FEDERAL COURT OF AUSTRALIA

Wilmington Trust Company (Trustee) v The Ship “Houston” [2016] FCA 1349

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| File number(s): | WAD 755 of 2015 |
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| Judge(s): | **SIOPIS J** |
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| Date of judgment: | 29 November 2016 |
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| Catchwords: | **ADMIRALTY** – the plaintiffs claimed delivery up of a ship and damages for conversion and/or detinue – whether the claims were proprietary maritime claims within s 16 of the *Admiralty Act*.  |
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| Legislation: | *Admiralty Act 1988* (Cth) ss 4(2), 4(2)(a), 4(2)(a)(i), 16, 18  |
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| Cases cited: | *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404*Elbe Shipping SA v The Ship Global Peace* (2006) 154 FCR 439  |
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| Date of hearing: | 7 April 2016 |
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| Date of last submissions: | 20 April 2016 |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Counsel for the Plaintiffs: | Mr P Hopwood |
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| Solicitor for the Plaintiffs: | Cocks Macnish |
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| Counsel for the Defendant: | Mr A Trichardt |
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| Solicitor for the Defendant: | Clyde & Co Australia |

ORDERS

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|  | WAD 755 of 2015 |
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| BETWEEN: | WILMINGTON TRUST COMPANY AS TRUSTEE FOR THE TERAS BBC HOUSTON TRUSTFirst PlaintiffTERAS BBC HOUSTON (BVI) LTDSecond Plaintiff |
| AND: | THE SHIP “HOUSTON”Defendant |

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| JUDGE: | SIOPIS J |
| DATE OF ORDER: | 29 november 2016 |

THE COURT ORDERS THAT:

1. TBONE’s interlocutory application dated 11 January 2016 is dismissed.
2. TBONE is to pay the plaintiffs’ costs.

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

REASONS FOR JUDGMENT

SIOPIS J:

1. The plaintiffs, Wilmington Trust Company as trustee for the Teras BBC Houston Trust, and Teras BBC Houston (BVI) Ltd, commenced an action against the defendant, The Ship “Houston” (the “Houston”), by way of an action *in rem* on 24 December 2015.
2. The “Houston” is a United States of America flagged vessel. Its port of registry is Wilmington, Delaware.
3. The relevant person named on the writ is Teras BBC Ocean Navigation Enterprise Houston, LCC (TBONE). The relevant person was referred to throughout the proceeding as “TBONE”.
4. In their particulars of claim, the plaintiffs state that “within the meaning of sections 4(2)(a)(i), 4(3)(f) and 4(3)(w) of the *Admiralty Act 1988* (Cth) and brought under sections 16 and 18 thereof”, they claim relief in respect of a bareboat charterparty between the first plaintiff and TBONE, dated 29 September 2010, in respect of the “Houston”.
5. The plaintiffs claimed the following relief in the writ:

(a) hire owed to the Plaintiffs pursuant to clause 11 of the Bareboat Charterparty for the period between 23 August 2015 and 2 December 2015;

(b) in the alternative to paragraph (a), hire owed to the Plaintiffs pursuant to clause 11 of the Bareboat Charterparty for the period between 23 August 2015 and the date the Vessel is delivered to the possession of the Plaintiff pursuant to clause 29, or alternatively clause 15 of the Charterparty, whichever the case may be;

(c) loss and damage arising from the detention and/or conversion of the Vessel from on or about 2 December 2015 or such other date as the Court deems appropriate;

(d) an indemnity pursuant to clause 17(a) of the Charterparty in respect of all loss, damage and expense incurred by the Plaintiffs in relation to the operation of the Vessel with respect to the Bareboat Charterparty;

(e) delivery up of the barge [sic] forthwith pursuant to clause 29, or alternatively clause 15, of the Bareboat Charterparty to a safe place in Singapore;

(f) interest pursuant to sections 51A and 52 of the *Federal Court of Australia Act 1976* (Cth) or at any other rate that this Court thinks appropriate; and

(g) costs.

1. By an interlocutory application, dated 11 January 2016, TBONE sought the following relief:

1. An order declaring that as from 2 December 2015, TBONE has not been the bareboat charterer and disponent owner of the Vessel pursuant to the Houston Charter.

2. An order that the Writ be set aside for want of jurisdiction, alternatively that the proceeding herein be dismissed for want of jurisdiction.

