FEDERAL COURT OF AUSTRALIA

Virtu Fast Ferries Ltd v The Ship “Cape Leveque”  
[2015] FCA 324

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| Citation: | 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 VALETTE" (IMO 955743) (FORMERLY AUSTAL YARD NO 248)** |
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| File number: | NSD 131 of 2015 |
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| Judge: | **RARES J** |
|  |  |
| Date of judgment: | 20 March 2015 |
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| Catchwords: | **ADMIRALTY** – arrest of surrogate ship – whether builder of nearly complete specialised ship or government purchaser was owner of ship for purposes of s 19(b) of the *Admiralty Act 1988* (Cth) – whether purchaser of a ship had right to obtain order for specific performance of a contract for construction of the ship – where government had paid substantial sums to builder of multiple ships under contract and no dispute existed as to government’s entitlement to order for specific performance of contract of next nearly complete ship – whether builder was legal owner of ship –effect of separate legal and beneficial ownership of a ship for the purpose of establishing in rem jurisdiction under the *Admiralty Act* – whether ship was a government ship within the meaning of s 8 of the *Admiralty Act* |
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| Legislation: | *Admiralty Act 1988* (Cth) |
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| Cases cited: | *Astley v Austrust* (1999) 197 CLR 1  *Euroceanica (UK) Limited v The Ship “Gem of Safaga”* (2009) 182 FCR 1  *Re Aro Co Limited* [1980] Ch 196  *Shagang Shipping Co Limited v Ship “Bulk Peace” (as surrogate for the Ship “Dong-A Astrea”)* (2014) 314 ALR 230  *Tanwar Entreprises Pty Limited v Cauchi* (2003) 217 CLR 315  *Tisand Pty Limited v Owners of the Ship MV “Cape Moreton” (ex “Freya”)* (2005) 143 FCR 43  *Wolverhampton Corporation v Emmons* (1901) 1 KB 515  *York House Pty Limited v Federal Commissioner of Taxation* (1930) 43 CLR 427 |
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| Date of hearing: | 20 March 2015 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 51 |
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| Counsel for the Plaintiff: | GJ Nell SC and JS Emmett |
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| Solicitor for the Plaintiff: | Aus-ship Lawyers |
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| Counsel for the Defendant: | AM Stewart SC and JG Simpkins |
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| Solicitor for the Defendant: | Norton Rose Fulbright Australia |
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| Counsel for the Intervener: | JA Hogan-Doran |
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| Solicitor for the Intervener: | HWL Ebsworth |

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| **Table of Corrections** |  |
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| 9 June 2015 | On the second page of the cover sheet in the heading Counsel for the Plaintiff the words “and JS Emmett” after “GJ Nell SC” have been added. |
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|  | On the second page of the cover sheet in the heading Counsel for the Defendant the words “and JG Simpkins” after “AM Stewart SC” have been added. |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 131 of 2015 |

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| BETWEEN: | VIRTU FAST FERRIES LTD  Plaintiff |
| AND: | THE SHIP "CAPE LEVEQUE" (IMO 9684603) AS SURROGATE FOR THE SHIP "JEAN DE LA VALETTE" (IMO 955743) (FORMERLY AUSTAL YARD NO 248)  Defendant |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 20 MARCH 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The writ be dismissed.
2. The plaintiff pay the costs of the relevant person, being Austal Ships Pty Ltd.

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

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| IN ADMIRALTY |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
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| JUDGE: | RARES J |
| DATE: | 20 MARCH 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

