

ADMIRALTY PRACTICE AND PROCEDURES:

AN OVERVIEW

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1 Jurisdiction In Personam and In Rem

The jurisdiction of an admiralty court may be exercised in personam or in rem.

1.1 Jurisdiction In Personam – S.43(1) FCA

In personam jurisdiction is conferred on the Federal Court by s. 43(1) of the Federal Court Act. In personam jurisdiction simply means that the court has jurisdiction against the person named as a defendant in the Statement of Claim (an individual or corporate entity). This is the usual jurisdiction exercised by all courts.

43. (1) Subject to subsection (4), the jurisdiction conferred on the Court by section 22 may in all cases be exercised in personam.

1.1.1 Limitations on In Personam Jurisdiction – s.43(4)

The limitations to in personam jurisdiction are contained in s. 43(4).

43 (4) No action in personam may be commenced in Canada for a collision between ships unless

(a) the defendant is a person who has a residence or place of business in Canada;

(b) the cause of action arose within the territorial, internal or other waters of Canada; or

(c) the parties have agreed that the Court is to have jurisdiction.

(5) Subsection (4) does not apply to a counter-claim or an action for a collision, in respect of which another action has already been commenced in the Court

1.2 Jurisdiction In Rem – s.43(2)

The jurisdiction in rem is the unique and defining characteristic of Admiralty practice and procedure. In rem jurisdiction allows a litigant to name an item of property as a defendant. Section 43(2) confers limited jurisdiction on the Federal Court to entertain such action.

43. (2) Subject to subsection (3), the jurisdiction conferred on the Court by section 22 may be exercised in rem against the ship, aircraft or other property that is the subject of the action, or against any proceeds of sale thereof that have been paid into court.

- In rem jurisdiction may only be exercised against a ship, aircraft or “other property” or the

proceeds of sale thereof if paid into court. The term “other property” is not defined but includes at least actions against cargo, bunkers, containers and equipment on board a ship.

- The ship, aircraft or other property must be “the subject of the action”. Property unrelated to the action cannot be made named and arrested merely to obtain security for the payment of any judgment. The action in rem is not an execution proceeding.
- In rem jurisdiction is further limited by section 22 of the Federal Court Act. In rem actions may only be commenced in respect of those claims coming within s. 22. These claims are:

22 (2) (a) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;

(b) any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;

(c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;

(d) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;

(e) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;

(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

(g) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

(h) any claim for loss of or damage to goods carried in or on a ship including,

without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;

(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

(j) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;

(k) any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;

(l) any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;

(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

(n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

(o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his employment;

(p) any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;

(q) any claim in respect of general average contribution;

(r) any claim arising out of or in connection with a contract of marine insurance; and

(s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.

1.2.1 Further Limits on In Rem Jurisdiction

1.2.2 Relationship with In Personam Liability

With the exception of actions for the enforcement of traditional maritime liens, the case law has established a requirement that there must be in personam liability of the owner of the ship to support an action in rem. (*Mount Royal Walsh Inc. v The "Jensen Star"*, (1989) 99 NR 42) This

requirement means that the owner of the ship must have personal liability for an action in rem to be sustained. The rule can create problems when a ship is under charter since the personal liability of the owner may not be involved. For example, if a ship supplier contracts with the charterer to supply a ship the personal liability of the owner is not involved and no in rem action can be maintained. In order to ensure an in rem claim the supplier must ensure that he contracts with the owner or with an agent of the owner.

The rule that the owner must be personally liable is somewhat relieved by a presumption that the person in possession of a ship has the authority to contract on the faith and credit of the ship and her owners. However, this is a rebuttable presumption.

1.2.2.1 Maritime Liens Excepted

The rule that the owner of the ship must be personally liable to support an action in rem does not apply to an action to enforce a traditional maritime lien. (*Goodwin Johnson Ltd. v SS. Scow AT&B No. 28*, [1954] SCR 518; *Marlex Petroleum Inc. v The "Har Rai"*, (1984) 4 DLR (4th) 739) Where the claim is for a traditional maritime lien the personal liability of the owner is not a relevant consideration or requirement. The traditional maritime liens include claims by seamen for wages (s.22(2(o))), claims for property damage caused by a ship in collision (s.22(2(d)) [note that claims for personal injury caused by a ship are not given maritime lien status] and claims for salvage (s.22(2(j))). (Claims on a bottomry bond or for disbursements by a Master would also be included but such claims are virtually extinct today.)

