FEDERAL COURT OF AUSTRALIA

Virtu Fast Ferries Ltd v The Ship “Cape Leveque” [2015] FCAFC 58

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| Citation: | Virtu Fast Ferries Ltd v The Ship “Cape Leveque” [2015] FCAFC 58 |
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| Appeal from: | Virtu Fast Ferries Ltd v The Ship “Cape Leveque” [2015] FCA 324 |
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| Parties: | **VIRTU FAST FERRIES LTD v THE SHIP “CAPE LEVEQUE” (IMO 9684603) AS SURROGATE FOR THE SHIP “JEAN DE LA VALLETTE” (IMO 9559743) (FORMALLY AUSTAL YARD NO. 248), AUSTAL SHIPS PTY LTD and COMMONWEALTH OF AUSTRALIA** |
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| File number: | NSD 302 of 2015 |
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| Judges: | **ALLSOP CJ, MANSFIELD AND MCKERRACHER JJ** |
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| Date of judgment: | 30 April 2015 |
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| Catchwords: | **ADMIRALTY** – arrest of surrogate ship – general maritime claim by purchaser of vessel alleged to be defective against shipbuilder under s 4(3)(n) of *Admiralty Act 1988* (Admiralty Act) – whether purchaser could arrest nearly completed vessel in shipyard of shipbuilder – whether s 19(a) of Admiralty Act satisfied – surrogate vessel under construction not a “ship” for purposes of s 19(a) – ship on delivery not owned by “relevant person” – cause of action said to arise between launch and delivery of ship based on terms implied into construction contract for first vessel not reasonably arguable – upon striking out of that claim, no cause of action by purchaser against shipbuilder when shipbuilder owner of ship  |
|  |  |
| Legislation: | *Admiralty Act 1988* (Cth)*Federal Court of Australia Act 1976* (Cth)   |
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| Cases cited: | *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181*Shagang Shipping Co Ltd v Ship “Bulk Peace” (as surrogate for the Ship “Dong-A Astrea”)* (2014) 314 ALR 230*Spencer v Commonwealth of Australia* (2010) 241 CLR 118 *Owners of “Shin Kobe Maru” v Empire Shipping Inc* (1994) 181 CLR 404 *Ship Hako Endeavour v Programmed Total Marine Service Pty Ltd* (2013) 211 FCR 369*KMP Coastal Oil Pty Ltd v The Owners of the Motor Vessel Iran Amanat* (1997) 75 FCR 78*CMC (Australia) Pty Ltd v Ship Socofl Stream* (1999) 95 FCR 403*Brisbane Slipways Operations Pty Ltd v Pantaloni* (2010) 270 ALR 13 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433*New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] 1 AC 154*European Roma Rights Centre) v* *Immigration Officer: Prague Airport* [2005] 2 AC 1  |
|  |  |
| Date of hearing: | 24 April 2015 |
|  |  |
| Place: |  |
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| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
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| Number of paragraphs: | 58 |
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| Counsel for the Appellant: | Mr GJ Nell SC and Mr JS Emmett |
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| Solicitor for the Appellant: | James Neill Solicitor |
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| Counsel for Austal Ships Pty Limited: | Mr AM Stewart SC and Ms CO Gleeson |
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| Solicitor for Austal Ships Pty Limited: | Norton Rose Fulbright Australia |
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| Counsel for the Commonwealth: | Mr JA Hogan-Doran and Mr Q Rares |
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| Solicitor for the Commonwealth: | HWL Ebsworth Lawyers |
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| **Table of Corrections** |  |
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| 2 June 2015 | The first sentence in para 26 has been replaced with “The word ‘ship’ is defined in s 3 specifically **not** to include a vessel under construction and before it has been launched.” [**emphasis added**] |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 302 of 2015 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | VIRTU FAST FERRIES LTDAppellant |
| AND: | THE SHIP “CAPE LEVEQUE” (IMO 9684603) AS SURROGATE FOR THE SHIP “JEAN DE LA VALLETTE” (IMO 9559743) (FORMALLY AUSTAL YARD NO. 248) First RespondentAUSTAL SHIPS PTY LTDSecond RespondentCOMMONWEALTH OF AUSTRALIAThird Respondent |

