at least for the contention advanced by the Shipowners.
3. If the decision in *The Petone* is accepted, it follows in the present case that the fact that PTMS paid the wages of the crew for the four vessels does not give PTMS any subrogated claim for a maritime lien against the vessels.
4. I prefer the following arguments made for PTMS.
5. First, the decision of *The Petone* is a single instance decision, which in turn resolved conflicting decisions. It was decided at a time when the provision of crews by a contractor was not as commonplace as in modern circumstances.
6. Secondly, the principle which Hill J applied in *The Petone* to justify his decision was the following (at 208-209):

… I know of no principle of English law which says that one who, being under no compulsion and under no necessity to protect his own property, but as a volunteer, makes a payment to a privileged creditor, is entitled to the rights and remedies of the person whom he pays. That is the position of the plaintiffs. **They chose as volunteers to pay off debts which constituted a marine lien upon the ship. They did not, in my opinion, thereby acquire any maritime lien**. They have, therefore, no right in rem based upon a maritime lien. They have no right in rem independent of a maritime lien. (emphasis added)

1. The following points may be made about this passage:
2. Hill J did not purport to apply any special principle of maritime law to prevent subrogation. For example, he did not rely upon any limits upon the assignability of a maritime lien, or any suggestion that it was inherently personal and only capable of exercise by crewmembers. He spoke more generally of ‘no principle of English law’;
3. at the time of the decision, there was a principle that:

A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment.

*Falcke v Scottish Imperial Insurance Company* (1886) 34 Ch D 234 (at 241) per Cotton LJ. That general rule still exists: *Foskett v McKeown* [2001] 1 AC 102 (at 119);

1. the principle from *Falcke*, however,does not involve payment of a privileged (or secured) creditor by the payer. To this extent, Hill J’s first sentence in the passage quoted goes beyond what was decided in *Falcke* and what was then contemporaneous law;
2. Hill J did not in substance consider the availability of a maritime lien in the light of any principle of subrogation. His reasoning effectively turned upon whether there was an independent claim *in rem* by the third party against the ship. By concluding that there was no independent claim (applying *Falcke*), Hill J reasoned that no subrogated claim could exist where an independent claim by the third party was not available.
3. there is, at least arguably and at least now, a principle in English law that subrogation to the rights of a secured creditor is to be regarded as a remedy to prevent unjust enrichment, and does not necessarily depend upon questions of the intention of the parties: *Banque Financière de la Citè v Parc (Battersea) Ltd* [1999] 1 AC 221 (at 224).
4. the High Court of Australia has accepted that there is a category of case where subrogation of a third party is allowed to securities paid off by that party. The Court explained *Banque Financière* on that basis. However, the High Court did not accept unjust enrichment as a unifying doctrinal basis for explaining all categories of subrogation in Australia: See *Bofinger v Kingsway Group Limited* (2009) 239 CLR 269 (at [97]-[98]).
5. PTMS submits that *The Petone* should not be followed because, in substance, it turned upon false reasoning and, in Australia, subrogation of a third party may be allowed to securities paid off by that party. For the reasons advanced for PTMS, I am satisfied that it is at least arguable that PTMS is entitled to the subrogated benefit of the crew’s maritime lien to the extent of the value of wages paid by PTMS to the crew.
6. I am equally unpersuaded that there is anything in the present contractual arrangements which should detract from this conclusion. Neither the crew nor the Shipowners were parties to the contractual arrangements in the Deed. The crew never waived the security of their maritime lien. PTMS never contractually waived any right to rely upon subrogation to the crew’s maritime lien vis-à-vis the Shipowners.
7. Consequently, PTMS’ contractual obligation to pay the crew has no relevance to whether it may be subrogated to the crew’s maritime lien.

# CONCLUSION

1. For the foregoing reasons, I will dismiss the applications with costs.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 1 August 2012