

Maritime Law

“WHAT ARE THE REMEDIES AVAILABLE TO A CHARTERER OF A SHIP IF THE SHIP IS ARRESTED BY THE OWNER FOR AN ALLEGED BREACH OF CONTRACT”

Date: September 7, 2022

Farai Hove Masaisai,
LLM (Maritime Law)
Maritime Attorney-at-law
Hove's Court
No. 15 Gordon Street Port of Spain

CONTENTS

1. Chapter 1: INTRODUCTION	
1.0 Introduction	4
1.1 Aim	5
1.2 Objectives	5
1.3 Research Question	5
1.4 Research Method and Methodology	5
1.5 Justification of Choice of Research Method and Methodology	6
1.6 Sources of Information	6
1.7 Scope of Research	7
1.8 Conclusion	7
2. Chapter 2: SHIP ARREST – IT’S PURPOSE – PROS AND CONS	
2.0 What is Ship Arrest	8
2.1 The Purpose of Ship Arrest	10
2.2 Ship Arrest in Trinidad and Tobago	11
2.3 Pros of Ship Arrest	13
2.4 Cons of Ship Arrest	14
2.5 Conclusion	15
3. Chapter 3: HOW TO ESTABLISH WRONGFUL ARREST-PROVING WRONGFUL ARREST IN A CLAIM FOR BREACH OF CONTRACT	
3.0 Introduction	16
3.1 What Amounts to Wrongful Arrest of a Ship?	16
3.2 The Position in Common Law Jurisdictions	16
3.3 The Civil Law Jurisdictions	18
3.4 The Statutory Position in Australia	20
3.5 Overview of Test for Wrongful Arrest of a Ship	22

4. Chapter 4: REMEDIES AVAILABLE TO DEMISED CHARTERERS ON THE ARREST OF A SHIP	
4.0 Introduction	23
4.1 Breach of Contract	23
4.2 Counterclaim	25
4.3 Wrongful Arrest	25
4.4 Conversion and Detinue	25
4.5 Detinue: How and Application	29
4.6 Unjust Enrichment- Application	31
5. Chapter 5: CONCLUSION	
5.0 Conclusion on Ship Arrest	35
5.1 Recommendations	36
6. Bibliography	37

Chapter 1

INTRODUCTION

1.0 Introduction

Ship arrest is a popular mechanism commonly used internationally to protect the interests of the owner of a ship in charterparty agreements within the maritime and admiralty practice when there is an alleged breach of contract. Ship arrest as a recognized recourse in civil law admiralty procedure, is bathed with several disadvantages for the parties involved, as the arrest of the ship which is the subject of the arrest and of charterparty agreements in these cases can be commercially detrimental to the charterer. The question whether uniform rules on liability for wrongful arrest of ships should be established has been debated since the origins of unification of the law on arrest of ships¹.

As a practicing Attorney-at-law in the Republic of Trinidad and Tobago where there is a very limited but developing jurisprudence on the issue of ship arrest in matters of alleged breach of contract and having most recently personally engaged as counsel in litigation of a ship arrest for an alleged breach of contract², I was compelled to sail into the ocean to explore the remedies available to a demised charterer of a ship, if the ship is arrested by the owner in circumstances of an alleged breach of contract. My personal bout with the topic has certainly sparked an interest in how it is handled internationally and this paper will reflect same.

I will discuss *what are the remedies available to a charterer of a ship, if the ship is arrested by the owner for an alleged breach of contract* and will further endeavour to highlight that the topic is not just a theoretical problem but a live practical issue faced in the maritime arena. This will be analysed with the assistance of first-hand insight to a local case study in the Republic of Trinidad and Tobago, reflective of a fragment of how the topic is addressed in the Caribbean in order to assess same against the backdrop of other major maritime players internationally.

This research will be tackled through the telescope of the demised charterer with a view to evaluating the jurisprudence and practice around ship arrest, remedies available in cases of alleged

¹ Giorgio Berlingieri, 'Liability for Wrongful Arrest of Ships: the efforts towards possible uniform rules'

² Cashman Equipment Corporation V EMCS Caribbean Limited CV 2020-01178 and Civ App. No. PO28 of 2022

breach of contract, in the United Kingdom, formulating a comparative analysis of how it is dealt with in Civil Law Systems, the Caribbean and Australia.

This chapter will first provide an introduction to the study by discussing the topic and context, the focus and scope of the research as well as its relevance and importance, objectives, followed by the aim and objectives, research question, research method and methodology and finally, sources of information.

1.1 Aim

This paper seeks to examine ship arrest through the lenses of the demised charterer in the context of an alleged breach of contract by the said charterer, it also explores the remedies available to the charterer of the ship upon the vessel being arrested and where it is proven to be wrongfully arrested.

1.2 Objectives

- To examine ship arrest and the circumstances in which it may be considered wrong.
- To explore remedies available to a demised charterer where the ship has been arrested by the owner for an alleged breach of contract.
- To explore potential or alternative remedies to a charterer for wrongful arrest of a ship.

1.3 Research Question

What are the remedies available to a charterer of a ship if the ship is arrested by the owner for an alleged breach of contract.

1.4 Research Method and Methodology

1.4.1. Research Method

The research method adopted is principally a doctrinal method. A deductive approach was used employing qualitative methods to focus on the remedies available to demised charterers confronted with an arrested vessel within selected jurisdictions and utilising a selected number of maritime law books, scholarly articles, journals and databases subscribed to by the City Law School online

Law Library, including material used in litigation of maritime claims that form part of current litigation in The Republic of Trinidad and Tobago.

1.4.2. Research Methodology

The methodology encompasses a review of scholarly works that treat with remedies available in different jurisdictions with particular emphasis on wrongful arrest differentiating the views of multiple writers and forming conclusions on the most appropriate and effective remedies available cross jurisdictionally.

1.5 Justification of Choice of Research Method and Methodology

The qualitative method was used due the nature of the enquiry into the remedies available to charterers for arrest of a chartered vessel. A review of books, scholarly articles and databases on the subject were employed. The writer succinctly puts forward possible new remedies available to a charterer when faced with the arrest of a ship and form conclusions on which are the most appropriate. The resources used are established works in the field of admiralty and maritime law. I was unable to be present physically on campus due to covid -19 restrictions and therefore could not attend the physical library so opted to utilize the university's world class online resources to assist with research.

1.6 Sources of Information

1.6.1 Primary Sources

Main primary sources include current admiralty litigation and authorities used in the course of litigation coupled with legislation, statutes and case law.

1.6.2 Secondary Sources

Main secondary sources include journals, scholarly articles, legal databases, admiralty and maritime texts books.

1.7 Scope of Research

The research focus is on arrest of ships and remedies available to a demised charterer of a ship if the ship is arrested by the owner for an alleged breach of contract. The candidate succinctly puts forward possible new remedies for arrest of a ship in these circumstances. The assessment and review of both the primary and secondary sources through deductive lens with a qualitative frame of reference begins with the action of arrest and traversing the remedies' framework postulating the most appropriate remedies to achieve business efficacy and litigation success for a charterer.

1.8 Conclusion

The focus of this dissertation was to assess the qualitative merits of potential remedies available to charterers of vessels, in the event that the vessel was arrested by its legal owners for breach of contract.

This issue is examined by analysing the legal elements to be satisfied for breach of contract in the context of ship arrests, and contrasts alternative remedies which would be more commercially beneficial to the parties. Charterer remedies available for wrongful arrest are then examined and assessed jurisdictionally. The writer goes on to examine several other potential legal remedies that Maritime Law should embrace such as the torts of conversion, detinue and unjust enrichment.

The use of inductive and qualitative research was primarily utilised to examine this dissertation topic through the use of *inter alia*, admiralty case law, practitioner textbooks and guidance, case studies, journals, legislation, international conventions and current litigation on the issue.

The information gathered through these primary and secondary sources when assessed by the writer, led to the determination that ship arrests as a primary and first instance form of redress for a ship owner is not suggestable in circumstances where there are not strong merits for the arrest, as the potential damages incurred from a counterclaiming Defendant with particular regard to consequential losses, can be substantial.