3. An order dispensing with compliance with the Rules in so far as they relate to the prescribed form to be used.

4. Costs.

5. Such further or other relief as the Court deems just.

1. At the hearing of the interlocutory application, TBONE relied upon the affidavit of Mr Maurice John Thompson, dated 11 January 2016. Mr Thompson is a partner in the firm of Clyde & Co, which represents TBONE in this proceeding. The plaintiffs led no evidence, being content to refer to the evidence of Mr Thompson whose affidavit exhibited the relevant correspondence which had passed between the parties.
2. At the hearing, TBONE stated that it no longer sought the declaratory relief referred to in para 1 of its interlocutory application. The only issue which remained for determination was whether the Court had jurisdiction to hear and determine the plaintiffs’ action *in rem*.

# background

1. In light of the conclusion to which I have come, it is unnecessary to set out the background facts in the detail which would otherwise have been the case. The following is an outline of the factual background.
2. By a bareboat charterparty on an amended BARECON 2001 form, dated 29 September 2010, the first plaintiff, as owner, chartered the “Houston” to TBONE. Pursuant to the charterparty, TBONE was entitled to the full use and control of the “Houston” at its own cost and was, pursuant to cl 11, obliged to pay hire for the duration of the charterparty.
3. The charterparty contained the following relevant clauses:

15. Redelivery

At the expiration of the Charter Period the Vessel shall be redelivered by the Charterers to the Owners at a safe and ice-free port or place as indicated in *Box 16*, in such ready safe berth as the Owners may direct. The Charterers shall give the Owners not less than thirty (30) running days’ preliminary notice of expected date, range of ports of redelivery or port or place of redelivery and not less than fourteen (14) running days’ definite notice of expected date and port or place of redelivery. Any changes thereafter in the Vessel’s position shall be notified immediately to the Owners.

…

…

28. Termination

(a) *Charterers’ Default*

The Owners shall be entitled to withdraw the Vessel from the service of the Charterers and terminate the Charter with immediate effect by written notice to the Charterers if:

(i) the Charterers fail to pay hire in accordance with *Clause 11*. However, where there is a failure to make punctual payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Owners shall give the Charterers written notice of the number of clear banking days stated in *Box 34* (as recognised at the agreed place of payment) in which to rectify the failure, and when so rectified within such number of days following the Owners’ notice, the payment shall stand as regular and punctual. Failure by the Charterers to pay hire within the number of days stated in *Box 34* of their receiving the Owners’ notice as provided herein, shall entitle the Owners to withdraw the Vessel from the service of the Charterers and terminate the Charter without further notice;

…

…

29. Repossession

In the event of the termination of this Charter in accordance with the applicable provisions of *Clause 28*, the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call, or at a port or place convenient to them without hindrance or interference by the Charterers, courts or local authorities. Pending physical repossession of the Vessel in accordance with this *Clause 29*, the Charterers shall hold the Vessel as gratuitous bailee only to the Owners. The Owners shall arrange for an authorised representative to board the Vessel as soon as reasonably practicable following the termination of the Charter. The Vessel shall be deemed to be repossessed by the Owners from the Charterers upon the boarding of the Vessel by the Owners’ representative. All arrangements and expenses relating to the settling of wages, disembarkation and repatriation of the Charterers’ Master, officers and crew shall be the sole responsibility of the Charterers.

1. On 2 December 2015, the second plaintiff, acting on behalf of the first plaintiff, served a notice by way of letter on TBONE. The notice stated that TBONE was in default in the payment of hire to the first plaintiff and that by reason of that default, the second plaintiff, on behalf of the first plaintiff, terminated the charterparty with immediate effect and withdrew the “Houston” from service.
2. The notice went on to say:

You are required to redeliver the Vessel to us at the next immediate port of call in the same or as good structure, state, condition and class as that in which she was delivered, fair, wear and tear not affecting the class excepted…We highlight that, pending our physical repossession of the Vessel, clause 29 of the charterparty obliges you to hold the Vessel as gratuitous bailee only, and that all arrangements and expenses relating to the settling of wages, disembarkation and repatriation of the Master, officers and crew shall be your sole responsibility.