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| JUDGES: | ALLSOP CJ, MANSFIELD AND MCKERRACHER JJ |
| DATE OF ORDER: | 30 APRIL 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the second respondent’s costs of the appeal.
3. Absent a consent minute of order, any application for costs by the Commonwealth be filed and served within seven days, together with all supporting evidence and submissions, and if opposed, any submissions and evidence of the appellant be filed and served within a further seven days, such application to be determined on the papers.

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 |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | VIRTU FAST FERRIES LTDAppellant |
| AND: | THE SHIP “CAPE LEVEQUE” (IMO 9684603) AS SURROGATE FOR THE SHIP “JEAN DE LA VALLETTE” (IMO 9559743) (FORMALLY AUSTAL YARD NO. 248) First RespondentAUSTAL SHIPS PTY LTDSecond RespondentCOMMONWEALTH OF AUSTRALIAThird Respondent |

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| JUDGES: | ALLSOP CJ, MANSFIELD AND MCKERRACHER JJ |
| DATE: | 30 APRIL 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# THE COURT

1. This appeal was heard on 24 April 2015. As the decision of the Court was required before 1 May 2015, for reasons which appear below, the Court has principally addressed one only of several issues raised on the appeal. The conclusion reached on that point is sufficient to dispose of the appeal, which, in our view, should be dismissed with costs.

# BACKGROUND

1. On 18 February 2015, the appellant, Virtu Fast Ferries Ltd (Virtu) filed a writ *in rem*, relevantly against the ship *Cape Leveque*, then under construction at the shipyard of the second respondent, Austal Ships Pty Ltd (Austal) in Western Australia. *Cape Leveque*, the first respondent, was said to be a surrogate for the ship *Jean de la Vallette*.
2. *Jean de la Vallette*, a double hulled ferry, was built for Virtu by Austal. She was launched on about 25 April 2010 and delivered to Virtu on 16 August 2010. In 2013, Virtu commenced arbitration in London under the ship building contract for *Jean de la Vallette*, dated 12 March 2009 (the Virtu contract). The arbitration has proceeded to the point of Virtu on 28 June 2013 having delivered its points of claim.
3. *Cape Leveque* is one of eight cape class patrol boats constructed, or being constructed, by Austal under a ship building contract with the Commonwealth dated 12 August 2011, for use by the Australian Customs and Border Protection Service (the patrol boat contract).
4. At the date of the original writ, Austal had completed and delivered four patrol boats, and a fifth was delivered shortly afterwards. *Cape Leveque* will be the sixth patrol boat to be delivered under the patrol boat contract. She was very substantially completed (over 90% of construction and fit out) by 18 February 2015, and the Commonwealth had paid about two thirds of the total sum payable under that contract. She is to be delivered to the Commonwealth, subject to the resolution of this appeal, on 1 May 2015: hence, the urgency in both the claim at first instance and on this appeal.
5. The issues before the primary judge, and on this appeal, concern whether in the circumstances *Cape Leveque* is properly sued as a surrogate ship.
6. The primary claim of Virtu is a general maritime claim under s 4(3)(n) of the *Admiralty Act 1988* (Cth) (the Act) as a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched), namely *Jean de la Vallette*. The points of claim indicate that Virtu asserts that she was not properly constructed, and is now showing significant cracking. It is apparent that the proposed arrest of *Cape Leveque* as a surrogate ship is not made, therefore, in the typical circumstances where a sea-going vessel is said to have caused loss and the surrogate vessel is arrested to better provide security for recovery of the loss, generally where the first vessel is not within the jurisdiction: see the observations of the plurality (Gaudron, Gummow and Kirby J) in *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181 at 195-198.
7. The general maritime claim concerning *Jean de la Vallette* is by her owner against her constructor. The surrogate, *Cape Leveque* is still in the shipyard of the constructor being built for another, entirely unrelated owner or putative owner.
8. It was argued before the primary judge that *Cape Leveque* could not be arrested as a surrogate ship because:
9. at the time of the writ, Austal was not the owner of the Cape Leveque under s 19(b) because she was owned by the Commonwealth, having regard to the terms of the patrol boat contract and the extent to which she had been constructed (found to be about 96% complete) and that the Commonwealth could, if necessary, have obtained an order for specific performance of the patrol boat contract by having her completed, launched and delivered to the Commonwealth;
10. at the time of the writ, the Cape Leveque belonged to the Commonwealth for the same reasons, so s 8(2) prevented her from being arrested: and
11. at the time Virtu’s cause of action arose, either the Jean de la Vallette was –