Chapter 2

SHIP ARREST – IT’S PURPOSE – PROS AND CONS

2.0 What is Ship Arrest

In light of the broad scope of the discussion surrounding ship arrest, brevity is demanded and consequently, a more pointed approach is preferred around this complex topic in order to cautiously guide the reader to gain an insight into ship arrest, its purpose and the associated pros and cons.

An arrest of a ship in the United Kingdom is usually undertaken by serving upon the vessel a “Warrant of Arrest”, in like concept to criminal proceedings despite this form of arrest being a civil law admiralty procedure³ stemming from different roots.

The International Convention Relating to the Arrest of Sea-Going Ships in 1952 defines ship arrest as “the detention of a ship by judicial process to secure a maritime claim but does not include the seizure of a ship in execution or satisfaction of a judgment”⁴.

More recently, a more modern definition of ship arrest is showcased in Article 1(2) of the 1999 Ship Arrest Convention⁵, bearing close similarities to the old definition in the 1952 Arrest Convention. It provides that “arrest” means “any detention or restriction on removal of a ship by order of a Court to secure a maritime claim but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument”.

Despite having a self-explanatory definition, it is crucial to dig deeper into properly understanding the dynamics of ship arrest and circumstances which justify same. However, prior to getting into what exactly constitutes ship arrest, it is important to understand the jurisdiction of the court which can be exercised either *in rem* or *in personam*.⁶

³ World Services Group, ‘Arrest of a Vessel Under English Jurisdiction’, (Shoosmiths, April 2006) <<https://www.worldservicesgroup.com/publications.asp?action=article&artid=1443>> accessed August 15, 2022

⁴ The International Convention Relating to the Arrest of Sea-Going Ships in 1952, art 1(2).

⁵ The Ship Arrest Convention 1999, art 1(2)

⁶ Gregory Nell SC, *The Arrest of Ships- Some Legal Issues* (2009) 39

***In personam* proceedings** refer to claims made against a person who is presumed “to be ultimately liable”⁷. Actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. This may include the shipping company, the charterer or the person in possession or control of the ship.

Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party⁸. *In rem* claims can be brought against the relevant ship⁹ itself without any consideration of the actual person who may be liable *in personam* for the claim or who may be the beneficial owner of the ship in question.

A **maritime lien** constitutes a commonly utilized category of actions in admiralty law which is enforceable by a claim *in rem* enabling the arrest and seizure of a vessel, in satisfaction of the claims against her¹⁰. It is accepted law since 1840, that the jurisdiction of the admiralty court could be exercised *in rem* or *in personam*. The Lord Admiral was permitted to strictly pursue a suit *in rem* against the ship in claims involving maritime liens and proprietary rights on the ship, which signalled the beginning of the “truly *in rem*” causes, wherein the defendant was the ship¹¹. Parties to a maritime or admiralty contract involving the charter of a ship were now empowered to keep possession of the ship until a debt owed by that person was discharged.

Lien, in its primary or legal sense, means a right at common law in one person to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied¹². In this primary sense, it is given by law and not by contract. A written agreement to give a lien is not a bill of sale, for a legal lien does not as a rule arise until possession of the property is obtained. However, in exceptional cases, possession is not essential to constitute a legal lien.

In many instances where charterparty agreements are in place and one party, usually the owner of ship, believes a charterer to be in breach of the contract, one of the most frequently used

⁷ Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 1: Jurisdiction and Risks Third Edition* (Informa Law 3rd edn, 2013) 98

⁸ *The Kongsli*, 252 F. 267, 270 (D. Me. 1918)

⁹ Mandaraka-Sheppard (n 6) 98

¹⁰ Aleka Mandaraka-Sheppard (n 7) 25

¹¹ *Ibid* 97

¹² Halsbury’s Laws of England, “Legal Lien” [2021]

mechanism activated to protect their interest is the arrest of the ship. Once arrested, the vessel is placed under the power of the court, whereby any further action involving the ship is halted by this action or procedure until such release or resolution of the breach is met. The arrest aims at preventing the ship from continuing its movement in order to apply the court decision concerning an action in rem¹³.

2.1 The Purpose of Ship Arrest

In the admiralty and maritime arena, ship arrest is a common enough phenomenon which ignites the flame of a bigger question of “Why ship arrest?” What is the purpose of ship arrest some may ask?

Arguably, the primary purpose of ship arrest in admiralty and maritime conflicts is to provide security for the Claimant’s claim before judgement of the claim¹⁴ or to enforce a maritime lien¹⁵ and to secure the jurisdiction of the claim. According to Lord Esher MR, “*the moment that the arrest takes place, the ship is held by the Court as a security for whatever maybe adjudged by it to be due to the claimant*”¹⁶.

Once a ship is arrested or threatened with arrest, the road to pursuing release of that ship in order to regain possession and use of that ship and also avoid a judicial sale, requires the Claimant to provide a form of security for its claim. On the other hand, the it may be warranted in order for the Defendant to secure the release of the ship. This security may present itself in the following forms¹⁷:

- Bail bond
- Letter of undertaking
- Letter of guarantee
- Security deposit

¹³ Omar Mohammed Faraj, *The Arrest of Ships: Comprehensive View on the English Law* (2012) 14

¹⁴ Gregory Nell SC, *The Arrest of Ships- Some Legal Issues* (2009) 40

¹⁵ Leila Woollam, “United Kingdom: Maritime Arrest Under English Law”, May 2010, <<http://www.mondaq.com/article.asp?articleid=97606>> accessed August 29, 2022

¹⁶ Messon, Nigel and Kimbell A, John, *Admiralty Jurisdiction and Practice, Fourth Edition*, (Informa Law and Finance, Great Britain 2011) 153

¹⁷ Gregory Nell SC (n 14)

The arrest of a ship operates to assist the court in keeping the property as security to answer the judgment while remaining less susceptible to any events which may happen between the time of arrest and the judgement.

In my role as lead counsel in the litigation of the case of *Cashman Equipment Corporation v EMCS Caribbean Limited CV2020-01178*, the purpose of the arrest of the ship in question, that was the JMC 50 Barge, was to provide security for the Claimant's claim pursuant to an alleged breach of contract. The ship was being used for profitable trade by the Defendant under a charterparty agreement with the Claimant at the material time of arrest. The commercial use of the ship by the demised charter was known to the Owner/Claimant at the time of the arrest.

Other arguments put forward, state that the main purpose of applying ship arrest is to satisfy a judgment in a claim *in rem* from the court¹⁸. However, the seizure of the ship can be triggered if there is a property on the ship related to the claimant rather than the ship itself¹⁹.

2.2 Ship Arrest in Trinidad and Tobago

The Republic of Trinidad and Tobago subscribes to the common law system and so heavily relies on and resorts to English law where their local laws are silent on a matter. The admiralty practice is one of those areas as this part of the law is limited and slowly developing here. However, thankfully, my career has lunged me into the deep end of admiralty proceedings where I was fortunate enough to work on a matter of ship arrest in Trinidad and Tobago. S

In relation to the arrest of ships in the jurisdiction of Trinidad and Tobago, there are several sources of law which provide for the arrest or detention of ships in certain circumstances. For example, section 11 of Quarantine (Maritime) Regulations Chapter 28:05 of the Laws of Trinidad and Tobago²⁰ provides for the detention of a ship to safeguard against the spread of infectious diseases.

Furthermore, section 316 of the Shipping Act Chapter 50:10 empowers the Director or Inspector to detain a ship found unseaworthy within the meaning of the Act:

¹⁸ Omar Mohammed Faraj (n 13)

¹⁹ Ibid

²⁰ Quarantine (Maritime) Regulations Chapter 28:05 of the Laws of Trinidad and Tobago, s 11

“(1) Where, whether on a complaint or representation made to him or otherwise, the Director or a surveyor has reason to believe that any Trinidad and Tobago ship, or any foreign ship at a port in Trinidad and Tobago, is an unseaworthy ship, he shall, if the complaint or representation is made in sufficient time before the sailing of the ship, ascertain whether or not the ship ought to be detained.