1. TBONE responded to the second plaintiff’s notice by an emailed letter, also dated 2 December 2015. TBONE stated that the first plaintiff had engaged in a wrongful arrest of the vessel in Virginia, in the United States of America. TBONE described this conduct as “a breach of the covenant of good faith inherent” in the charterparty. TBONE went on to say that by reason of the first plaintiff’s breach, it thereby, gave notice to the first plaintiff of early redelivery of the “Houston”. The letter stated that in compliance with cl 15 of the charterparty, TBONE would redeliver the vessel on the redelivery date, which it nominated as 17 December 2015, at Port Hedland, Western Australia, and arrange for the redelivery survey and inventory. TBONE also stated that it had paid all hire up to the date of redelivery.
2. The cargo which the “Houston” was then carrying comprised locomotives for use on one of the large mining projects in Western Australia.
3. In subsequent correspondence, the first plaintiff advised TBONE that it rejected the allegations made in TBONE’s letter of 2 December 2015. However, the parties, nevertheless, subsequently, engaged in further correspondence in relation to the means of effecting redelivery of the “Houston” at Port Hedland.
4. On 15 December 2015, TBONE advised the first plaintiff by letter that “as a direct result of” the plaintiffs’ “continued bad faith conduct”, the proposed redelivery date had been delayed to 28 December 2015. In that same letter, TBONE also sought confirmation that the second plaintiff would not interfere by court action with the cargo discharge operations at Port Hedland; and stated that redelivery would be in accordance with the “charter terms” governing termination due to “the owner’s breach”.
5. On 16 December 2015, a representative of the plaintiffs responded by an email asserting the validity of the right to terminate the charterparty. The letter went on to claim the outstanding hire and complained that TBONE had on various occasions ignored the demands for the immediate redelivery of the “Houston” at various ports of call. The plaintiffs did not give the assurance that they would not interfere in the cargo discharge operations at Port Hedland.
6. On 22 December 2015, TBONE through its solicitors, Clyde & Co, filed a caveat against the arrest of the “Houston” in this Court. In its form 2 filed in this Court in support of the caveat, TBONE by its solicitors, stated, under the heading “Relationship with Ship”, that it was the “Bareboat Charterers and Despondent [sic] Owners of the [“Houston”]” pursuant to the charterparty, dated 29 September 2010.
7. In the form 2, Clyde & Co also undertook on behalf of TBONE, that if a proceeding to which the caveat applied was commenced against the “Houston” in any Australian court, TBONE would:

(a) enter an appearance in the proceeding; and

(b) comply with any obligations as to bail or payment into court under rule 9 of the *Admiralty Rules*;

within 3 days after being served with initiating process in the proceeding.

1. On 23 December 2015, Clyde & Co sent an email to Cocks Macnish, the solicitors representing the plaintiffs, enclosing the caveat against arrest of the “Houston” filed in this Court on the previous day.
2. Clyde & Co’s covering email advised that the “Houston” was carrying locomotives for discharge at Port Hedland in Western Australia and that, at that stage, the vessel’s ETA in Port Hedland was 26 December 2015 and it was likely to come alongside the berth to discharge the cargo on early 28 December 2015 with completion expected on 30 December 2015.
3. The email went on to say that:

We would reiterate, that the Caveat Against Arrest of the vessel and the obligation our client has assumed in filing same should be sufficient to communicate our client’s desire to meet any allegations owner’s interests may make against our client and the MV “Houston” whilst it is under bareboat charter, and should be sufficient to negate any need on the part of the owner’s interests to arrest the MV “Houston” or take any alternative precipitous action that could result in the delay in the discharge of the locomotives.

1. On 24 December 2015, the plaintiffs issued the writ, the subject of this proceeding.
2. On 31 December 2015, TBONE entered an appearance. In its appearance TBONE stated:

My relationship with the ship against which this proceeding has been commenced is as the bareboat charterer and despondent [sic] owner of the defendant vessel.

1. On 11 January 2016, TBONE filed its interlocutory application, challenging the jurisdiction of the Court to hear and determine the action *in rem* filed by the plaintiffs.

# jurisdictional basis

1. There are two *in rem* jurisdictional bases invoked by the plaintiffs.
2. The first is that the plaintiffs have, in the action *in rem*, made claims which fall within the ambit of s 16 of the *Admiralty Act* as proprietary maritime claims.
3. The second is that the plaintiffs have made claims which fall within the ambit of s 18 of the *Admiralty Act*. Section 18 provides:

*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.