(i) not a ship, because she was still under construction, or

(ii) was not owned by Austal because she had been delivered to Virtu; and

(iii) in the period between her being launched and being delivered to Virtu, either no cause of action arose in favour of Virtu against Austal, or the cause of action asserted by Virtu against Austal during that period had no arguable prospect of success.

Both at first instance and on appeal, Virtu accepted steps (i) and (ii) of the third issue, so the focus was on step (iii) of that issue.

1. The matter came before the primary judge on an interlocutory application of Austal on the following grounds:
2. the writ, as amended, was invalid or ought to be set aside and the proceedings dismissed on the ground that Austal was not the owner or charterer or in possession or control of *Jean de la Valette* when the causes of action in respect of that ship arose for the purposes of s 19(a) of the *Admiralty Act 1988(Cth)* because*,* first*,* the causes of action asserted in the London arbitration proceedings arose either before *Jean de la Valette* was launched or after she had been delivered to Virtu and, *secondly*, because there was no credible or evidential basis supporting the assertion of any breach of the Virtu contract in the period between the launch of *Jean de la Valette* and her delivery to Virtu;
3. for the purposes of s 19(b) of the Act, Austal was not the owner of *Cape Leveque* on the date of the issue of the writ, 18 February 2015; and
4. *Cape Leveque* was a government ship within the meaning of s 8(4) of the Act, and accordingly, the Court had no jurisdiction in respect of her.

# THE DECISION OF THE PRIMARY JUDGE

1. The primary judge concluded that, at the time of the writ, Austal was not the owner of *Cape Leveque*. The factors referred to above meant that, at that time, the Commonwealth alone had the right of dominion and true ownership of her: applying *Shagang Shipping Co Ltd v Ship “Bulk Peace” (as surrogate for the Ship “Dong-A Astrea”)* (2014) 314 ALR 230. Consequently, s 19(b) was not satisfied. His Honour rejected an alternative contention by Virtu that the ownership was, in a strict legal sense, in Austal and the beneficial ownership in the Commonwealth, both as to the factual premise and because in any event s 19(b) would require both the legal and beneficial owners as “cognate relevant persons” to be the owner and the Commonwealth in that circumstance could not be a relevant person for the purposes of s 19(a) at the time the cause of action arose.
2. Based on the same conclusion as to ownership, the primary judge also said that s 8(2) of the Act would preclude Virtu from proceeding in rem against *Cape Leveque* because it is a government ship, as it belonged to the Commonwealth at the material time.
3. His Honour did not need to, and did not determine the third issue that, in any event, s 19(a) was not engaged by Virtu because its cause of action against Austal for breach of contract, in particular a breach of cl 2.1 and cl 3.1 of the Virtu contract arose either before *Jean de la Vallette* was a ship as defined in s 3, or after *Jean de la Vallette* was transferred to Virtu itself. His Honour described as “more exotic” the alternative claim that the relevant cause of action was the breach of an implied term that *Jean de la Vallette* would not be delivered if Austal knew or believed she might be suffering from widespread or significant latent defects not reasonably discoverable on reasonable pre-delivery inspection, and so a cause of action for breach of contract arose immediately before, and at, delivery when Austal was the owner of that ship. He said he would not have found that term was capable of being implied into the Virtu contract, having regard to the express warranty for defects which appeared in the vessel after delivery.
4. The writ was therefore dismissed with costs.