**(REVISED FROM THE TRANSCRIPT)**

1. On 18 February 2015, **Virtu** Fast Ferries Ltd filed a writ *in rem* against two ships, ***Cape Jervis*** and ***Cape Leveque***, each of which was under construction, as surrogates for the ship, ***Jean de la Valette***. All three ships had been built at **Austal** Ships Pty Ltd’s yard at Henderson in Western Australia.
2. *Jean de la Valette* was launched on about 25 April 2010 and delivered to Virtu on 16 August 2010. In 2013, Virtu commenced an arbitration in London under the ship building contract for *Jean de la Valette*, dated 12 March 2009 (**the Virtu contract**) and, on 28 June 2013, delivered its points of claim in the arbitration.
3. On 12 August 2011, Austal entered into a shipbuilding contract with the Commonwealth to build eight cape class patrol boats for use by what is now the Australian Customs and Border Protection **Service** (**the patrol boat contract**).
4. As at 18 February 2015, the date Virtu filed of the original writ, *Cape Leveque* was about 96% complete, in accordance with the requirements of the patrol boat contract, and *Cape Jervis* was about 99% complete. At that time the Commonwealth had paid Austal $199.8 million, or about 67%, of the total patrol boat contract price of $296.7 million. Earlier, four patrol boats had been completed and delivered. *Cape Jervis* was due for delivery on 2 March 2015.
5. On 9 March 2015, Virtu filed an amended writ, deleting any claim against *Cape Jervis*. The sole surrogate ship now named in the amended writ is *Cape Leveque*. Austal delivered *Cape Jervis* under the patrol boat contract on 10 March 2015 and the Commonwealth paid the further sum due, on that occurrence, of about $11.65 million.

## The issues

1. Austal filed an interlocutory application, which it later amended, in support of its present claim to strike the writ out on the grounds that:
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 legislative scheme

1. The Act relevantly provides:

**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:

(a) a barge, lighter or other floating vessel;

(b) a hovercraft;

(c) an off-shore industry mobile unit; and

(d) a vessel that has sunk or is stranded and the remains of such a vessel;

but does not include:

(e) a seaplane;

(f) an inland waterways vessel; or

(g) **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:

…

(n) 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:

(a) 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.

**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:

(a) 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

(b) 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)

1. These proceedings have been heard urgently today, and I have had the benefit of full argument and detailed written submissions. The Commonwealth intervened to support Austal’s position. In my opinion, the proceedings can be disposed of on a narrow ground, namely, that at the date that the writ was filed, Austal was not the owner of *Cape Leveque* within the meaning of s 19(b) of the Act.

## The patrol boat contract

1. Clause 1.5.1 of the patrol boat contract provided that in consideration of the **total contract price** and any other payment due under it, Austal had, among other obligations, to design, manufacture, produce, verify, validate and deliver each patrol boat and all supplies necessary and incidental to each patrol boat, perform and undertake all activities, achieve all of what were defined as **milestones** and outcomes and comply with the specifications and requirements detailed in the statement of work.
2. Clause 4.2.1 provided that Austal “must not register, or take any action relating to registering, any [patrol boat] (including for trials or any purpose) prior to provision of the [patrol boat] to the Commonwealth”.
3. Clause 8.1.1 required Austal to deliver **supplies**, defined as goods and services, under the patrol boat contract including items acquired in order to be incorporated into those supplies. Clearly enough, the supplies, as defined, included the patrol boats.
4. Austal’s obligation to provide the supplies in accordance with the patrol boat contract, included meeting any milestones, defined as events or series of events for which it was responsible, was specified in **attachment B** to the contract that I will describe shortly. Clause 8.3 dealt with ownership and risk, relevantly stating in cll 8.3.1 and 8.3.2:

**8.3 Ownership and Risk**

8.3.1 Subject to clause 7, **ownership of Supplies or partially completed Supplies shall pass to the Commonwealth**:

a. **when the Supplies or partially completed Supplies are included in a Milestone, upon payment of a claim for that Milestone in accordance with clause 10.1.3**; or

b. when the Supplies or partially completed Supplies are not included in a Milestone or which are provided through Ad-Hoc Services, on payment of a claim relating to those Supplies in accordance with clause 10.2;

8.3.2 The Contractor shall ensure that, at the time ownership of any item of Supplies passes to the Commonwealth, those Supplies shall be free of any registered or unregistered charge, lien, mortgage or other encumbrance. (emphasis added)

1. Under cl 8.6.1, if Austal sought payment of a milestone, it had to complete and present a signed milestone progress certificate that certified that the milestone had been achieved in accordance with the patrol boat contract, and provide any supporting information required by the Commonwealth to verify those matters. Clause 10 dealt with price and payment and cll 10.1.1 and 10.1.2 as follows:

**10.1 Price and Price Basis**

10.1.1 The Total Contract Price is the total of:

a. the Acquisition Phase Contract Price set out in Attachment B plus the cost of any Ad-Hoc Services relating to the Acquisition Phase; and

b. the total cost of all ISS Phase Supplies are determined in accordance with Attachment B-1 including the cost of any Ad Hoc Services relating to the ISS Phase.