1.2.3 Changes in Ownership - s.43(3) FCA

Section 43(3) contains an important limitation on in rem actions.

43. (3) Notwithstanding subsection (2), the jurisdiction conferred on the Court by section 22 shall not be exercised in rem with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

An action in rem cannot be maintained where there has been a change in the beneficial ownership of the ship or other property unless the claim is in relation to:

- title, possession or ownership of a ship - 22 (2) (a);

- any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship - 22 (2) (b);
- a mortgage on a ship - 22 (2) (c);
- damage to property or for loss of life or personal injury caused by a ship - 22 (2) (d);
- salvage - 22 (2) (j);
- pilotage - 22 (2) (l);
- wages – 22(2)(o);
- general average contribution - 22 (2) (q); and
- wharfage - 22 (2) (s).

For all other claims, a change in beneficial ownership will extinguish the right to commence an in rem action. However, note that if the in rem action is commenced before the change in ownership it is not defeated by a subsequent change in ownership. The critical date is the time of commencement of the action.

Also, note that the claims for which a change in ownership is not relevant include the traditional maritime liens.

As to what constitutes “beneficial ownership”, it includes legal or registered ownership but has also been held to include equitable ownership in the sense of a trust relationship. The courts have, and will, look behind the registered ownership to enquire who truly enjoys the profits and benefits of ownership. (Royal Bank of Scotland PLC v The “Golden Trinity” et al., 2004 FC 795; Norcan Electrical Systems Inc. v. Feeding Systems A/S et al., 2003 FCT 702)

1.2.4 Sovereign Immunity – s. 43(7)

Section 43(7) prohibits in rem actions against sovereign powers as follows:

43 (7) No action in rem may be commenced in Canada against

- (a) any warship, coast-guard ship or police vessel;
- (b) any ship owned or operated by Canada or a province, or any cargo laden thereon, where the ship is engaged on government service; or

(c) any ship owned or operated by a sovereign power other than Canada, or any cargo laden thereon, with respect to any claim where, at the time the claim arises or the action is commenced, the ship is being used exclusively for non-commercial governmental purposes.

It is important to note that ss. (c) requires that the ship be used exclusively for non-commercial purposes. A ship owned by a state or state agency that is used for commercial purposes is subject to an in rem action.

1.3 Sisterships - s.43(8)

Section 43(8) extends the right to bring an in rem action against what are commonly referred to as sisterships. The English text of the section is as follows:

43(8) The jurisdiction conferred on the Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.

This section has been the subject of much debate and controversy. The English version of s. 43(8) was considered in *Hollandsche Aanamings Maatschappij b.v. v The "Ryan Leet"*, (1997) 135 FTR 67, where it was held that in order to maintain an in rem claim against a sistership the beneficial owner of the alleged sistership must be the registered owner of the ship that is the subject of the action. Later decisions recognised that the French version of section 43(8) was subtly different from the English version. In *Norcan Electrical Systems Inc. v. Feeding Systems A/S et al.*, 2003 FCT 702 and *Royal Bank of Scotland PLC v The "Golden Trinity" et al.*, 2004 FC 795, the court considered the French version which it translated as follows:

"The jurisdiction conferred on the Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action." [Emphasis added]

The court held that the French version was the better approach focusing as it does on beneficial ownership rather than registered ownership. The court further held that in order to determine beneficial ownership it was permissible to look behind the registered ownership and that this was not an unauthorised piercing of the corporate veil. The test is to determine "who ultimately enjoyed or was entitled to the profit and benefit derived from the ships, something which leads to the concept of beneficial ownership".

The problems with the sistership legislation have led to calls for reform of the law but there has

not been sufficient consensus as to what the law should be. The current proposal by the Policy Division of Transport Canada is to amend the English version of s43(8) to bring it in line with the French version.