(2) Where the Director or surveyor is satisfied that the ship is an unseaworthy ship, he may— (a) in the case of any ship, cause the ship to be detained;”

However, in Trinidad and Tobago, admiralty proceedings, are primarily governed by Part 74 of the Civil Proceedings Rules 1998 (as amended)²¹. Rule 74.2 of the Civil Proceedings Rules 1998 (as amended)²² provides for the following claims *inter alia*:

- any claim to the possession or ownership of a ship or to the ownership of any share therein, including power to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, must be sold, and to make such other order as the court thinks fit;
- any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- any claim in respect of a mortgage of or charge on a ship or any share therein;
- any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of admiralty.

Rule 74.3(1) and (2) clearly provides verbatim that in the case of any such claim or question as is aforementioned, a claim *in rem* may be brought against the ship or property in connection with which the claim or question arises.

Thus, the Civil Proceedings Rules 1998 (as amended) provides the primary legal basis for ship arrest in my home country. As a jurisdiction which subscribes to the common law system having the Privy Council and the highest Appellate Court, Trinidad and Tobago heavily relies on the English common law to fill in any gaps where the jurisprudence has not independently matured.

²¹ Civil Proceedings Rules 1998 (as amended) of the Laws of Trinidad and Tobago, part 74

²² Ibid rule 74.2

Therefore, beyond the scope of the provisions for ship arrest in the domestic law of Trinidad and Tobago, the English Common law applies.

2.3 Pros of Ship Arrest

More often than not, shipping companies are incorporated abroad and as a result, personal service of an *in personam* claim cannot be effected to the relevant person, unless the claim is captured under specific categories of claims which require the permission of the court²³. However, with the arrest of a ship, wherever the ship is arrested, said jurisdiction may be invoked, overriding the need to effect personal service as required in *in personam* proceedings. Thus, arguably, the action *in rem* of ship arrest yields more effective results and merits, which cannot be said for the action *in personam*.

For example, in the local case of *Cashman Equipment Corporation v EMCS Caribbean Limited CV2020-01178*, the Claimant arrested the subject ship in waters of Trinidad for an alleged breach of contract flowing from a claim of outstanding charter hire fees and lack of insurance coverage. The Claimant, a company incorporated and organized under the laws of Commonwealth of Massachusetts in the United States of America arrested the JMC 50 barge, a vessel which was the subject of a charter party/purchase agreement with EMCS Caribbean Limited, a company incorporated under the laws of Tortola, British Virgin Islands, while it was within the waters of Trinidad in the Republic of Trinidad and Tobago. As such, the matter was set for adjudication in the High Court of Trinidad and Tobago reflective of where the ship was arrested.

Additionally, the person making the claim would be the one responsible to apply a claim form against the defendant in an action *in personam*. In situations where both parties subscribe to the same jurisdiction, such a claim bears no jurisdictional issue on the face of it. However, when the jurisdiction differs for both parties many obstacles may present themselves. The continuous sailing for the ships for different marine purposes make them vulnerable to different jurisdictions and as such, the legal nature of the action *in rem* makes it very popular as a legal remedy.

²³ *The Manchester Carriage* [1973] 1 Lloyd's Rep 386; *The Craiova* [1976] 1 Lloyd's Rep 356

Moreover, the arrest of a ship provides security for the Claimant. Wherever a ship may be located, it may be the only asset against which a Claimant may have been able to claim²⁴. Ship arrest operates by way of a special legal regime that offers a remedy for security of a claim by considering the ship itself as the defendant, otherwise known as an ‘in rem’ claim. As seen in the case of *Cashman Equipment Corporation v EMCS Caribbean Limited CV2020-01178*, the JMC 50 Barge was arrested by the Claimant while it was in chartered use for profit by the Defendant, as a means of providing security for a claim of breach of contract.

2.4 Cons of Ship Arrest

When a ship is arrested, several undesirable consequences may flow from this action. For instance, the shipowner stands to lose the benefit of charter-hire fees during the period of arrest while the demised charterer would likely lose its ability to take advantage of the economic potential of the vessel.

However, one of the less obvious disadvantages as seen in *Cashman Equipment Corporation v EMCS Caribbean Limited CV2020-01178*, is that the ship is placed under the custody of the residing court and cannot be moved without the court’s permission. During this time, the ship may also be immobilised which may directly affect trade or any other profitable use of the ship.

Moreover, as pointed out in the court of appeal decision of *Cashman Equipment Corporation v EMCS Caribbean Limited PO28 of 2022*, arrest of a ship results in deterioration of the ship and expenses associated with maintaining the arrest. As per the Honourable Justice of Appeal Peter Rajkumar at paragraph 33 of the Judgment:

“It is not in dispute that Admiralty practice recognizes the undesirability of prolonging the arrest of a vessel beyond the period when that is actually necessary. Without enumerating all the well-known and undisputed reasons therefor they include the expense of maintaining an arrest and the risk of its deterioration. The vessel while under arrest can earn no income but requires expenditure thereon for numerous matters for example, maintenance, certification, insurances. It

²⁴ Hosking B and Banks R ‘Ship Arrest and Security’ (Standard Club, June 2018) < <https://www.standard-club.com/fileadmin/uploads/standardclub/Documents/Import/publications/goto-handouts/2767676-club-cover-and-rules-ship-arrest-and-security.pdf>> accessed September 1, 2022

*is not in dispute that the vessel now requires some repairs. It is in neither party's interest to have a potentially deteriorating vessel in need of repair with its certificates, inspection and classification status lapsing while remaining in the custody of the court where it cannot be repaired. While under arrest, it can earn no income for any party and its value can only depreciate while awaiting the resolution of contested court proceedings. This would not be in keeping with the overriding objective and in particular that of saving expense, especially the unnecessary expense of funding a continuing arrest given that an alternative non-depreciating security can be readily substituted.*²⁵

Additionally, the arrest dictates that the ship as security is in the hands of the court for the claim and this security cannot be beat by the later insolvency of the owner or hirer of the arrested property. In *The Cella*²⁶, Fry L.J. stated:

"The arrest enables the court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment".

Similarly, Lopes L.J. declared:

*"...that from the moment of the arrest, the ship is held by the court to abide the result in the action, and the rights of the parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently"*²⁷.

2.5 Conclusion

Ship arrest is an action *in rem* recognized under the common law and specifically in Trinidad and Tobago. The reason why persons may opt for an act of ship arrest varies, however, it can be argued that the primary purpose is to provide security in a claim as seen in *Cashman Equipment Corporation*²⁸. Furthermore, it is important to note that wherever a ship is arrested, the jurisdiction of the place of arrest will be invoked and this can operate as either an advantage or disadvantage to the parties involved.

²⁵ *Cashman Equipment Corporation v EMCS Caribbean Limited* PO28 of 2022 pages 11, 12

²⁶ *The Cella* (1888) 13 P.D. 88

²⁷ *Ibid* 89

²⁸ *Cashman Equipment Corporation* (n 25)

Chapter 3

HOW TO ESTABLISH WRONGFUL ARREST IN A CLAIM FOR BREACH OF CONTRACT

3.0. Introduction

In this chapter I will look at what it takes to establish a wrongful arrest claim in different jurisdictions and then make suggestions as to where the law may develop.

3.1 What Amounts to Wrongful Arrest of a Ship?

Frank Stevens, sets out the effect that an arrest may have on an operator of a ship:

*“For the owner or operator of a ship, on the other hand, an arrest is a very unwelcome and sometimes nightmarish scenario. An asset, with (very) substantial daily operating costs, is immobilised and thus prevented from earning money; security will have to be arranged and paid for; legal steps may have to be taken to challenge the arrest; and so on. As clearly as the possibility to arrest a ship is a benefit to the creditor, it is a detriment to the shipowner and an impairment of his rights.”*²⁹

This is similarly the case where a charterer has had the chartered vessel arrested by an owner for an alleged breach of contract.

3.2 The Position in Common Law Jurisdictions

The common law test for damages for wrongful arrest of vessels in admiralty law, was set out by the Judicial Committee of the Privy Council in *The Evangelismos*³⁰:

“Undoubtedly there may be cases in which there is either mala fides, or that crassa negligentia, which implies malice, which would justify a Court of Admiralty giving damages.....