10.1.2 **Notwithstanding any other provision of this Contract, the Commonwealth shall not be obliged to make any payment unless and until the Contractor has complied with all provisions of this clause 10 relevant to the claim for payment.** (emphasis added)

1. Clause 10.2.1 provided that if Austal had achieved a milestone for which payment could be claimed, it could submit a claim for payment. Clause 10.3.1 dealt with what was required for such a claim, and the balance of cl 10 dealt with other matters to do with claims.
2. Clause 11.2 gave the Commonwealth a right to “step-in” by giving a notice to Austal in writing if Austal was in breach of a material obligation under the patrol boat contract. Such a breach would occur if the Commonwealth had issued Austal with a notice requiring it to remedy the breach and Austal had not done so within a reasonable time. The Commonwealth could also “step-up” at its absolute discretion where it considered that it was necessary or desirable to do so because, among other things, it was in Australia’s national interests.
3. Attachment B to the patrol boat contract consisted of a price and payment schedule that specified a series of milestones and the amounts payable upon their achievement. **Attachment C** set out a delivery schedule that defined the milestones. The first three milestones required that the Commonwealth pay to Austal, *first*, about $12.6 million for contract signature and mobilisation or about 4.5% of the total contract price on entry into the patrol boat contract, *secondly*, similar sum of about $12.7 million three months later for preliminary design review, and, *thirdly*, after a further six months, about $26 million, or 9.3% of the total contract price, for the critical design review. Up until the third milestone, Austal had no obligation to deliver any of the patrol boats. Upon the first patrol boat being ready for delivery, the next milestone provided that if she were ready, the Commonwealth had to pay Austal $53.5 million. or 19.2% of the total contract price.
4. On 21 December 2012, during the course of the contract period, the Commonwealth and Austal entered into a supplementary deed of **agreement** under which they agreed that Austal would accelerate the laying of hulls for the second, third and fourth patrol boats but delay their complete fit out until the scheduled milestone times the original attachments B and C. Those attachments were amended to provide: additional milestones for some accelerated steps and payments, further substituted milestones for delivery of each of the three accelerated patrol boats and payment of the balance of the amounts originally due at those times.
5. Originally, the patrol boat contract provided that when the completed second patrol boat (which became the first of the three accelerated ships) was delivered, there would be a milestone that required the Commonwealth to pay Austal $42.3 million or 15.2% of the total contract price. When the third ship was delivered the original milestone provided that $28.8 million became payable, or 10.3% of the price. When the fourth ship was delivered, the original milestone provided that the Commonwealth pay $11.5 million, or 4.13% of the price.
6. Under the acceleration agreement the Commonwealth agreed to pay 20% of the original delivery date milestone payment for the first patrol boat on signing of the acceleration agreement, a further 20% on her launch and the remaining 60% on her acceptance. When construction of each of the second, third and fourth patrol boats reached a point that the parties termed the **preserved state**, the Commonwealth had now to pay (no earlier than 1 July 2014, in respect of the third and fourth) 70%, 75% and 75% respectively of the original delivery milestone payments and the remaining balances on acceptance of each ship. Originally, the delivery milestones for those three patrol boats had been fixed for 19 May 2014, 15 September 2014 and 15 December 2014. Hence, Austal had to begin work early on the second, third and fourth patrol boats and would be paid early a substantial proportion of the previous milestone payments that had initially been due only on delivery of the completed ships.
7. The unaltered milestone for *Cape Jervis* provided that when she was delivered and the Commonwealth accepted her, it would pay a further $11.65 million, or 4.17% of the total contract price. The next milestone for *Cape Leveque* is due to be achieved on 1 May 2015, and if she is in a condition that, when delivered she is accepted, the Commonwealth then will have to pay about $11.77 million, or 4.22% of the price. There are two subsequent milestones for delivery of the remaining two patrol boats due after that, for each of which about $11.9 million will be payable. A final acceptance milestone requires payment to Austal of the outstanding balance of a further $44.6 million, about 16% of the total contract price.