2 Admiralty Rules – Part 13 Federal Court Rules

Part 13 of the Federal Court Rules, 1998 contains the special rules applicable to admiralty actions. It is important to remember, however, that the general rules of civil procedure also apply to admiralty actions unless inconsistent with the special rules. (Rule 475(2))

Rule 55 of the Rules of Court of the British Columbia Supreme Court contains the special rules for admiralty proceedings commenced in that court. These rules are less detailed than those in the Federal Court but are very similar.

2.1 Pleadings

2.1.1 General Rules

Pleadings are the documents that are filed in a court proceedings and that set out the parties case. The general rules relating to pleadings are contained in Rules 171-207 of the Federal Court Rules 1998. The pleadings in a simple action will consist of: a Statement of Claim filed by the Plaintiff setting out the Plaintiff's case against the Defendant; a Statement of Defence filed by the Defendant setting out the defence to the claim; and, possibly, a Reply filed by the Plaintiff answering the defences pleaded by the Defendant. Additional pleadings that may be filed are: a Counterclaim filed by the Defendant where the Defendant has a claim against the Plaintiff; a Third Party Claim filed by the Defendant against either a co-Defendant or a person not a party to the action where the third party claim is related to the claim of the plaintiff. There will be Statements of Defence filed to any Counterclaim or Third Party Claims and could also be a Replies to those Statements of Defence.

The general rules prescribe the form and content of the pleadings in an action. The form of any pleading is set out in the Schedules to the Rules. For all pleadings the Rules require that there be a style of cause setting out the names of the Plaintiffs and Defendants and that there be a concise statement of the material facts on which the party relies but not the evidence. (Rule 174) A pleading may also contain a pleading of law. (Rule 175) A Statement of Claim shall in addition plead the relief claimed.

2.1.2 Admiralty Rules

2.1.2.1 Style of Cause

Rule 477 provides as follows:

477. (1) Admiralty actions may be in rem or in personam, or both.

(2) The style of cause of an action in rem shall be in Form 477.

(3) The style of cause of an action in personam shall be as provided for in subsection 67(2).

(4) In an action in rem, a plaintiff shall include as a defendant the owners and all others interested in the subject-matter of the action.

The Admiralty Rules recognize and allow for two types of actions; actions in personam and actions in rem and both types of actions can be combined in a single proceeding. (Rule 477(1)) An action in rem is commenced by filing a Statement of Claim in rem. The special style of cause prescribed for an action in rem is contained in Rule 477(2) and Form 477. The style of cause must be prefaced by a statement that the action is one in rem and the in rem defendant shall be named as “the owners and all others interested in” the subject matter of the action. The generic style of a cause for an action in rem is as follows:

FEDERAL COURT

ADMIRALTY ACTION IN REM

BETWEEN:

(Name)
Plaintiff

and

The owners and all others interested in
The Ship (name)

(or)

The owners and all others interested in
The Ship (name) and freight

(or)

The owners and all others interested in
The Ship (name) and her cargo and freight

(or if the action is against cargo only)

The cargo ex The Ship (name)

(or if the action is against the proceeds realized by the sale of the ship or cargo)

The proceeds of the sale of The Ship (name)

(or)

The proceeds of the sale of the cargo of The Ship (name),
(or as the case may be)

Defendants

2.1.2.2 Sisterships

Rule 478 provides:

478. In an action against more than one ship in accordance with subsection 43(8) of the Act, each ship shall be named as a defendant in the statement of claim

Where the action is against a sistership in accordance with s. 43(8) of the Federal Court Act, the sistership shall be named as a defendant in the statement of claim. (Rule 478) In practice, a claim involving a sistership will usually include as in rem Defendants both the ship that is the subject of the action and the sistership. Technically, however, it is only necessary to include the sistership.

Where there are multiple sisterships each of them could be named in the Statement of Claim. However, in practice it is only necessary to name a sistership that is within the jurisdiction (so that it can be arrested) and that has sufficient value to satisfy the claim.