The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say, that the action was so

²⁹ Stevens F, “Chapter Nine: Liability for Wrongful Arrest” in Baris Soyer and Andrew Tettenborn (eds), *Ship Operations New Risks, Liabilities and Technologies in the Maritime Sector* (Informa Law from Routledge 2020)

³⁰ *The Evangelismos: Xenos V Aldersley and Ors* (1858) 12 Moo PC 352, (1858) 14 ER 945

*unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?"*³¹

The position of the Privy Council was echoed by the Judicial Committee in its decision in *The Strathnaver*³². Sir Robert Phillimore delivered their Lordships' opinion and in agreeing with the position as set out by the very eminent Judge Pemberton Leigh, he said the following:

*"In that case 'the collision took place at sea.' The vessel causing the damage got away. From the appearance of a vessel in port the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, and in consequence of the owner having no funds in this country, she was detained for some months before she was released on bail. The Plaintiffs failed to identify the vessel seized as being the one causing the damage, and the Admiralty Court dismissed the action with costs, refusing to award damages. Then there was an appeal to their Lordships, and Mr. Pemberton Leigh in delivering the judgment of their Lordships said: It is also said that it is the established rule of the Admiralty Court where a party brings an action and succeeds in upholding it, that he is entitled, unless there are circumstances to take it out of the ordinary rule, to have compensation for the loss he has suffered, which in some cases is very inadequate, but it is the only compensation the Court can award. Their Lordships think there is no reason for distinguishing this case or giving damages. Undoubtedly there may be cases in which there is either mala fides or that crassa negligentia which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of Admiralty the proceedings are however ' more convenient, because in the action in which the main question is disposed of, damages may be awarded." **Their Lordships came to the conclusion, though, the case was certainly a very strong one, inasmuch as the wrong vessel had been seized, that in the absence of proof of mala fides or malicious negligence, they ought not to give damages against the parties arresting the ship. It appears to their Lordships that the general principles of law are correctly laid down in that***

³¹ *The Evangelismos* (n 34) 359-60 , 948

³² *Ibid*

*judgment, and it is their intention to adhere to them. They will therefore humbly advise Her Majesty that that part of the learned Judge's sentence be reversed.*³³”

3.2.1 Damages not confined to Pecuniary Loss

Proof of actual damage is not necessary to sustain an action in a court of admiralty for wrongful arrest, if the seizure of the vessel was the result of mala fides or crassa negligentia implying malice³⁴. “*It appears to me that detention of a man’s goods stands in this respect on the same footing as detention of his person. It cannot be supposed that no damage results to him from it*”.³⁵

The situation is much the same in Canada³⁶ and although there are no recorded decisions on wrongful arrest of a ship in the Republic of Trinidad and Tobago, I would suggest that given that our highest court is still the Privy Council, then the common law test as set out in *Evangelismos* would prevail in my home country also.

Therefore, a ship that has been arrested by the owner for an alleged breach of contract must show that there was either mala fides (bad faith) or crassa negligentia (gross negligence) or malice on the part of the owner when he arrested the ship.

3.3 The Civil Law Jurisdictions

Frank Stevens³⁷ succinctly covers the civil law systems and the tests that they apply for wrongful arrest in his chapter on liability for wrongful arrest.³⁸

In civil law systems, wrongful arrest is often considered an aspect of tort law³⁹. In very general terms, the arrest is wrongful if it is effected in circumstances where a normally prudent, reasonable creditor would not have arrested the ship.

³³ *Walter Turnbull and Others V The Owners of the Ship “Strathnaver,” her Cargo and Freight* [1875] UKPC 73 8 Dec 1875. PC

³⁴ *The Walter D. Wallet* ICLR: Probate/Family/1893/*The Walter D. Wallet* – [1893] P. 202

³⁵ *The Walter D. Wallet* – [1893] P. 202 at page 208, The President, Sir Francis H. Jeune

³⁶ *Armada Lines Ltd v Chaleur Fertilizers Ltd* [1997] 2 SCR 617

³⁷ Stevens F (n 33)

³⁸ *Ibid* 133-148

³⁹ *Ibid* 134

Frank Stevens looks carefully at the systems that operate in both Belgium and France, neither of which have expressed statutory provisions on wrongful (ship) arrest⁴⁰. He notes that there are only a small number of cases on wrongful ship arrest in France and almost none in Belgium but the status quo seems to be that for an arrest to be wrongful, fault or negligence on the part of the creditor is required⁴¹.

The question of fault or negligence is determined in light of the circumstances and the information available at the time of the arrest. If the claim is eventually dismissed it does not automatically mean that the arrest was wrongful.⁴² Conversely, even if the claim is successful, it can be found that the ship arrest was still wrongful despite the claim having merit.

In France, if the arresting of the ship is found to be unjustified, in that the arrested vessel is substantially more than the value of the claim, or there is an abuse by the Claimant/Arrestor in requesting a substantial amount of security when compared to the value of the claim, this can lead to a finding of wrongful arrest⁴³.

In Belgium there is also a requirement that the party bringing the claim for wrongful ship arrest must prove recklessness and that the arrestor knew that his actions would probably cause damage⁴⁴.

3.3.1 The 1952 Arrest Convention⁴⁵

Article 6 of this convention covers wrongful arrest and states the following:

“All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.”

⁴⁰ F. Smeele, “Liability for wrongful arrest of ships from a civil law perspective” [London, Informa, 2007] 267–271.

⁴¹ J.-P. Remery, “Cass. 22 February 2007 (ms. Hafnia)” [D.M.F. 2007] 530.

⁴² Court of Appeal Antwerp 21 October 1996, R.W. 1996–97, 1064; N. Cayrol, “Dommages-intérêts et abus du droit d’agir”, 2013, HAL-01017593 (archives-ouvertes.fr); E. Dirix, Beslag, Wolters Kluwer, 2018 (4th Ed.), n° 335 at p. 263.

⁴³ *Lempy Maritima Enterprise v Mohamed Zaatari and Cie Al Itthad Al Watani The "Alexamder III"* [1996] DMF 503, 506 (Cour de Cassation, France).

⁴⁴ Beslagr. Antwerp 20 August 1993, J.P.A. 1995, 241 (ms. Tutova).and also see page 138-139 of Ship Operations, New Risks, Liabilities and Technologies in the Maritime Sector

⁴⁵ The International Convention (n 4)

This was as a result of the divergence in opinions from the Nations that have a Civil System as compared to the Nations that abide by the common law system.⁴⁶ The convention therefore resolved that the issue of wrongful arrest would be resolved based on the law of the country in which the action is brought.

3.3.2 The 1999 Arrest Convention⁴⁷

Article 6(2) and (3) of the 1952 Arrest Convention is amended in so far as it is relevant to wrongful arrest it states the following:

“(1) The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and provided.

(2) The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected.”

The same issues were faced in 1999 as was the case in 1952 with the issue of wrongful arrest of a ship being left to the *lex fori*⁴⁸.

3.4 The Statutory Position in Australia

The test for wrongful ship arrest in Australia is governed by section 34 of the Admiralty Act 1988. It states the following:

“(1) Where, in relation to a proceeding commenced under this Act:

(a) a party unreasonably and without good cause:

⁴⁶ F Berlingieri, “Berlingieri on Arrest of Ships: a commentary on the 1952 and 199 Arrest Conventions”, [2000 London: LLP] 192.

⁴⁷ The International Convention (n 5)

⁴⁸ F Berlingieri, (n 50) 340

(i) demands excessive security in relation to the proceeding; or

(ii) obtains the arrest of a ship or other property under this Act; or

(b) a party or other person unreasonably and without good cause fails to give a consent required under this Act for the release from arrest of a ship or other property;

the party or person is liable in damages to a party to the proceeding, or to a person who has an interest in the ship or property, being a party or person who has suffered loss or damage as a direct result.

Based on the wording of this statute the burden of proof would be on the party and in our particular case, it would be the charterer, claiming damages for the wrongful arrest to prove that the owner had acted “unreasonably and without good cause”⁴⁹. This burden would be determined on a balance of probabilities and would depend on the facts and evidence of the particular case.