1. The plaintiffs contended that if they succeeded in establishing *in rem* jurisdiction on one of the two jurisdictional bases claimed, that would be sufficient to meet TBONE’s jurisdictional challenge.

# The jurisdiction in relation to a proprietary maritime claim

1. I deal first with the plaintiffs’ reliance on s 16 of the *Admiralty Act* for the jurisdiction to bring an action *in rem* in this Court.
2. Section 16 of the *Admiralty Act* provides as follows:

*Right to proceed* in rem *on proprietary maritime claims*

A proceeding on a proprietary maritime claim concerning a ship or other property may be commenced as an action *in rem* against the ship or property.

1. Section 4(2) of the *Admiralty Act* states:

A reference in this Act to a proprietary maritime claim is a reference to:

1. a claim relating to:

(i) possession of a ship;

(ii) title to, or ownership of, a ship or a share in a ship;

…

1. The plaintiffs contended that each of their claims in the writ, namely, the claim for loss and damage arising from the detention and/or conversion of the ”Houston” from on or about 2 December 2015; and the claim for the delivery up forthwith of the “Houston”, was a claim which related to the possession of a ship under s 4(2)(a)(i) of the *Admiralty Act*. Each of the claims, said the plaintiffs, was, therefore, properly to be characterised as a proprietary maritime claim. Accordingly, said the plaintiffs, the jurisdiction of the Court had, pursuant to s 16 of the *Admiralty Act*, been properly invoked.
2. The plaintiffs relied upon the High Court decision in *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 (*Shin Kobe Maru*).
3. In that case, the plaintiff sought an order that, in accordance with the terms of a joint venture agreement with the defendant, the ownership in a vessel be transferred to the joint‑venture company or another joint‑venture company in which the plaintiff and defendant had an interest.
4. The plaintiff contended that its claim was a proprietary maritime claim which fell within the ambit of s 4(2)(a) of the *Admiralty Act*.
5. One of the issues before the High Court was whether s 4(2)(a) of the *Admiralty Act* embraced a claim by a party who did not assert its own right to ownership in a vessel, but that of a third party. The High Court held that a wide meaning was to be given to the words “relating to” in s 4(2)(a) of the *Admiralty Act*. At 418-419, the High Court observed:

In their natural and ordinary meaning, the words “a claim…relating to…ownership” are wide enough to encompass a claim that a third party is or has been or is entitled to become the owner of the property in question. In this regard, the expression “a claim…relating to…ownership” may be contrasted with “a claim to ownership” or “a claim for ownership”, which latter expressions would ordinarily indicate a claim as to one's own ownership, not that of another. And although plaintiffs do not usually bring proceedings to benefit another, such proceedings are not entirely unknown. Thus, for example, proceedings have been brought on a contract for the purchase of property to be conveyed as a gift to a third party. (Footnotes omitted.)

1. Further, one of the grounds of appeal in *Shin Kobe Maru* was that the Full Federal Court had erred in failing to find that on the “balance of probabilities” the plaintiff’s claim was within the head of jurisdiction claimed. The High Court rejected that ground of appeal.
2. In rejecting that ground of appeal, the High Court observed at 426-427:

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 light of all of the evidence advanced in the proceedings held to determine whether there is jurisdiction.

In this case, Empire asserts jurisdiction on two bases. So far as jurisdiction is asserted by reason of s 4(2)(a), it does not depend on any factual precondition but, rather, on the claim having the legal character required by that paragraph, namely, “a claim relating to…possession of [or]…title to, or ownership of, a ship”…

The question whether Empire’s claim bears the legal character of a proprietary maritime claim as defined in s 4(2)(a) of the Act does not depend on findings of fact and, thus, cannot invoke any consideration of the balance of probabilities.

1. The High Court went on to find that the plaintiff’s claim fell within the ambit of s 4(2)(a) of the *Admiralty Act* and was to be characterised as a proprietary maritime claim.
2. In the case of *Elbe Shipping SA v The Ship Global Peace* (2006) 154 FCR 439 (*Global Peace*), Allsop J (as his Honour then was) observed at [70]:

In *The* *Shin Kobe Maru* the only “fact” that needed to be shown was the existence of a claim that bore “the legal character” of the kind referred to in s 4(2)(a)(i) and (ii) of the Act. The claim might fail for any number of reasons, but as a claim, that is as a body of assertions, it bore the legal character or answered the description of “a claim relating to possession of, or title to or ownership of a ship”.