## The parties’ submissions as to ownership of *Cape Leveque*

1. Both the Commonwealth and Austal argued that regardless of whether Austal was the legal owner of *Cape Jervis*, the Commonwealth had a right to specific performance of the patrol boat contract, which was subsisting, as at the date of the issue of the writ. They contended that there was no basis on which the Court would refuse to make an order for specific performance. Thus, they submitted, the interest of the Commonwealth, as purchaser of *Cape Leveque* under the patrol boat contract, was that of a beneficial owner with the right to compel the complete performance of the contract.
2. Virtu argued that the Commonwealth was not entitled, at the present time, to specific performance in relation to *Cape Leveque* or its acquisition of that ship. That was because, it contended, the Commonwealth had not paid for her, or tendered payment for the relevant milestone due to be reached on 1 May 2015 in respect of her delivery and acceptance. Virtu argued that there were several steps that the patrol boat contract required before *Cape Leveque* would be offered for testing and acceptance, including verification of requirements as to how she had been completed and her readiness to sail. Those included the preparation of a supplies acceptance certificate by Austal under cl 8.7.6, the certification of the supplies by the Commonwealth under cl 8.7.7, together with the preparation and submission by Austal of the claim for the milestone payment, with necessary accompanying documents under cl 10.3.1. Virtu contended there was no evidence that any of those requirements had been met, and that they could not have been regarded as having been for the sole benefit of the Commonwealth. In those circumstances, Virtu submitted, the Commonwealth could not have been granted an order for specific performance and, thus, could not have been the owner of *Cape Leveque* at 18 February 2015, when the writ was filed.

## Was Austal the owner of *Cape Leveque* at the date the writ was filed?

1. In *In Re Aro Co Limited* [1980] Ch 196, the Court of Appeal of England and Wales held that upon filing of a writ *in rem*, the plaintiff obtains a security interest in the ship named in the writ, and that it is not necessary for that security interest to be perfected by service of the writ on the ship by arresting her. Virtu has not sought to issue an arrest warrant. Nonetheless, the Commonwealth contends, correctly in my opinion, that subject to s 8(2)(a) of the Act, the filing of the writ may have created in favour of Virtu a security interest in *Cape Leveque*,that now presents a potential impediment to the Commonwealth acquiring a clean title to her if it were not her owner at 18 February 2015.
2. In my opinion, the first question that requires determination is whether, for the purpose of s 19(b) of the Act, Austal was the owner of *Cape Leveque* on the date of the issue of the writ, 18 February 2015. The test to be applied for determining whether a person is an owner under the Act is not in doubt. As Allsop CJ said, with the agreement of McKerracher J and me, in *Shagang Shipping Co Limited v Ship “Bulk Peace” (as surrogate for the Ship “Dong-A Astrea”)* (2014) 314 ALR 230 at 234-235 [19]-[20], [23], [24]:

19 It is now necessary to deal with both the test to be applied for that conclusion, as well as the evidence that has been led. The test in Australia is not in doubt. The concept of the owner has been analysed in a number of cases in this court, all consistent with each other. In *Kent v SS ‘Maria Luisa’ (No 2)* ((2003) 130 FCR 12); ([2003] FCAFC 93), the Full Court dismissed an appeal from Beaumont J, reported at 130 FCR 1. By majority of Tamberlin J and Hely J, the notion of the owner was dealt with in terms that reflected the discussion in the Australian Law Reform Commission Report No 33, Civil Admiralty Jurisdiction, and reflected the proprietary and property based analysis applied in England, and the refusal to follow Brandon J’s practical view of a ship owning person in *Medway Drydock and Engineering Co v Owners of the MV Andrea Ursula (The Andrea Ursula)* [1973] QB 265; [1971] Lloyd’s Rep 145.

20 I refer to, in particular, at [61] and following in the reasons of the majority in *The Maria Luisa*. Nothing I now say should be taken as an attempt to rework anything said by Tamberlin J and Hely J, or Ryan J and myself in *Tisand Pty Ltd v Owners of the Ship “MV Cape Moreton” (ex “Freya”)* (2005) 143 FCR 43 at [100] – [122]. Broadly speaking, and with that caveat, **what is required is to show what the evidence says about questions of property, such that it can be concluded that the relevant person has the right both to make physical use of the vessel and to sell and in effect keep the proceeds of a disposition of sale of the vessel. It involves connotations of dominance, ultimate control, and ultimate title**. It is not sufficiently reflected in a notion of influence or control. **It is the right of dominion and true ownership.**

…

23 … **an arresting party needs to be able to demonstrate ownership of a surrogate ship by the relevant person**, not merely a degree of control, even a high degree of control, **over the commercial disposition of the ship**.