It is sometimes possible to amend a Statement of Claim to add a sistership that comes into the jurisdiction after the action was commenced. Whether this is possible will depend on whether the time for service of the Statement of Claim has expired and, if so, whether the sistership was previously in the jurisdiction during the currency of the Statement of Claim.

2.1.2.3 Who May Defend and Effect

Rule 480 provides that an action in rem may only be defended by the owner of the ship or by a person who claims to otherwise have an interest in the ship and the Statement of Defence shall disclose the interest of the person in the ship.

The case law has established that the act of filing a defence to an action in rem is to convert the action to one in personam. This means that the person who files a defence to the in rem action becomes liable for the claim and can have judgment rendered against them even though they may not be named as a Defendant in the Statement of Claim.

480. (1) An action in rem against a ship or other thing named as a defendant in the action may be defended only by a person who claims to be the owner of the ship or thing or to be otherwise interested therein.

(2) A defence filed by a person referred to in subsection (1) shall disclose the interest that the person claims in the ship or thing.

2.2 Service

2.2.1 General Rules

Service refers to the requirement that a pleading be delivered to the opposing party and the means of delivery. The general rules regarding service are contained in Rules 127-148 and 203-207.

2.2.1.1 Personal Service

A Statement of Claim must be personally served (Rule 127), which generally requires that it be hand delivered to the Defendant. Where personal service is not possible, a Plaintiff can apply to the court for an order dispensing with service or for another means of service. (Rule 136) Pleadings other than the Statement of Claim need not be personally served and can generally be served by mail or fax to the solicitor for the opposing party.

2.2.1.2 Time for Service

A Statement of Claim must be served within 60 days of the day it is issued by the court. (Rule 203) A Statement of Defence must be served and filed within 30 days of service of the Statement of Claim if the Defendant is served in Canada, within 40 days if served in the United States and within 60 days if served anywhere else. (Rule 204)

2.2.1.3 Service Ex Juris

As indicated above, a Defendant need not be in the jurisdiction to be served with a Statement of Claim. Rule 137 permits a Plaintiff to serve a Defendant outside of Canada. A Statement of

Claim served outside of Canada must be served in the manner prescribed by the rules for personal service within Canada or in the manner prescribed by the law of the jurisdiction where service is effected unless the service is effected in a country that is a contracting state to the Hague Convention on service in which case service must be effected according to the convention.

2.2.2 Admiralty Rules

2.2.2.1 Manner of Service

Rule 479 provides:

479. (1) Subject to subsection (2), the statement of claim in an action in rem shall be served

(a) in respect of a ship or cargo or other property on board a ship, by attaching a certified copy of the statement of claim to some conspicuous part of the ship;

(b) in respect of cargo or other property that is not on board a ship, by attaching a certified copy of the statement of claim to the cargo or property;

(c) in respect of freight,

(i) if the cargo in respect of which the freight is owing is on board a ship, by attaching a certified copy of the statement of claim to a conspicuous part of the ship,

(ii) if the cargo in respect of which the freight is owing is not on board a ship, by attaching a certified copy of the statement of claim to the cargo, or

(iii) if monies payable for the freight are in the possession of a person, by personal service of the statement of claim on that person; and

(d) in respect of any proceeds paid into court in another proceeding, by filing a certified copy of the statement of claim in that proceeding.

(2) If access cannot be obtained to property in respect of which a statement of claim is to be served under subsection (1), the statement of claim may be served personally on a person who appears to be in charge of the property.

The manner of service of a Statement of Claim in an action in rem is prescribed by Rule 479. If the action in rem is against a ship or cargo on board a ship, the Statement of Claim must be served by attaching it to a conspicuous part of the ship. (Rule 479(1)(a)) It is usually affixed to the door or window of the wheelhouse. If the action is against cargo or other property not on

board a ship, the Statement of Claim is served by affixing it to the cargo or other property. (Rule 479(1)(b)) If the action is against freight, the method of service is prescribed by rule 479(1)(c). Rule 479 does not specify who may serve a Statement of Claim and it may therefore be served by anyone. However, service of a Statement of Claim is usually done to effect an arrest of the ship or other property and where the ship or other property is to be arrested Rule 482 requires that the Statement of Claim, Affidavit to Lead Warrant and Warrant be served by a sheriff.