# THE LEGISLATION

1. Section 3(1) of the Act defines “ship” in the following way:

**3. Interpretation**

(1) In this Act, unless the contrary intention appears:

... *ship* means a vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved, and includes:

1. a barge, lighter or other floating vessel;
2. a hovercraft;
3. an off-shore industry mobile unit; and
4. a vessel that has sunk or is stranded and the remains of such a vessel;

but does not include:

1. a seaplane;
2. an inland waterways vessel; or
3. a vessel under construction that has not been launched.

**4. Maritime Claims**

...

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

...

1. a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched).

**8. Act to bind Crown**

...

(2) This Act does not authorise:

* + - 1. a proceeding to be commenced as an action *in rem* against a government ship or government property;

(4) In this section:

***government*** means the Commonwealth, a State, the Northern Territory or the Administration of Norfolk Island;

*government property* means cargo or other property that belongs to a government, but does not include cargo or other property that belongs to a trading corporation that is an agency of a government;

*government ship* means a ship that belongs, or is for the time being demised or sub-demised, to a government (including such a ship used by or in connection with a part of the Defence Force), but does not include a ship that belongs, or is for the time being demised or sub-demised, to a trading corporation that is an agency of a government.

1. Sections 14 and 19 of the Act provide:

**14. Admiralty actions *in rem* to be commenced under this Act**

In a matter of Admiralty or maritime jurisdiction, a proceeding shall not be commenced as an action *in rem* against a ship or other property except as provided by this Act.

**19. Right to proceed *in rem* against surrogate ship**

A proceeding on a general maritime claim concerning a ship may be commenced as an action *in rem* against some other ship if:

1. a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first mentioned ship; and
2. that person is, when the proceeding is commenced, the owner of the second mentioned ship.

(emphasis added, other than the bold and italics used for identifying the terms defined in the Act and section headings)

# THE ISSUES ON THE APPEAL

1. Virtu’s appeal challenges the conclusion of the primary judge that, at the time of the issue of the writ, the Commonwealth was the owner of *Cape Leveque* for the purposes of s 19(b) of the Act, and in concluding that at that time Austal was not in any way relevant to s 19(b) the owner of that ship. It also challenges the conclusion that the ship belonged to the Commonwealth, and so was a government ship, for the purposes of s 8(2)(a) of the Act. It asserts that, at the time of the writ, that ship was owned by Austal, or alternatively that legal title in that ship was held by Austal, so that it was “the owner” for the purposes of s 19(b) of the Act, and that at that time she did not belong to the Commonwealth.
2. Austal has enlivened its contention at first instance based on s 19(a) of the Act that, in addition, it was not the owner of *Jean de la Vallette* whom the cause or causes of action arose, because they arose only after she was delivered to Virtu, or alternatively before she was launched.
3. The helpful written and oral submissions of counsel for the parties, and for the Commonwealth on the appeal, addressed those three issues, with some refinement and care. As can be seen from the outline of the issues, the matters concerning s 19(b) involve important questions about the meaning and operation of s 19(b) and of the meaning of the phrase “the owner” in the Act.
4. Before turning to their consideration, we note that, at one point, it was suggested that the interlocutory application of Austal at first instance was confined to challenging the proper engagement of the jurisdiction of the Court under s 19. Hence, it was asserted that Austal did not assert that, in respect of the period between the launch of *Jean de la Vallette* and her delivery to Austal, Virtu had no reasonable prospect of successfully making out a cause of action so as to properly engage s 19(a). The amended interlocutory order referred to above appears to have made that assertion, and we were referred to transcript of the submissions before the primary judge which indicates that assertion was made, albeit briefly. Accordingly, we accept that Austal did make such a contention to the primary judge.
5. As we have indicated above, we consider that the appeal should be dismissed. We have reached that view on the basis of the matters raised by Austal in its Notice of Contention that the writ should be dismissed because there are no reasonable prospects of success of making out the assertions relevant to s 19(a) of the Act.
6. Given the urgency with which the appeal required to be heard and determined, we do not propose to deal with the issues concerning s 19(b) and s 8(2)(a) of the Act.