24 Mr Justice Brandon pungently put it in the *Andrea Ursula* that shipping was not conducted by equity lawyers, but “shipping men”. He asked where the money went. (emphasis added)

1. In my concurring judgment, with which the Chief Justice also agreed, I said (314 ALR at 239 [47]-[49]):

47 … the concepts of owner, and ownership, of property were, as the Chief Justice has discussed, explored in great detail in, among other cases, *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43. There, Ryan and Allsop JJ explained that notions of “property” and “ownership” were not amenable to crisp, comprehensive definition in the abstract and that, **in the context of s 19(b), they involve the possession and enjoyment of dominion over, and power or right to dispose of, a chattel of a kind that is usually engaged in a commercial enterprise**. They said (at 143 FCR at 73 [119]) that in that context, “the word ‘ownership’ or ‘owner’ connotes the right or power to have and dispose of dominion, possession and enjoyment of the ship, subject, of course, to intervening interests”.

48 There is a distinction between the notion of the control as an incident of ownership that is, or is able to be, exercised by a person who, in fact, has dominion over property from the control over a company that owns the property that is, or is able to be exercised, by a person who is in the position of an actual or a shadow director or a holding company: see the discussion in *Ho v Akai Pty Limited (In Liq)* (2006) 24 ACLC 1526 at [21], [73]-[75] per Finn, Weinberg and Rares JJ. …

49 As the Chief Justice has indicated, it is important to ensure that a creditor who seeks to invoke the court’s exercise of its jurisdiction to arrest a vessel and compel a person who is, relevantly, the beneficial owner of the vessel to meet its obligations does not invite the court to do so on insufficient or inexact evidence. Nor is it appropriate for a creditor to use the power to arrest a vessel as a mere opportunity to seek subsequently to engage in a fishing expedition to determine whether, later, enough evidence to justify the arrest will emerge if it can be obtained by the Court’s compulsory processes. (emphasis added)