It is still a matter of some conjecture as to exactly what the threshold would be to give rise to an entitlement to damages under the Australian statutory provision. However, the purpose of the section 34 was to make it less onerous for shipowners or demise to obtain damages for wrongful arrest⁵⁰.

The Australian courts are not confined to the common law position of mala fides or crassa negligentia as outlined above in *Evangelismos*. Damien J. Cremean proposes that the terminology “unreasonably and without good cause” is a much broader notion than bad faith and does not necessarily require the owner of the ship to show malice or implied malice for damages to be secured.⁵¹

⁴⁹Nell SC (n 11) 39-62

⁵⁰ Michael Woodford, “Damages for Wrongful Arrest: Section 34, Admiralty Act 1988” (2005) 19 MLAANZ Journal, 116

⁵¹ Damien J. Cremean, *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (2003), Sydney: Federation Press

3.5 Overview of Test for Wrongful Arrest of a Ship

It is in these circumstances the legal test for wrongful arrest of a ship is very much dependent on where the cause of action arises jurisdictionally, with the common law jurisdictions being very much the polar opposite to the civil law jurisdictions. Thus, the result being an exercise in futility in trying to arrive at a unified test for wrongful arrests of ships, in the two conventions mentioned herein. The statutory approach has been taken by some countries (as seen in Australia) where the common law test may have been considered an imbalance in favour of an arrestor of the ship. Therefore, a charterer seeking damages for wrongful arrest of a demised vessel must have a working knowledge of the test that applies based on the Jurisdiction that the vessel was arrested in.

Chapter 4

REMEDIES AVAILABLE TO A CHARTERER ON THE ARREST OF A SHIP

4.0 Introduction

In this section I will seek to canvass the remedies and alternative remedies available to a demised charterer in the circumstances where a ship is arrested by the owner. The issues of breach of contract, wrongful arrest, conversion, detinue and unjust enrichment will be scrutinised, in addition to arguing that good business efficacy should be the premise upon which judicial officers should exercise their case management function towards an expedient and efficacious dissolution of admiralty litigation involving the arrest of a ship with particular reference to The Republic of Trinidad and Tobago.

4.1 Breach of Contract

Breach of contract may be one of the main reasons why a ship is arrested. The ship owner may posit a supposedly repudiatory breach of an existing contract to petition the court in a particular jurisdiction. In response the charterer having to file a defence will want to file a counterclaim with breach of contract as a cause of action particularly where the contract inherently is void of conditions that allows for a termination of the contract and where the alleged breach is more consistent with a warranty wherein damages would suffice, thus, creating the breach of contract action for the demised charterer.

Arresting a vessel for an alleged breach of contract may have the potential of resulting in a wrongful arrest claim, if the owner maliciously terminates the charterparty agreement improperly, which could effectively repudiate the contract⁵².

⁵² *Cashman Equipment Corporation V EMCS Caribbean Limited* CV 2020-01178, High Court Admiralty Claim in Rem in the Republic of Trinidad and Tobago, where the charterparty was terminated by the owner of the ship for alleged late payment of charterparty payments, the charterer counter claimed for wrongful arrest and damages for breach of contract. The writer herein acted as Counsel for the Charterer of the res. The substantive trial was held on the 22nd, 23rd, 24th and 25th days of August 2022, the decision of the trial Judge is pending.

*The Astra*⁵³, decided in April 2013 by Flaux J decided that the obligation to make punctual payment of hire was a condition of the contract and therefore, a breach of this condition entitled the vessel's owner to both withdraw the vessel and claim damages for loss of profit for the remainder of the charter period.

However, subsequent to this judgment, Popplewell J in *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd*⁵⁴ disagreed with the decision in *The Astra* and found that the payment of hire was not a condition of the contract. The decision was appealed and the Court of Appeal in *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS*⁵⁵ unanimously decided that the payment of hire on time was not a condition of the contract. Gross L J in delivering the leading judgment, indicated at paragraphs 63 and 64:

“So too, has been the surprise expressed in the literature at the decision in The Astra, together with the sense of reassurance furnished by the decision of Popplewell J in the present case. It certainly does not appear to me that the market requires the payment of hire to be a condition – and, in any event, such a result could be simply achieved by appropriate express wording if that was thought desirable.....”

Ultimately, however, I am firmly of the view that Popplewell J came to the correct conclusion and that the obligation to make punctual payment of hire is not a condition of the charterparties.”

In the circumstances the law as it stands in common law jurisdictions is that a charterer's failure to pay an instalment does not entitle the shipowner to terminate the charter and claim damages for the loss of the balance of the charterparty.

⁵³ *Kuwait Rocks Co v AMB Bulkcarriers Inc (The Astra)* [2013] EWHC 856(Comm), [2013] 2 Lloyd's Rep 69.

⁵⁴ *The Spar Capella, Spar Vega and Spar Draco* [2015] 1 CLC 356, [2015] 2 Lloyd's Rep 407

⁵⁵ *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982

4.2 Counterclaim

In filing its defence, the charterer's counterclaim is a pivotal means of ensuring that additional issues central to the charterer's case are placed before the court and which will have to be determined during the course of the litigation. In it, issues and causes of action such as breach of contract, wrongful arrest, conversion and detinue, unjust enrichment and trespass to property are used not only as a shield but also as a sword against the owner that has arrested the ship.

4.3 Wrongful Arrest of a Ship

In our previous chapter we discussed the legal concept of wrongful arrest of a ship in much detail and the tests set out based on the different Jurisdictions and the legal systems that apply therein. We therefore would not go into much detail as it has been thoroughly rehearsed above.

Goordeen rightly advances that notwithstanding the existence of two international conventions, it is still left to the court in each jurisdiction to determine the parameters of a wrongful arrest claim.⁵⁶

Within the Jurisdiction of the Republic of Trinidad and Tobago, prior to the case of *Cashman Equipment Corporation v EMCS Caribbean Limited*⁵⁷, heard on the 22nd to 25th days of August 2022, there existed no tried matters for a claim of wrongful arrest of a ship.

4.4 Conversion and Detinue

Conversion, detinue and trespass to property are considered intertwined in what they seek to address with conversion being the most encompassing in addressing the willful interference with goods and property. Hawes concisely stated that, "*Detinue as an action was limited to wrongful detention of goods or parting with possession of them; and trespass came to lie only where there was an unlawful physical interference with goods, such as taking or damaging them. Conversion covers a wide range of circumstances and so has encroached and overlapped into the areas occupied by the other, narrower, torts.*"⁵⁸

⁵⁶ Sohana Goordeen, *The Test for Wrongful Arrest of Vessels: in Search of Harmonisation*

⁵⁷ *Cashman Equipment* (n 56)

⁵⁸ Cynthia Hawes, *Tortious Interference with Goods in New Zealand: The Law of Conversion, Detinue and Trespass* A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (University of Canterbury 2010) 7

4.4.1 Conversion: How and Application

The pleading of conversion addresses an intentional wrong and a defendant must intend to do the act which constitutes the denial of rights. This act must be deliberate and intentional which denies in this context the demised charterer's possessory interest in the ship.⁵⁹

This cause of action is applied within the jurisdiction of Trinidad and Tobago as seen within the cases of *Carlton Rattansingh v The Attorney General of Trinidad and Tobago & Others*⁶⁰ and has been extended to admiralty claims for conversion of cargo, where the ship's captain refused to issue a bill of lading to the shipper in the case of *Valperz Industry and Traders, SA, SW Chartering Inc v The Owners and/or Parties Interested in the Motor Vessel ROULA*.⁶¹

4.4.2 Assessment of Damages

Assessment of damages are flexible and dependant on the particular facts of each case.⁶² Lord Nicholls articulated that what Claimants could recover is the true loss which was suffered.⁶³

In determining what is that true loss, it will have to be ascertained whether the defendant's wrongful action contributed to the loss, with the focus shifting to what is the extent of the loss for which the tortfeasor is to be held liable.⁶⁴

4.4.3 Changing values

The judicial function is to assess damages in the context where the market value of the goods (ship) changes on or after the date of the conversion. There is some flexibility in the application of rule and the Claimant is required to mitigate the loss.