2.2.2.2 Substitutional Service

Generally, substitutional service is not permitted for service of an in rem Statement of Claim. However, in exceptional cases the court will permit the Statement of Claim to be served in a manner different from that prescribed. (Brooks Aviation Inc. v Wrecked and Abandoned Boeing Sb-17g Aircraft, 2002 FCT 503; 458093 B.C. Ltd. v The "Zomby Woof", (January 26, 1998) No. T-2587-94 (F.C.T.D.)) Moreover, Rule 479(2) provides that where access cannot be obtained to the ship or other property, the Statement of Claim can be served by personally serving it on a person who appears to be in charge of the ship or other property.

2.2.2.3 Service Ex Juris

An in rem Statement of Claim cannot be served outside of Canada for a claim commenced in the Federal Court or outside of British Columbia for a claim commenced in the Supreme Court of British Columbia. (McCain Produce Inc. v Visser Potato Ltd., 2001 FCT 994) Therefore, the ship or other property must be within the jurisdiction to effect service. If the ship does not come into the jurisdiction before the Statement of Claim expires (ie. 60 days from the date it is issued), the Plaintiff will have to obtain an order extending the time for service of the Statement of Claim. Such orders are usually granted provided the Plaintiff can show that the ship was not in the jurisdiction during the currency of the Statement of Claim. (Companhia Siderurgica Nacional v The "Imperial Confidence" et.al., (April 23, 1996) No.T-3083-94 (F.C.T.D.))

It should be noted that where the action is both in rem and in personam the prohibition against service ex juris operates only in respect of the in rem portion of the claim. The in personam Defendant can be served ex juris.

2.3 Arrest, Bail and Release

2.3.1 Arrest

The great advantage of the action in rem is the ability to arrest the ship or other property that is the subject of the action. An arrest provides a means to ensure that there is security for any judgment that the Plaintiff ultimately obtains. Rule 481(1) gives the right of arrest.

481. (1) A designated officer may issue a warrant for the arrest of property in an action in rem, in Form 481, at any time after the filing of a statement of claim.

2.3.1.1 Procedure

The ship or other property subject to the in rem action are subject to the arrest procedures set out in the rules. An arrest is effected by filing an Affidavit to Lead Warrant and obtaining a Warrant of Arrest which are then served on the ship by the sheriff together with the Statement of Claim.

The requirements of the Affidavit to Lead Warrant are set out in Rule 481(2):

(2) A party seeking a warrant under subsection (1) shall file an affidavit, entitled "Affidavit to Lead Warrant", stating

(a) the name, address and occupation of the party;

(b) the nature of the claim and the basis for invoking the in rem jurisdiction of the Court;

(c) that the claim has not been satisfied;

(d) the nature of the property to be arrested and, where the property is a ship, the name and nationality of the ship and the port to which it belongs; and

(e) where, pursuant to subsection 43(8) of the Act, the warrant is sought against a ship that is not the subject of the action, that the deponent has reasonable grounds to believe that the ship against which the warrant is sought is beneficially owned by the person who is the owner of the ship that is the subject of the action.

The Affidavit to Lead Warrant can be fairly brief as all it needs to contain is the information specified above. The only part of the affidavit that may require some elaboration is the requirement in respect of sisterships to show the deponent has reasonable grounds to believe the ship to be arrested is beneficially owned by the owner of the ship that is the subject of the action.

At the Federal Court the process for obtaining a Warrant of arrest is primarily a clerical procedure. The Affidavit to Lead Warrant is presented to a registry officer who will review it to

ensure it contains the information required by Rule 481(2). Provided it does contain the required information, the registry officer will then sign and issue the requested Warrant. This process takes approximately 15 minutes. At the B.C. Supreme Court the process is more complicated as an Affidavit to Lead Warrant is usually referred to a Master of the court for issuance of the Warrant. An arrest in the B.C. Supreme Court can take a day or more.