# REASONS FOR CONCLUSION

1. It is not contentious that:
2. prior to her launch, *Jean de la Vallette* was not a “ship” as defined in s 3 of the Act because she was still under construction; and
3. after her delivery to Virtu, in respect of the cause or causes of action properly relied on by Virtu which arose only after that time, s 19(a) is not available to support the writ.

Consequently, it is necessary firstly to consider whether s 19(a) is available to support the arrest of the surrogate ship by reason of a cause or causes of action which arose before her launch. Secondly, it is necessary to consider whether Virtu’s claim against Austal properly includes a cause or causes of action which were between her launch and her delivery to Virtu.

1. Senior counsel for Virtu contended that, assuming a cause of action arose during the construction of *Jean de la Vallette* by Austal, s 19(a) is available to support the writ because Virtu’s claim is a general maritime claim under s 4(3)(n) of the Act, and so that consequence is contemplated.
2. We do not accept that contention.
3. The word “ship” is defined in s 3 specifically not to include a vessel under construction and before it has been launched. Section 4(3)(n) is clearly intended to allow for a general maritime claim of the character now asserted against Austal in respect of defects in her construction. But it does not follow that s 19(a) is therefore to be read so that the term “first-mentioned ship” means a ship including a claim relating to it before it was launched. That would be inconsistent with the definition of “ship”. It would not be consistent with the requirement of s 19(a) that, at the time of the cause of action, Austal was “the owner or charterer of, or in possession or control of” *Jean de la Vallette*. Those words indicate a reference to a ship as defined rather than to a vessel in the process of construction. If a vessel under construction were contemplated to be a “ship” for the purposes of s 19(a), then there would be clear words indicating that. Such a clear indication is given in the definitional jurisdictional description in s 4(3)(n), but is not given in s 19(a). Indeed, a “vessel before it is launched” is a very broad description which could accommodate a vessel at its very early stages of construction, even before it is physically identifiable as a vessel which will ultimately be launched as a ship. So far as we were made aware in the course of submissions, there has been no prior case where a surrogate ship has been arrested in respect of a cause of action which has arisen during the construction of a vessel, and prior to that vessel being launched as a ship.
4. Dr Cremean, in Admiralty Jurisdiction (The Federation Press, 3rd ed, 2008 at 97-98) makes the point that s 4(3)(n) applies only where the vessel under construction has been launched, so as to be a ship, but allows for a general maritime claim in respect of a ship for alleged defects in its construction (including, the learned author says, defective construction which might arise from faulty design or other faulty work). He does not discuss the proposition now put forward on behalf of Virtu.
5. It is consistent with our conclusion that s 17 of the Act providing for a right to proceed *in rem* is given in respect of “a ship or other property” where it applies. It may be accepted that the “other property” expression applies to a wider category of assets than a ship. Neither ss 18 nor 19 provide any equivalent more extensive right to proceed *in rem* in respect of other “property”. Section 17 must, of course, be seen in its own terms (see *Laemthong* at 202-203), but its terms demonstrate a deliberate legislative consideration of the extent to which it permits an action in rem, and so fortifies the view that the use of the word “ship” in s 19 reflects a deliberate legislative consideration of when the arrest of a surrogate ship should be allowed.
6. To address the alternative contention of Virtu, it is first necessary to consider the Virtu contract and to identify clearly how its claim was presented in the Points of Claim in the arbitration.
7. The Virtu contract first provided for Austal to design, construct and launch and deliver *Jean de la Vallette* to Virtu, all in accordance with good international high quality workmanship: cl 2.1. Clause 3 further prescribed for the quality of construction to satisfy applicable laws, regulations and other regulatory standards. During construction, Virtu had rights of inspection: cl 7.1. Sea trials were required before delivery, with a procedure for certification and for Virtu to give notice of non-conformance with specifications: cl 12.1.4.
8. Clause 15.3 provides:

The Vessel shall always be safely afloat at the anchorage or wharf at the Port of Delivery at the time of delivery. Before signing the Protocol of Delivery and Acceptance the Builder shall be responsible to ensure that the Vessel is in a good and orderly condition, ready for service and in all respects at delivery and with clean hull free from any fouling or slime whatsoever.

1. Clause 20 contains Austal’s warranties and guarantees with respect to the vessel, and procedures for notification and remedy of notified defects.
2. Clauses 25 and 26 provide that the proper law of the contract is English law, and for arbitration of disputes.
3. The Points of Claim in the arbitration refer to extensive and severe cracking to various areas of the hull and superstructure of the ship, possibly caused through design defects, construction defects (including secure and systemic welding deficiencies): para 3. The conclusion of the “Summary” paragraph says that Virtu’s claims for damages for breach of contract include losses for the failure properly to repair, and delays in repairing, defects in breach of Austal’s contractual obligations, and damages for the diminution in the value of the ship.
4. Paragraph 8 refers to cl 2.1 and cl 3.1 of the Virtu contract as prescribing the standards to which the ship was to be built, and to cl 20 as prescribing Austal’s contractual obligations to repair and rectify any defects.
5. Paras 14 ff refer to the delivery of the ship, and the discovery of severe cracking thereafter from about May 2011. Para 19 describes the areas of the cracking in the primary structure of the ship. Para 22 refers to defects in design. Para 23 gives detailed particulars of the defects. Paras 24 ff describe Austal’s breaches of its repair obligations, and of breaches of its quality control obligations at the construction stage.
6. To that point, the allegations concern the design and construction of the vessel, during which (as we have concluded) period the vessel was not a ship for the purposes of the definition of “ship” in s 3 or for the purposes of s 19(a) of the Act.
7. Under the subheading “Austal’s breaches of duty in tendering Vessel for delivery despite knowing that it suffered from extensive welding defects and deficiencies” are paras 33-38, upon which Virtu placed reliance to assert that it had pleaded a cause of action which arose between the launch and the delivery of the vessel.
8. Paragraph 33 reads:

It was an implied term of the Contract (implied in order to give the same business efficacy) that Austal would not tender the Vessel for delivery to Virtu in the event that Austal knew or believed that it might be suffering from widespread and/or significant latent defects which Virtu would not be able reasonably to discover on any pre-delivery inspection.

1. Paragraph 34 asserts alternatively a representation by conduct, or impliedly, that:

... it (Austal) did not know or believe that the Vessel might be suffering from any widespread and/or significant latent defects which Virtu would not be able reasonably to discover on any pre-delivery inspection.

1. Paragraph 35 asserts that at the time the ship was tendered to Virtu:

... Austal knew or would have known of at least some of the defects or deficiencies in the machine welds in at least part of the vessel; and that therefor there was at least a risk that such defects or deficiencies…might be present throughout the welds in the ship.