1. In *Tisand Pty Limited v Owners of the Ship MV “Cape Moreton” (ex “Freya”)* (2005) 143 FCR 43 at 73 [119]-[121], Ryan and Allsop JJ explained the principles applicable to determine who is the owner of a ship for the purposes of establishing *in rem* jurisdiction under the Act, which the Full Court applied in *Bulk Peace* 314 ALR 203.
2. The Court will grant specific performance of a contract for the building of premises, or relevantly, a ship for constructing, when, *first*, the work to be done is defined, *secondly*, the plaintiff (relevantly, here, the party in the position of the Commonwealth) has a material interest in its execution which cannot adequately be compensated by damages, and, *thirdly*, the builder (here Austal) by the contract, has obtained from the other party to the contract (here the Commonwealth) possession of the site or property on which work was to be done: *York House Pty Limited v Federal Commissioner of Taxation* (1930) 43 CLR 427 at 437 per Knox CJ and Starke J, and 439 per Isaacs J, applying *Wolverhampton Corporation v Emmons* (1901) 1 KB 515.
3. In *Tanwar Entreprises Pty Limited v Cauchi* (2003) 217 CLR 315 at 332‑333 [53], Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ held that the ‘interest’ of the purchaser under a contract for the sale of land is commensurate with the availability of specific performance. A shipbuilding contract is a contract of a kind which the Court can enforce by an order for specific performance: see the remarks I made, which are not challenged for the present purposes, in *Euroceanica (UK) Limited v The Ship “Gem of Safaga”* (2009) 182 FCR 1 at 15 [55].
4. It is appropriate to decide the issue of who was the owner of *Cape Leveque*,for the purposes of s 19(b) of the Act, at the date of filing of the writ by considering Virtu’s argument that legal ownership of *Cape Leveque* will only pass to the Commonwealth if and when she is delivered to and accepted by the Commonwealth on the milestone due to be reached on 1 May 2015.
5. The unchallenged evidence is that at the date of the issue of the writ, *Cape Leveque* was about 96% complete. I am of opinion that the Commonwealth would be entitled to specific performance of Austal’s obligation to deliver her in a completed state, in fulfilment of the 1 May 2015 milestone. The Commonwealth had the entire beneficial ownership of *Cape Leveque* as at 18 February 2015, subject to payment of the milestone and the performance of any steps that each of the parties to the patrol boat contract had to undertake, individually or co‑operatively. There was no suggestion that either the Commonwealth or Austal was, or would in the future be, in breach of the patrol boat contract.
6. I am of opinion that the interest of a purchaser of a ship under a contract may be capable, depending on the circumstances, of giving it standing to obtain an order for specific performance against the vendor. That is so particularly here, where the ship is a patrol boat, that, having regard to the terms of the patrol boat contract, the Commonwealth contracted to purchase in discharge of its responsibilities to pursue and protect the national interest. Moreover, cl 4.2.1 of the patrol boat contract prohibited Austal from registering any of the patrol boats in Austal’s name at any time, even when they were being trialled at sea. The Commonwealth has a real interest in *Cape Leveque* that is sufficient to support a claim by it for specific performance of the patrol boat contract, so as to secure delivery of that ship to it.
7. Both the Commonwealth and Austal recognise that the Commonwealth would be entitled to an order for specific performance. Moreover, there is no basis to suggest that the patrol boat contract would not otherwise be performed and completed in accordance with its terms, but for the consequence of the creation of a potential secured interest for Virtu, by reason of the interposition of the filing of the writ.
8. The patrol boat contract also made provision for the supply of equipment for use in the operational functioning of the patrol boats when completed. That equipment has operational features relevant to matters of security. Those features appear to include attributes and functions confidential to the Commonwealth, in terms of their design and operation, that make each patrol boat inherently unsuitable for any other owner.
9. Each ship could only be used as a patrol boat for the purposes of the Commonwealth. It would be absurd to consider that at the time Virtu filed the writ, Austal had any right of disposition over the approximately 96% complete *Cape Leveque*, or that Austal could exercise any right of dominion or true ownership in respect of her, albeit that Austal had what, in my opinion, was bare legal ownership of, or title to, the undelivered patrol boat. Indeed, cl 4.2.1 prohibited Austal from registering itself as owner of any patrol boat.
10. Austal’s position was that of a builder of the ship that, *first*, already had been paid a considerable sum by the Commonwealth in respect of the cost of her construction, *secondly*,would be paid any sum outstanding in respect of both her value and the 1 May 2015 milestone when it is reached, inevitably, in due course, *thirdly*, had no right to dispose of her for any purpose, and, *fourthly*, would have no defence against being ordered to specifically perform its obligations under the patrol boat contract to complete and deliver *Cape Leveque* to the Commonwealth on 1 May 2015: *York House* 47 CLR at 437, 439; *Cauchi* 217 CLR at 332-333 [53]; *Bulk Peace* 314 ALR at 324 [19]-[20], [23]-[24], 239 [47]-[49].
11. In my opinion, on the material in evidence and having regard to the absence of any dispute between the Commonwealth and Austal under the patrol boat contract, there would be no defence to an action for specific performance brought by the Commonwealth against Austal, seeking delivery of *Cape Leveque*.
12. Virtu also argued that there could be separate legal and beneficial owners of a ship and that the jurisdictional nexus under s 19(b) would be satisfied if the relevant person was either of those persons, for the purposes of the cause of action relied on to found jurisdiction to file the writ.
13. In my opinion, that argument is untenable as a matter of law, having regard to the test in relation to ownership identified in *Bulk Peace* 314 ALR 230, and earlier in *Cape Moreton* 143 FCR 43.
14. In any event, if there could be one legal owner and a different beneficial owner for the purposes of s 19(b), either of whom could be identified as the relevant person, the jurisdiction to file a writ against a ship could only arise where that duality of legal and beneficial ownership existed so that all the persons entitled to exercise dominion or ownership over the ship were, in truth, the cognate relevant persons. That is not the position here. The relevant person for Virtu’s maritime claim was Austal, but the owner of *Cape Leveque* for the purposes of s 19(b) was the Commonwealth.
15. For these reasons, I am satisfied that the Commonwealth was, and Austal was not, the owner of *Cape Leveque* for the purposes of s 19(b) of the Act because the Commonwealth, and the Commonwealth alone, had the right of dominion and true ownership over her: *Bulk Peace* 230 ALR at 234 [19]-[20].
16. In light of that conclusion, it follows, in addition, that *Cape Leveque* was a government ship on 18 February 2015, and there was no jurisdiction for Virtu to proceed *in rem* against her on its maritime claim, by force of s 8(2) of the Act.
17. Virtu does not assert that it had a cause of action against *Cape Leveque* *in personam*. Accordingly, the proceedings must be dismissed.

