

FEDERAL COURT RULES THAT FFA-LINKED SHIP ARREST WAS NOT LEGALLY JUSTIFIED

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Justice Gordon of the Federal Court of Australia has ruled in the case of *Transfield ER Futures Ltd v The Ship Giovanna Iuliano* that ships cannot be arrested on the basis of claims relating to Forward Freight Agreements (FFAs).

It is understood to be the first ruling of a court in a Commonwealth country on this issue. It is also likely to stand as persuasive authority in many jurisdictions for the proposition that an arrest cannot be founded on a claim arising from an FFA.

The issue before the court was whether a claim arising out of an FFA could constitute a maritime claim for purpose of founding jurisdiction in rem.

If so, that would thereby enable a claimant to obtain security for the claim by arresting a ship.

Justice Gordon ruled that such a claim is not a "general maritime claim concerning a ship" within the meaning of the *Admiralty Act*. She added that the arrest of the bulk carrier

Giovanna Iuliano in respect of a claim under a FFA "was not justified".

The judge immediately proceeded to set aside the writ and arrest warrant, and order that the ship be released.

Although Australia is not a party to the 1952 Arrest Convention, the key findings in this case are equally relevant to countries that have given effect to the convention.

Background

On 17 May 2012, Transfield commenced in rem proceedings against the *Giovanna Iuliano* for the purpose of obtaining security for a claim against its owners, Deulemar Shipping SpA*, which was said to arise under the FFA.

Transfield had obtained a judgment against Deulemar in the Queens Bench Division of England's High Court in respect of that claim.



While the Federal Court was not required to consider that issue, there was a question as to whether, having obtained judgment, Transfield's claim could be properly cast as arising under a FFA rather than the enforcement of a judgment.

In any event, Transfield had pleaded that the in rem jurisdiction of the Federal Court was invoked under section 17 of the *Admiralty Act* on the basis that its claim against Deulemar under the FFAs was a "general maritime claim" pursuant to section 4(3)(f), namely:

"a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charter-party or otherwise."

On 18 May 2012, the ship was arrested at Port Melbourne. Deulemar filed an urgent application to have the arrest set aside.

On 22 May 2012 Justice Gordon ordered that the arrest be set aside and that the ship be released on the grounds that the Federal Court's in rem jurisdiction had not been properly invoked by Transfield.

Analysis - right to proceed in rem on owner's liabilities

Section 17 of the *Admiralty Act* prescribes the elements that must be satisfied in order to commence proceedings in rem against a ship on account of owners' liabilities as follows:

"Where in relation to a general maritime claim concerning a ship or other property, a relevant person:

- a. was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and
- b. is, when the proceeding is commenced, the owner of the ship or property.

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

With regard to the application of section 17, Justice Gordon cited the Full Court of the Federal Court's decision in *The Skulptor Konekov* (in which the Full Court applied the reasoning of the House of Lords in *The Eschersheim*) as authority for the principles that a "general maritime claim" cannot be at large (with section 17 directing that it must concern "a ship or other property"), and the requirement that there must exist a relationship between the claim and a particular ship was applicable to all heads of claim under section 4(3) of the *Admiralty Act*.

In ruling that Transfield's claim arising out of an FFA was not a claim concerning a particular ship, the judge noted that FFAs do not involve the chartering of any ship or the carrying of goods on any ship, rather they are derivatives:

"...FFAs are commonly described as "derivatives". They are derivatives because no party buys or sells any goods. There is no chartering of any ship. There is no carrying of goods whether by ship or otherwise.

"FFAs are usually entered into for one of two purposes: as a form of insurance, or hedge, by freight companies who desire some form of

protection from fluctuations in freight prices either charged or paid by them ... or as pure speculation, a bet. FFAs can be, and are, traded as financial instruments."

Maritime claims

Section 4(3) of the *Admiralty Act* lists the different types of "general maritime claim" which are, in effect, statutory heads of jurisdiction on which proceedings in rem can be instituted under section 17 to support an application for the arrest of a ship. The "statutory right of action in rem" set out in section 4(3)(f) is set out above.

It was argued on behalf of Transfield that the words "relates to" in section 4(3)(f) should be construed broadly in the sense that what is required is that an applicant show that its claim is 'connected' with an agreement covered by the section.

In support of this argument, reference was made to legal authorities in which a liberal construction and interpretation of the *Admiralty Act* had been applied.

Justice Gordon acknowledged that the Australian and English authorities supported a wide construction of the words "arising out of" as being equivalent to "in connection with".

In particular, the judge noted Justice Allsop's "careful analysis of the history [of the *Admiralty Act*]" in *Heilbrunn v Lightwood plc*.

However, she did not agree that the same considerations applied to the construction of the words "arising out of" could be applied to the interpretation of the phrase "related to".



Rather, consistent with the approach taken by Justice Allsop in Heilbrunn, Justice Gordon adopted the interpretation of the House of Lords in *Gatoil* “which concluded that the phrase “related to” should not be construed widely, but that there should be some “reasonably direct connection” with the activities described in the provision” (in this case, the carriage of goods by a ship).

Justice Gordon then proceeded to make the following definitive statement: “Approaching the matter in that way ..., none of the FFAs in issue has a reasonably direct connection with the activity of carriage of goods by a ship and thereby “relates to the carriage of goods by a ship” under s 4(3)(f) of the Act.

“Put another way, there is a need for a relationship between the claim and the particular ship the subject of the application in rem. Here, there was no relationship. There was no claim which fell within the description of a general maritime claim in s4 and, in particular, there was no claim of the type provided for in s4(3)(f) of the Act.”

Commentary

Justice Gordon’s findings are consistent with the widely-held view among maritime law practitioners internationally that claims arising out of FFAs are not of a character which are capable of giving a claimant a “statutory right of action in rem” or, for that matter, founding jurisdiction in rem on any other basis.

The fact that there does not seem to be any decided case in Australia or

the United Kingdom “where a claim in relation to a FFA had founded jurisdiction for the arrest of a ship” was considered by Justice Gordon to be “not surprising given the nature of the agreement and the fact that there is no relationship between the claim arising out of the FFA and the particular ship the subject of the application in rem.”

The judgment provides a cogent analysis of the principles that apply in order for a claimant to found jurisdiction in rem and their application to claims arising under FFAs which are relevant to countries where the legislative basis for arrest is similar to Australia, and those countries where the Arrest Convention has been implemented.

Accordingly, this decision is of international significance as it is likely to be accepted in many countries as persuasive authority that the lawful arrest a ship cannot be maintained on the basis of claim under a FFA.

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