⁵⁹ Cynthia Hawes (n 62) 53

⁶⁰ *Carlton Rattansingh v The Attorney General of Trinidad and Tobago & Others* C.A. No. 105 of 2000

⁶¹ *Valperz Industry and Traders, SA, SW Chartering Inc v The Owners and/or Parties Interested in the Motor Vessel ROULA* CV2013 01038

⁶² *Kuwait Airways Corp v Iraqi Airways Co* (Nos 4 and 5), [2002] 2 AC 883 (HL)

⁶³ Cynthia Hawes (n 62) 172

⁶⁴ *Ibid* 172

4.4.4 Improvement of goods by defendant

Where there is an appreciation in the value of converted goods as a consequence of the defendant's acts, a claimant may not be entitled to the increase.⁶⁵

4.4.5 Stock in Trade

The sum awarded for damages is determined by whether a substitute of the converted item can be obtained easily or at the exact price paid originally.⁶⁶

4.4.6 Consequential Damages

The remoteness or foreseeability of the resultant damage and loss which flows for the conversions will determine the amount of consequential damages awarded.⁶⁷ Damages are assessed based upon the availability of a substitute or the costs of replacement at market value.⁶⁸

4.4.7 Exemplary Damages

Normally exemplary damages are not awarded in breach of contract cases except where⁶⁹ there is the presence of outrageous conduct disclosing malice, fraud, insolence and cruelty.⁷⁰ In *Aron Torres v Point Lisas Industrial Port Development Corporation Limited*⁷¹, Justices of Appeal Warner, Mendonca and Weekes (as she then was) gave a detailed analysis of the law as it pertains to exemplary damages for breach of contract and examined the law in multiple jurisdictions and considered its development over time. In their detailed analysis, they came to the conclusion that exemplary damages were applicable to breach of contract cases within the Republic of Trinidad and Tobago, this is a divergence from the UK law.

4.4.8 Concurrent Liability in Contract

⁶⁵ *Aitken v Gardiner and Watson* [1956] OR 589, 609

⁶⁶ *Furness v Adriam Industries Pty Ltd*, [1996] 1 VR 668

⁶⁷ *Kuwait Airways Corp* (n 57)

⁶⁸ *J E Hall Ltd v Barclay* [1937] 3 All ER 620

⁶⁹ *Clinitech Company Limited V South-West Regional Health Authority*, CV 2016-03434, 2019, P41

⁷⁰ *Rookes v Barnard*, [1964] AC 1129

⁷¹ *Aron Torres v Point Lisas Industrial Port Development Corporation Limited* [2005] C.A No. 84 of 2005

A claimant can sue in both contract and tort where the tortfeasor breaches the contract and converts the property⁷² and damages awarded on a similar basis for each since the wrong stemmed from the same action.⁷³

4.4.9 Specific Restitution

The tortfeasor will be required to pay pecuniary damages and can either return the property or pay the value to the claimant.⁷⁴

4.4.10 Recaption

Recaption is a purely common law remedy⁷⁵ wherein a claimant is permitted to retake the property either by peaceable or reasonable force.⁷⁶ This remedy is fraught with possible negative outcomes.

4.4.11 Conversion in admiralty claims

Looking at conversion through the lens of admiralty in an Australian case⁷⁷ it is instructive in that though based upon an interpretation of section 4(2)(a)(i) of the Admiralty Act 1988 (Cth), which provides that claims “relating to possession of a ship” are proprietary maritime claims and therefore capable of supporting an action *in rem* against the vessel.⁷⁸ The judge in the matter concluded that claims for delivery up of a ship and for damages for conversion and/or detinue fell within the statute definition and premised his decision on the basis that such claims sought to vindicate rights.⁷⁹

In seeking to understand conversion in the jurisdiction of Trinidad and Tobago, the judge in *Valperz Industry and Traders SA* identified three circumstances to found a claim in conversion. The first and second are pertinent to our discussion in that there must have had a positive wrongful

⁷² Cynthia Hawes (n 62) 178,184

⁷³ *Royal Bank v W Got & Associates Electric Ltd*, (2000) 178 DLR (4 th) 385 (SCC)

⁷⁴ *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644

⁷⁵ Cynthia Hawes (n 62) 186

⁷⁶ *Ibid*

⁷⁷ *Wilmington Trust Company (Trustee) v The Ship “Houston”* [2016] FCA 1349, para 49

⁷⁸ *Mohammud Jaamae Hafeez-Baig, Jordan English, Claims Relating to Possession of a Ship: Wilmington TRUST Company (Trustee) V The Ship “Houston”* [2016] FCA 1349, p1

⁷⁹ *Ibid*, 1

act of dealing with the goods in a manner inconsistent with the owner's rights and an intention in so doing, to deny the owner's rights or to assert a right inconsistent with them and the second circumstance is where goods are wrongfully detained by the defendant.⁸⁰

Conversion is a plausible remedy for admiralty claims as it is broad in its application and overlaps in a number of other torts thus giving a claimant flexibility in litigation.

4.4.12 Propositions in law which could be expanded as a cause of action

In the context of the jurisdiction of Trinidad and Tobago, there is a need apart from the inherent common law principles for an amendment to the existing Shipping Act Chapter 50:10 to allow for a cause of action in conversion to be raised. It can be modelled after the s 4(2)(a)(i) of the Admiralty Act 1988 of Australia.

4.5 Detinue: How and Application

Detinue as a tort is said to be derived by the retention of another person's property which adversely affects their legal right. In establishing detinue there is a need to show that a demand for the return of the property was made and in no uncertain terms refused.⁸¹ Detinue is said to accrue on the date of refusal and may continue until the property is recovered or at the time of judgment.⁸²

4.5.1 Process and Remedies

In advancing a claim for detinue it is important to sufficiently identify the object of the tort and any assessment of damages must account for the actual loss suffered by the wrongful detention of the subject property.⁸³

There are a number of remedies available for detinue but our focus is limited to three. The first, is that the judgment for the value of the goods as assessed and damages for the detention. Secondly,

⁸⁰ *Valperz Industry* (n 65) 36

⁸¹ *Cynthia Hawes*, (n 62) 11

⁸² *General and Finance Facilities Ltd* (n 78)

⁸³ *Cynthia Hawes*, (n 53) 10, 11

judgment for the return of the goods and or recovery of the value as assessed and damages for the detention. Finally, judgment for the return of the goods and damages for the detention.⁸⁴

4.5.2 Detinue in admiralty claims

Hawes in discussing detinue highlighted the case of *Harris v Lombard NZ Ltd [1974] 2 NZLR 161, 166* and pointed out that, “*the plaintiff had taken a boat on hire purchase and, the plaintiff being in arrears with payments, the boat was repossessed by the finance company. The boat was then sold in breach of the then current hire purchase legislation. As the plaintiff had a right to damages for breach of statutory duty, McMullin J did not finally determine the question whether the plaintiff would have been entitled to claim in detinue. However, he considered it possible that the plaintiff’s right to acquire property in the boat which would have arisen on payment of all the instalments might perhaps constitute the necessary property right; and had the plaintiff been shown to have had no property right at all, this would have been fatal to his claim in detinue.*”⁸⁵

4.5.3 Propositions in law which could be expanded as a cause of action

In the context of the jurisdiction of Trinidad and Tobago, there is a need apart from the inherent common law principles for an amendment to the existing Shipping Act to allow for a cause of action in detinue to be raised. It can be modelled after the Australian Admiralty Act 1988 section 4(2)(a)(i).