## Other issues

1. I would also add that there are indications in the structure of the patrol boat contract and the way in which its payment terms operate to suggest that a considerable part of the proportionate value of *Cape Leveque*, as one of the eight patrol boats that Austal was to deliver, has already been paid by the Commonwealth. However, Virtu argued that cl 8.3.1 suggested that the property in *Cape Leveque* would only pass to the Commonwealth when that particular ship was included in a specific milestone.
2. The patrol boat contract contemplated that Austal would continue to build each of the patrol boats in the agreed sequence so that each would be ready at the respective times the milestones in the contract required them to be presented for acceptance by, and delivery to, the Commonwealth.
3. A reasonable person in the position of the parties would have understood at the time of entry into the patrol boat contract that the laying of keels and construction of the detailed works necessary to complete each of the eight patrol boats would take considerable time and cost substantial amounts of money. Such a person would also have understood, then, that the contractual payment schedule was so structured as to provide Austal with substantial financial resources appropriate to it being able to perform its obligations to construct and deliver each of the patrol boats in accordance with the contractual schedule.
4. Where cl 8.3.1 referred to partially completed supplies being included in a milestone, it may be, on one argument, that the contract contemplated that ships under construction, that were not due to be tendered for delivery until a subsequent milestone would come within that description. However, I do not need to decide that question although, as a matter of commercial commonsense, there is something to be said for such a construction.
5. The parties also engaged in intricate and detailed arguments about whether the requirements of s 19(a) of the Act were satisfied. It is not necessary for me to decide that question, having regard to the clear view to which I have come. The cause of action on which Virtu relied in the arbitration proceedings was based on a breach of cll 2.1 and 3.1 of the Virtu contract for the construction of *Jean de la Valette*. That cause of action appeared to involve an alleged obligation of Austal to construct, test, survey, launch, equip, complete, trial, sell and deliver *Jean de la Valette* to Virtu in accordance with good international high quality workmanship. The allegations in the arbitration included assertions that Austal constructed the ship *Jean de la Valette* with defective welding.
6. Virtu’s points of claim in the arbitration asserted that Austal constructed *Jean de la Valette* and delivered her in a condition in breach of contract, because Austal’s welding work was defective, and that she suffered from latent defects derived from welding problems and her design – matters occurring prior to her launch. Austal contended that, accordingly at the time the cause of action arose, *Jean de Valette* was not a ship within the meaning of the definition of “ship” in s 3 of the Act.
7. Austal also argued that s 4(3)(n) could not be used to support Virtu’s claim in the writ based on a general maritime claim. That was because, *first*, any pre-launch defects in welding or workmanship complained of occurred at a time when *Jean de la Valette* was not then a ship, and, *secondly*, the post-delivery development or revelation of any defects occurred after Virtu had become her owner. In my opinion, it is arguable that those causes of action could fall within the extended reach of s 4(3)(n) to claims relating to a vessel under construction, though I do not need to decide that question.
8. Austal also contended that s 4(3)(n) could not support Virtu’s more exotic alternative claim in the arbitration that there was an implied term that *Jean de la Valette* would not be delivered if Austal knew or believed she might be suffering from widespread or significant latent defects that Virtu would not be able to reasonably discover at any pre-delivery inspection. If it were necessary to consider whether a general maritime claim could be based on the latter implied term, I would not have found that it was capable of being a term to be implied by law, and there were no facts pleaded to support it being a term implied as a matter of fact. Virtu made a further claim in the arbitration based on a corresponding implied representation by conduct allegedly made by Austal. Virtu alleged that Austal was in breach of that implied representation. Again, that claim raises difficulties under Australian law, particularly having regard to its apparent conflict with the express terms of cl 20 of the Virtu contract that provided an express warranty for defects in the vessel that appeared after delivery: cf *Astley v Austrust* (1999) 197 CLR 1 at 21-23 at [46]-[48] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

## Conclusion

1. For these reasons, I am of opinion that the writ must be dismissed with costs. Austal is entitled to an order for costs. The Commonwealth did not seek to be joined as a party or to intervene in the proceedings or interlocutory application, and so it is not appropriate to make an order now for costs in its favour.

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| I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 9 April 2015