Once the Warrant is issued by the Court it must be served on the ship or other property by the sheriff together with the Affidavit to Lead Warrant and the Statement of Claim. It is the service of these documents together that perfects and effects the arrest of the ship or other property. (Rule 482) The warrant and Affidavit to Lead Warrant must be served in the same manner as prescribed in Rule 479 for service of the Statement of Claim.

2.3.1.2 Effect of Arrest

Rules 483 and 484 stipulate the effects of an arrest.

483. (1) Subject to subsection (2), possession of, and responsibility for, property arrested under subsection 482(1) does not vest in the sheriff but continues in the person in possession of the property immediately before the arrest.

(2) The Court may order a sheriff to take possession of arrested property on condition that a party assume responsibility for any costs or fees incurred or payable in carrying out the order and give security satisfactory to the Court for the payment thereof.

484. No property arrested under a warrant shall be moved without leave of the Court or the consent of all parties and caveators

Rule 483(1) states that the arrest of a ship or other property does not vest possession of the ship or other property in the sheriff. To the contrary, the possession of and responsibility for the ship or other property remains with the person who had possession immediately before the arrest. The only but significant effect of an arrest is that the property arrested cannot be moved without the leave of the court or the consent of all parties and caveators. (Rule 484) The court will generally grant leave to move an arrested ship where the movement will not impair the security afforded by the arrest and it is necessary to preserve and protect the ship.

Rule 483(2) provides that the court may order a sheriff to take possession of the ship or other property provided that the party requesting the sheriff to take possession assume responsibility for the expenses and provides security for the expenses. The court will order a sheriff into

possession where there is reasonably plausible evidence that the vessel should have the protection afforded by a sheriff in possession. (Striebel v The “Chairman”, 2002 FCT 545)

2.3.1.3 What is Covered

The warrant of arrest and the prohibition against movement extends to cover all of the equipment on board the ship and also equipment removed from the ship prior to the arrest. (Whyte v The “Sandpiper VI”, 2002 FCT 271; Pacific Tractor Rentals (V.I.)Ltd. v The "Palaquin", (June 14, 1996) No. T-2616-95 (F.C.T.D.))

2.3.1.4 Contempt

A party that moves an arrested vessel or removes equipment from an arrested vessel is guilty of contempt of court, a criminal offence. (Whyte v The “Sandpiper VI”, 2002 FCT 271)

2.3.1.5 Wrongful Arrest

It is a well established rule and one that was recently confirmed by the Supreme Court of Canada in Armada Lines Ltd. v. Chaleur Fertilizers Ltd., (1997) 2 SCR 617, that damages for wrongful arrest may only be awarded where the arresting party acts with either bad faith or gross negligence. Thus, an action for wrongful arrest cannot be maintained merely because the Plaintiff in the arresting action was unsuccessful. The Plaintiff must have either been grossly negligent or have acted in bad faith, things which are very difficult to establish.

2.3.2 Bail

Bail is dealt with in Rules 485 and 486,

485. On motion, the Court may fix the amount of bail to be given for the release of arrested property.

486. (1) Unless the parties agree otherwise, bail shall consist of

(a) the guaranty of a bank;

(b) the bond of a surety company licensed to do business in Canada or to furnish security bonds in the part of Canada where the bond is executed, in Form 486A; or

(c) a bail bond in Form 486A.

(2) A party who intends to give bail in the form of a bond referred to in paragraph (1)(b) or (c) shall serve and file a notice of bail, in Form 486B, at least 24 hours

before filing the bond.

(3) An adverse party or caveator who is not satisfied with the sufficiency of a bond set out in a notice of bail shall serve and file a notice of objection in Form 486C.

(4) Any question as to the form of bail or the sufficiency of a surety may be determined by a designated officer or referred by that officer to the Court.

A ship or other property under arrest may be released from arrest upon the posting of bail. The amount of bail required may be determined by the court on motion. (Rule 485) The amount of bail is usually set at the Plaintiff's reasonably arguable best case plus an amount to cover interest and costs. (C.P. Ships (Bermuda) Ltd. v The "Panther Max", 2002 FCT 406)

The maximum amount of bail or other security is the value of the ship or other property arrested.

The form of bail is specified by Rule 486 and Form 486A.