4.6 Unjust Enrichment- Application

Unjust enrichment claims are claims made for debt and not damages or compensation.⁸⁶ In cases where a defendant is unjustly enriched at a claimant’s expense, English Law provides the Claimant a right to restitution. Restitution aims to restore the value given by the Claimant to the Defendant.⁸⁷

⁸⁴ *General and Finance Facilities Ltd* (n 78)

⁸⁵ Cynthia Hawes, (n 53)14

⁸⁶ *Boake Allen Ltd v HMRC* [2006] EWCA Civ 25, STC 606, paragraph 175

⁸⁷ *British Transport Commission v Gourley* [1956] A.C. 185, paragraph 208

To establish a claim for Unjust Enrichment, three questions are asked by the court, namely:

- (i) Has the defendant been enriched?
- (ii) Was the enrichment at the claimant's expense?
- (iii) Was the enrichment unjust?⁸⁸

Within the jurisdiction of Trinidad and Tobago, this cause of action is recognised and well developed within the civil courts. However, it has never been applied within the context of admiralty claims.

Within the United Kingdom, in the case of the "*Trident Beauty*",⁸⁹ the Claimant Pan Ocean Shipping Ltd were obliged to make advance payments for its freight fees to the vessel's owner under the charter-agreement, which also possessed clause provisions for restitution through unjust enrichment, should the freight not be earned. The right for receipt of the freight was later assigned to the Defendant, Creditcorp Ltd.

The freight was never earned despite Pan Ocean's payment to the assignee. The court noted that despite Pan Ocean's expense incurred to the Defendant's benefit, as the charter was contracted out the only remedy available to Pan Ocean would be against the shipowners. Creditcorp took on assignment, only the benefit of the contract and the shipowners held the contractual duty to pay. As such the claim of restitution against the Defendant failed.

4.6.1 Proposition for law to be expanded within the context of Admiralty Law

As the law presently stands, unjust enrichment is not utilised within the Admiralty Courts for disputes of this paper's nature. In circumstances, where a ship is arrested and charter-hire fees were paid in advance, the shipowner will be enriched during the period of detainment as the charterer will incur the expense of hire-fees while not conferring the benefit of the vessel's use.

The three key elements for establishing this cause of action are appropriately set, being that

- (i) The Shipowner has been enriched by the advance payment of charter fees.
- (ii) The enrichment was at the Charterers expense.

⁸⁸ *Banque Financière De La Cité v. Parc (Battersea) Ltd and Others* [1998] UKHL 7

⁸⁹ *Pan Ocean Shipping Ltd v Creditcorp Ltd* [1994]HoL, 1 WLR 161

(iii) The enrichment was unjust.

4.6.2 Proposed Commercial Solutions

“My Lords, in merchant shipping time is money. A cargo ship is expensive to finance and expensive to run. The shipowner must keep it earning with the minimum of gaps between employments. Time is also important for the charterer, because arrangements must be made for the shipment and receipt of the cargo, or for the performance of obligations under subcontracts. These demands encourage the planning and performance of voyages to the tightest of margins.”⁹⁰

A Charterer operating under a Time Charterparty holds a commercial imperative to ascertain profitable activity during their use of the vessel, while incurring as minimal interruption as possible.⁹¹ The arrest of a ship is commercially unbeneficial to all parties involved, namely the shipowner and the charterer in our particular case. The shipowner loses the benefit of charter-hire fees during the period of arrest while the demised charterer loses its ability to exploit the economic potential of the vessel.

The charterer holds the option to make a payment of security into the court, to have the ship released in the interim. However, from a practical perspective not all charterers will be financially fluid enough to provide such security, as depending on the jurisdiction, the security provided will be made in the expected amount of the claim or value of the ship, both of which may reach to exorbitant prices.

A commercially practical solution to combat these issues, would be to balance the interests of all parties by permitting the charterer to continue trade and collecting their revenue during the period of arrest. This way the shipowners will continue to collect their charter-hire fees during this period of proceedings and the charterer is able to collect their charter income.

For the shipowner’s security and peace of mind, the charterer will present the shipowner and court with a manifest of all scheduled destinations, cargo details, payment details for each voyage and a requirement that the shipowner’s charter fees be directly deposited from the charterer’s clientele

⁹⁰ *Torvald Klaveness A/S v Arni Maritime Corp (The Gregos)* [1994] 1 W.L.R. 1465

⁹¹ Bennett H, Section 1-005, *Carver on Charterparties* (2nd edn Sweet & Maxwell 2020)

to the court or shipowner. This provides each party with a short-term commercial solution during litigation, which does not impose overly stringent pressure onto either party during the preliminary period of proceedings.

Furthermore, this course of action has the additional benefit of eliminating an additional head of damages to be obtained at the end of proceedings. Typically, a charterer will claim for consequential losses in the event of arrest, as they lose the economic benefit from the use of the vessel during arrest and litigation.

The value of charter revenue lost out by the charterer in addition to the judgement interest which may be granted is significant and reclaiming it in addition to the other causes of actions for damages, be it *inter alia*, wrongful arrest or breach of contract, may be an arduous task. By reducing the damages payable, in theory the pay out of court judgement damages will be less onerous on the shipowner and circumvent additional proceedings for enforcement.

English Law has previously encountered a variation of this practice however it was not readily accepted. Within the case of *Greenmar Navigation Ltd v The Owner of the Ships [1993] Q.B. 673*⁹², Saville J. at first instance, provided for an order that a vessel should remain under arrest however be allowed to return to its employment of cross-channel service against certain undertakings to be given by the freighters and defendants.

This order was appealed for its contradictory nature, as the vessel could not remain within the Admiralty Marshall's custody as mandated by the judge and yet be allowed to trade outside the jurisdiction. Saville J. provided no rationale behind his decision barring, "*it being intended as an immediate short-term and temporary commercial solution, balancing the interests of all the parties*"⁹³. The order was subsequently overturned.

To avoid this pitfall, it is proposed that court orders at this preliminary stage should be granted in the form of a limited arrest. If the charterer possesses current trade obligations or can present potential trade prospects which must be assessed on their merits, then the arrests restrictions can be eased to permit cross-jurisdictional trade in the interim.

⁹² *Greenmar Navigation Ltd v The Owner of the Ships (THE BAZIAS 3 THE BAZIAS 4)* (1993) Queens Bench 673

⁹³ *Greenmar Navigation Ltd* (n 96)

Amendments to Trinidad and Tobago's Civil Proceedings Rules 1998 (as amended) or Shipping Act, Chapter 50:10 will be required to provide Judges with the requisite authority and/or discretion, to provide orders for these limited arrests.

DO NOT COPY

Chapter 5

CONCLUSION

5.0 Conclusion

We took a deep dive into what is ship arrest under the English law and comparative Trinidad and Tobago Law, with a view to defining the scope of wrongful arrest of a ship in a claim for breach of contract in order to answer the ultimate question of “What are the remedies available to a charterer of a ship if the ship is arrested by the owner for an alleged breach of contract?”

In answering the research question, the findings revealed that conversion and detinue are among the available alternative causes of action which may be used as a plausible remedy for admiralty claims of wrongful arrest of a ship, as the tort is broad in its application and overlaps in a number of other torts thus giving a claimant flexibility in litigation.

Additionally, it would be wise to remember that arresting a vessel for an alleged breach of contract may have the potential inter alia of resulting in a wrongful arrest claim, if the owner terminates the charterparty agreement improperly and maliciously as the arresting of the vessel could effectively repudiate the contract

It is noteworthy to also remember that the common law position on the test for wrongful arrest, which is adhered to in the Republic of Trinidad and Tobago, is that a ship that has been arrested by the owner for an alleged breach of contract, the burden would be on the demised charterer to show that there was either mala fides (bad faith) or crassa negligentia (gross negligence) or malice on the part of the owner when he arrested the ship⁹⁴. On the other hand, in the civil law jurisdictions, the arrest is wrongful if it is effected in circumstances where a normally prudent, reasonable creditor would not have arrested the ship⁹⁵. Conversely in Australia, wrongful arrest will be found if a party unreasonably and without good cause obtains the arrest of a ship governed by local statute as the Australian courts are not confined to the common law position.⁹⁶

⁹⁴ *The Evangelismos* (n 34)

⁹⁵ *Stevens F* (n 33)

⁹⁶ *Michael Woodford* (n 54)

5.1 Recommendations

Future research in the area of wrongful arrest of a ship in Trinidad and Tobago should be centred on the issue of bail/bond for the release of a ship and whether an overriding objective of business efficacy/economic integrity should be the underlying principle in the determination for the release of the ship. Of particular concern is the basis upon which the bail/bond is premised, whether on the value of the ship or the value of the claim and should the value of the claim be the better approach to safeguard against the stronger party in the litigation allowing the ship to deteriorate under arrest and the prejudice this can have on the other party. The value of the claim approach appears to be the wiser option, but common law principles may hinder this approach and statutory intervention may be the answer.