1. The Particulars do not support the allegation of knowledge, but refer to what Austal “would have seen” from offcuts of the planking or if it had done certain more complex testing which it “would have, or alternatively ought to have done” during construction and prior to delivery.
2. Paragraphs 36-38 plead that Austal “in breach of duty” did not inform Virtu at the time of delivery that the ship might be suffering from widespread latent defects, and that if it had done so Austal would not have accepted delivery at that time.
3. The remainder of the Points of Claim relate to the issue of damages.
4. It is alternatively said on behalf of Virtu that cl 15.3 of the Virtu contract was breached at the time of delivery of the ship, when Austal was clearly the owner of the ship.
5. The short answers to that last contention, in our view, are:
6. cl 15.3 and its alleged breach is not relied upon in the Points of Claim, and as the writ seeks security against a surrogate ship as security for the satisfaction of any award made in the arbitration, the security it seeks under s 19 cannot be in respect of any liability of Austal to Virtu for breach of cl 15.3 of the Virtu contract; and
7. in any event, as probably recognised by the fact that cl 15.3 is not referred to in the Points of Claim, cl 15.3 is clearly not a contractual term which would be contravened if the defects asserted are made out, as it is to do with the presentation and seaworthiness of the ship at that time. The obligations about the quality of design and construction are addressed elsewhere in the Virtu contract.
8. As to the alleged breach of implied terms after launch and in the period immediately before delivery of *Jean de la Vallette*, when it is clear that Austal was the owner of that ship, Austal contended that:
9. as a jurisdictional fact to support the enlivening of s 19(a), it is necessary that Virtu show an arguable case that such a cause of action may be made out and it has not done so; and alternatively
10. the claim based upon such a cause of action should be summarily dismissed under s 31A of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) as the Court should be satisfied that Virtu has no reasonable prospect of successfully prosecuting that part of its claim, as there is no credible evidential basis to support the assertion and Austal, through the unchallenged affidavit of Samuel Abbott positively and specifically refutes that Austal or its officers had any such knowledge, or suspicion, that the latent defects asserted did or might exist.
11. In *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 at 138-141 [49]-[60] Hayne, Crennan, Kiefel and Bell JJ explained the operation of s 31A of the FCA Act in terms which we, of course, apply on the present appeal.
12. The first question is to address how the existence of jurisdictional facts is to be decided. The High Court in *Owners of “Shin Kobe Maru” v Empire Shipping Inc* (1994) 181 CLR 404 at 426 (*Shin Kobe Maru*) and later in *The Iran Amanat* at [16]-[20] and at [22] addressed that question. In the *Shin Kobe Maru*, the Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) said at 426:

Where jurisdiction depends on particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. And, of course, they must be established on the balance of probabilities in the light of all the evidence advanced in the proceedings held to determine whether there is jurisdiction.