1. The defendant contended that neither of the two claims relied on by the plaintiffs as proprietary maritime claims, namely, the claim in conversion and/or detinue, and the delivery up claim, bore the legal characterisation of a proprietary maritime claim.
2. In support of this argument, the defendant made a number of submissions which depended upon the acceptance of TBONE’s version of the facts advanced in its submissions, or were otherwise contentious. Thus, for example, TBONE contended that, after 2 December 2015, it held the “Houston” as a gratuitous bailee and, therefore, the plaintiffs’ claims for delivery up of the “Houston”, or conversion and/or detinue, were misconceived because the first plaintiff already held possession.
3. TBONE also submitted that the evidence was that, after arrival of the “Houston” at Port Hedland, the “Houston” was available for physical possession by the plaintiffs and, therefore, the claim for delivery up of the “Houston” was also misconceived.
4. Another argument TBONE made was that on the proper construction of the charterparty, there was no right in the plaintiffs to seek delivery up of the vessel in Singapore.
5. In my view, TBONE’s arguments addressed, what Allsop J in *Global Peace* referred to as, the reasons why the plaintiffs’ claims might fail. In other words, the arguments went to the merits of the plaintiffs’ claims, and not the legal characterisation of those claims. In this regard, I observe in passing, that the version of events espoused by TBONE in its submissions referred to at [44] above is, at least arguably, inconsistent with TBONE’s letter of 2 December 2015 and the statements TBONE made on 22 December 2015 in its form 2 in relation to the caveat against arrest, when it said it was then the “bareboat charterer” of the “Houston”.
6. TBONE’s arguments were not addressed to whether the “body of assertions” comprising the claims made by the plaintiffs, were claims that related to the possession of the “Houston” under s 4(2)(a) of the *Admiralty Act*. Accordingly, TBONE’s contentions did not accord with the proper approach to determining whether the Court had jurisdiction under s 4(2)(a) of the *Admiralty Act*, prescribed by the High Court in its observations in *Shin Kobe Maru*, referred to at [40] above, and adopted by Allsop J in *Global Peace* (see [42] above).
7. In my view, the body of assertions comprising the plaintiffs’ claims for delivery up of the “Houston” and for damages in conversion and/or detinue in respect of TBONE’s conduct after 2 December 2015, are each to be characterised as a “claim relating to possession”, within the ambit of s 4(2)(a)(i) of the *Admiralty Act*.
8. This is because the claim for delivery up of the “Houston” is a claim for the delivery up of possession of the “Houston” and is, therefore, a claim for possession of a ship, and so, clearly, falls within the ambit of cl 4(2)(a) of the *Admiralty Act*.
9. Further, the body of assertions comprising the claims for damages for the torts of conversion and/or detinue comprises the plaintiffs’ assertion of TBONE’s interference in the first plaintiff’s right to possession of the “Houston” after 2 December 2015. The claim is founded upon an assertion that TBONE by its conduct after 2 December 2015, and whilst the “Houston” was in its actual possession, denied the first plaintiff’s right to possession. In my view, that claim is to be characterised as being a claim “relating to possession” of a ship, as it seeks to vindicate the first plaintiff’s asserted right to possession of the “Houston”, consequent upon its notice of 2 December 2015, in which it claimed to terminate the charterparty.
10. Accordingly, in my view, each of the claims made by the plaintiffs at subparas (c) and (e) of the writ *in rem*, bears the legal characterisation of a claim relating to the possession of a ship. The plaintiffs have, therefore, properly invoked the *in rem* jurisdiction of the Court under s 16 of the *Admiralty Act*.

# jurisdiction pursuant to s 18 of the *admiralty act*

1. Much of the argument was addressed to this head of *in rem* jurisdiction.
2. However, in light of my findings above, it is unnecessary to consider whether the claims for hire and indemnity are to be regarded as general maritime claims which would invoke the *in rem* jurisdiction of the Court on the basis of s 18 of the *Admiralty Act*.
3. It follows that TBONE’s interlocutory application dated 11 January 2016 is dismissed.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Siopis. |

Associate:

Dated: 29 November 2016