In this research I have attempted to succinctly show that in Trinidad and Tobago Jurisdiction there is a need to provide additional layers in the body armoury of a litigant that prays a cause of action of wrongful arrest. Therefore, there will be a need to amend existing legislation such as the Shipping Act Chapter 50:10 to give statutory effect to wrongful arrest and the remedies that follow such as conversion, detinue. Additionally, that concomitant with the legislative changes an amendment to the Civil Proceedings Rules 1998 (as amended) making business efficacy as part of the overriding objective specifically for admiralty claims so that matters will be expedited, and all effort made to safeguard the deterioration of the ship, to prevent the abuse of the courts' processes.

I So Advise.

Bibliography

Aleka Mandaraka-Sheppard, *Modern Maritime Law Volume 1: Jurisdiction and Risks Third Edition* (Informa Law 3rd edn, 2013)

Armada Lines Ltd v Chaleur Fertilizers Ltd [1997] 2 SCR 617

Aron Torres v Point Lisas Industrial Port Development Corporation Limited [2005] C.A No. 84 of 2005

Aitken v Gardiner and Watson [1956] OR 589, 609

Banque Financière De La Cité v. Parc (Battersea) Ltd and Others [1998] UKHL 7

Bennett H, Section 1-005, *Carver on Charterparties* (2nd edn Sweet & Maxwell 2020)

Beslagr. Antwerp 20 August 1993, J.P.A. 1995, 241 (ms. Tutova). and also see page 138-139 of *Ship Operations, New Risks, Liabilities and Technologies in the Maritime Sector*

Boake Allen Ltd v HMRC [2006] EWCA Civ 25, STC 606

British Transport Commission v Gourley [1956] A.C. 185

Carlton Rattansingh v The Attorney General of Trinidad and Tobago & Others C.A. No. 105 of 2000

Cashman Equipment Corporation V EMCS Caribbean Limited CV 2020-01178 (Trinidad & Tobago High Court)

Cashman Equipment Corporation v EMCS Caribbean Limited Civ App PO28 of 2022 (Trinidad & Tobago Court of Appeal)

Charterparties, Law, Practice and Emerging Legal Issues, Edited by Baris Soyer and Andrew Tettenborn, Published in 2018 by Informa Law from Routledge

Civil Proceedings Rules 1998 (as amended) of the Laws of Trinidad and Tobago

Clinitech Company Limited V South-West Regional Health Authority, CV 2016-03434, 2019

Court of Appeal Antwerp 21 October 1996, R.W. 1996–97, 1064; N. Cayrol, “Dommages-intérêts et abus du droit d’agir”, 2013, HAL-01017593 (archives-ouvertes.fr); E. Dirix, *Beslag*, Wolters Kluwer, 2018 (4th Ed.), n° 335 at p. 263.

Cynthia Hawes, *Tortious Interference with Goods in New Zealand: The Law of Conversion, Detinue and Trespass* A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (University of Canterbury 2010)

Damien J. Cremean, *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (2003), Sydney: Federation Press

Enforcement of Maritime Claims, Fourth Edition, D.C. Jackson, published by Informa Professional in 2005

F. Berlingieri, "Berlingieri on Arrest of Ships: a commentary on the 1952 and 1999 Arrest Conventions", [2000 London: LLP]

F. Smeele, "Liability for wrongful arrest of ships from a civil law perspective" [London, Informa, 2007]

Furness v Adriatic Industries Pty Ltd, [1996] 1 VR 668

General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 1 WLR 644

Giorgio Berlingieri, 'Liability for Wrongful Arrest of Ships: the efforts towards possible uniform rules'

Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS [2016] EWCA Civ 982

Greenmar Navigation Ltd v The Owner of the Ships (THE BAZIAS 3 THE BAZIAS 4) (1993) Queens Bench 673

Gregory Nell SC, *The Arrest of Ships- Some Legal Issues* (2009)

Halsbury's Laws of England, "Legal Lien" [2021]

Hosking B and Banks R 'Ship Arrest and Security' (Standard Club, June 2018)
<<https://www.standard-club.com/fileadmin/uploads/standardclub/Documents/Import/publications/goto-handouts/2767676-club-cover-and-rules-ship-arrest-and-security.pdf>>

J E Hall Ltd v Barclay [1937] 3 All ER 620

J.-P. Remery, "Cass. 22 February 2007 (ms. Hafnia)" [D.M.F. 2007]

Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5), [2002] 2 AC 883 (HL)

Kuwait Rocks Co v AMB Bulkcarriers Inc (The Astra) [2013] EWHC 856(Comm), [2013] 2 Lloyd's Rep 69

Leila Woollam, “United Kingdom: Maritime Arrest Under English Law”, May 2010, <<http://www.mondaq.com/article.asp?articleid=97606>>

Lempy Maritima Enterprise v Mohamed Zaatari and Cie Al Itthad Al Watani The "Alexamder III" [1996] DMF 503, 506 (Cour de Cassation, France).

Messon, Nigel and Kimbell A, John, *Admiralty Jurisdiction and Practice, Fourth Edition*, (Informa Law and Finance, Great Britain 2011)

Michael Woodford, “Damages for Wrongful Arrest: Section 34, Admiralty Act 1988” (2005) 19 MLANZ Journal

Mohammud Jaamae Hafeez-Baig, Jordan English, Claims Relating to Possession of a Ship: Wilmington TRUST Company (Trustee) V The Ship "Houston" [2016] FCA 1349, p1

Omar Mohammed Faraj, *The Arrest of Ships: Comprehensive View on the English Law* (2012)

Pan Ocean Shipping Ltd v Creditcorp Ltd [1994]HoL, 1 WLR 161

Quarantine (Maritime) Regulations Chapter 28:05 of the Laws of Trinidad and Tobago

Rookes v Barnard, [1964] AC 1129

Royal Bank v W Got & Associates Electric Ltd, (2000) 178 DLR (4 th) 385 (SCC)

Sohana Goordeen, *The Test for Wrongful Arrest of Vessels: in Search of Harmonisation* 7

Stevens F, “Chapter Nine: Liability for Wrongful Arrest” in Baris Soyer and Andrew Tettenborn (eds), *Ship Operations New Risks, Liabilities and Technologies in the Maritime Sector* (Informa Law from Routledge 2020)

The Cella (1888) 13 P.D. 88

The Evangelismos: Xenos V Aldersley and Ors (1858) 12 Moo PC 352, (1858) 14 ER 945

The International Convention Relating to the Arrest of Sea-Going Ships in 1952

The Kongsli, 252 F. 267, 270 (D. Me. 1918)

The Manchester Carriage [1973] 1 Lloyd’s Rep 386; *The Craiova* [1976] 1 Lloyd’s Rep 356

The Ship Arrest Convention 1999

The Spar Capella, Spar Vega and Spar Draco [2015] 1 CLC 356, [2015] 2 Lloyd’s Rep 407

The Walter D. Wallet ICLR: Probate/Family/1893/The Walter D. Wallet – [1893]

The Walter D. Wallet – [1893] P. 202 at page 208, The President, Sir Francis H. Jeune

Torvald Klaveness A/S v Arni Maritime Corp (The Gregos) [1994] 1 W.L.R. 1465

Valperz Industry and Traders, SA, SW Chartering Inc v The Owners and/or Parties Interested in the Motor Vessel ROULA CV2013 01038

Walter Turnbull and Others V The Owners of the Ship “Strathnaver,” her Cargo and Freight [1875] UKPC 73 8 Dec 1875. PC

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

World Services Group, ‘Arrest of a Vessel Under English Jurisdiction’, (Shoosmiths, April 2006) <<https://www.worldservicesgroup.com/publications.asp?action=article&artid=1443>>

Wordcount: 10919