1. In the *Iran Amanat*, the Court (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ) said that the proper assessment of a jurisdictional challenge does not depend on whether the plaintiff’s claim is likely to succeed, drawing a distinction between the “conditional nature of the inquiry raised by the definition of ‘relevant person’ and the unconditional nature of the inquiry raised by paras (a) and (b) [of s 19]”. In that case, there was no summary dismissal application: see at [20]. See also the discussion by Rares J of the issue in *Ship Hako Endeavour v Programmed Total Marine Service Pty Ltd* (2013) 211 FCR 369 at [37]-[42].
2. Having regard to the undisputed jurisdictional fact that Austal was the owner of *Jean de la Vallette* during the period between her launch and her delivery, it is not clear that Virtu additionally has a positive obligation to adduce evidence that it has a cause of action, based upon the alleged implied term or misrepresentation and their asserted breach, which is sufficiently sound to maintain that cause of action to justify the proposed arrest of a surrogate vessel as part of establishing jurisdictional facts. There is certainly, on the other hand, dicta that the remedy of surrogate arrest is a serious one which should be granted only after careful and proper consideration: *KMP Coastal Oil Pty Ltd v The Owners of the Motor Vessel Iran Amanat* (1997) 75 FCR 78 at 85; *CMC (Australia) Pty Ltd v Ship Socofl Stream* (1999) 95 FCR 403 at [37]; *Brisbane Slipways Operations Pty Ltd v Pantaloni* (2010) 270 ALR 13 at [104].
3. In any event, it is our view that on the material available, those two causes of action have no reasonable prospect of succeeding, and so – to the extent that the writ seeks to enliven s 19(a) by reference to them. The writ should be dismissed under s 31A of the FCA Act.
4. There is no identified requirement of business efficacy which would support the implication of a term of the character referred to in para 33 of the Points of Claim. The obligations of Austal in the design and construction of the vessel are explicit in the Virtu contract, and are identified and pleaded in the Points of Claim. The assertion of the obligation to disclose the possible existence of latent defects is not one which, routinely business efficacy would require. To the extent that it is said that Austal knew of the latent defects, there is no particular in the Points of Claim which would support such an assertion. To the extent that it is said that Austal had a belief about the existence of latent defects, again there is no particular in the Points of Claim which would support such an assertion. The asserted representation in para 34 of the Points of Claim that Austal did not know or believe that the ship might be suffering from latent defects is not, of itself, a basis for asserting a cause of action. The critical assertion to that in para 35 of the Points of Claim is that Austal “knew or would have known” or “ought to have known” of the asserted latent defects. The assertion of knowledge is not supported by the particulars, and the assertion that Austal “would have known” is not, in its context, more than an assertion of knowledge. If, as the particulars assert, the carrying out of further or different inspections during the course of construction would, or may have, exposed the risk of “latent defects”, then the real allegation – if it is to succeed – is the failure during construction to carry out those inspections in accordance with the contractual requirements. It would give rise to a cause of action at the time of that failure. If there is not a contractual obligation to have carried out those inspections, given the detailed character of the express obligations in the Virtu contract, it would not be the case that more refined and explicit inspections should have been taken by implying that obligation into the contract. In any event, the breach of any such implied term would give rise to a cause of action during the construction phase. The governing law was English law. Thus, no recourse can be had to some governing or over-arching principle of good faith that may affect the proper approach to the implication of the terms: *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439; *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] 1 AC 154 at 167 and see the discussion in *R (European Roma Rights Centre) v* *Immigration Officer: Prague Airport* [2005] 2 AC 1 at 50-51 [59]-[60]. No such argument was put and no such matter is pleaded in the arbitration.
5. In our view, those reasons lead to the conclusion that the causes of action of Virtu pleaded in paras 33-36 of the Points of Claim have no reasonable prospect of succeeding, and the writ to the extent that it relies upon those causes of action to sustain the claim in rem must be dismissed.
6. The interlocutory application of Austal at first instance was supported by the affidavit of Samuel Abbott, who was at the time of construction of the vessel *Jean de la Vallette*, the Structural Design Manager. He has been involved in the investigation and repair and remediation of the cracks in her, since they were reported. Apart from producing the builder’s certificate and the certification of technical acceptance, and the protocol of delivery and acceptance, all dated 16 August 2010 (the date of delivery), he deposes to the fact that, at the time of delivery, he had no knowledge of any of the defects in the vessel of which Virtu now complains, and was unaware of anyone at Austal who had any such knowledge.
7. It is accepted that there is no evidence which Virtu produced which might contradict his evidence. As it is unchallenged, it adds to the assessment of whether the claim based upon those two causes of action has a real prospect of success. It fortifies the conclusion we have reached.
8. Accordingly, as we would summarily dismiss the cause of action based on those two causes of action (as the primary judge indicated he was also disposed to do) the appeal must be dismissed. Virtu should pay Austal’s costs of its appeal. The Commonwealth was joined as a party on 5 March 2015. It was described as an intervenor in the judgment below. The primary judge did not award any costs in its favour. If the Commonwealth has any application for costs, it should make it on notice for a variation of these orders.
9. It should go without saying that the fate of this appeal concerns only the claim by Virtu under s 19 to effect the arrest of *Cape Leveque* to better source recovery of its general maritime claim against Austal. That claim will of course continue to be available, through the arbitration referred to.

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| I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices Mansfield and McKerracher. |

Associate:

Dated: 30 April 2015