BAIL BOND

I, (full name and occupation of deponent), of the (City, Town, etc.) of (name) in the (County, Regional Municipality, etc.) of (name), SWEAR (or AFFIRM) THAT:

1. I submit myself to the jurisdiction of this Court and consent that if (insert name of party for whom bail is to be given, and state whether plaintiff or defendant, or as the case may be) do(es) not pay what may be adjudged against them (or as the case may be) in this action, with costs, or do(es) not pay any sum due to be paid under any agreement by which the action is settled before judgment and which is filed in this Court, execution may issue against me, my executors or administrators, or my personal property or movables, for the amount unpaid or an amount of \$(amount), whichever is the lesser.

(Add where bond given by an individual:)

2. I have a net worth of more than the sum of \$(state amount in which bail is to be given) after payment of all my debts, as shown by the financial statement attached as Appendix A hereto.

Sworn (or Affirmed) before me at the (City, Town, etc) of (name) in the (County, Regional Municipality, etc.) of (name) on (date).

Commissioner for Taking Affidavits

(or as the case may be)

(Signature of Surety)

The accepted forms of bail are the guaranty of a bank, the bond of a licenced surety company or a bail bond in the form 486A. Rule 486 also allows other forms of security provided the parties agree. The most common form of security is a letter of undertaking provided by the P&I Club of the arrested vessel. In such a letter the P&I Club agrees to attorn to the jurisdiction and file a defence and further agrees to pay any judgment up to a specified maximum.

2.3.3 Release

2.3.3.1 When Available

Rule 487 governs the release of vessels or other property from arrest.

487. (1) Unless a caveat has been filed under subsection 493(2), a designated officer may issue a release of arrested property in Form 487

(a) on payment into court of

(i) the amount claimed,

(ii) the appraised value of the property arrested, or

(iii) where cargo is arrested for freight only, the amount of the freight, verified by affidavit;

(b) if bail has been given in an amount fixed under rule 485 and in accordance with subsections 486(1) and (2) and no objection under subsection 486(3) is outstanding;

(c) on the consent in writing of the party at whose instance the property was arrested; or

(d) on the discontinuance or dismissal of the action in respect of which the property was arrested.

2.3.3.2 Release Without Security

The court may also order that a ship be released from arrest pursuant to Rule 488.

488. (1) On motion, the Court may, at any time, order the release of arrested property.

(2) Where, pursuant to subsection 43(8) of the Act, a ship that is not the subject of an action has been arrested, any owner or other person interested in the ship may bring a motion to the Court for the release of the ship, and if it is found that the ship is not beneficially owned by the person who is the owner of the ship that is the subject of the action, the Court shall order its release without the taking of bail.

(3) Where on a motion under subsection (2) the Court is satisfied that the action in which the ship has been arrested is for a claim referred to in any of paragraphs 22(2)(a) to (c) of the Act, the Court may order the release of the ship without the taking of bail.

This rule is often invoked to request that a ship be released without security. However, the courts have repeatedly said that the release of a ship without bail will only be done in rare instances where the circumstances are quite extraordinary or where the case is beyond doubt hopeless. (*Fish Maker LLC v The "Zodiak" et al.*, 2004 FC 670)

2.3.3.3 How Effected

Unless there is an order of the court directing the ship or other property arrested to be released the ship or other property is released from arrest upon the issuance of a document directing the sheriff to release the ship or other property from arrest. (Form 487)

RELEASE

TO the Sheriff of the (County, Regional Municipality, etc. of (name), or as the case may be):

WHEREAS by warrant issued (date) you were directed to arrest the ship (name) (or her cargo, etc. or as the case may be) and to keep the same under arrest until further order of this Court,

YOU ARE NOW DIRECTED to release the said ship (name), (or her cargo, or as the case may be) from the arrest effected by virtue of that warrant.

(Date)

Issued by: _____

(Designated Officer)

Address of local office: _____

This release was issued at the request of, and inquiries may be directed to:

(Name, address, telephone and fax number of solicitor or party)

Pursuant to Rule 489 the property shall be released upon service of the Release upon the sheriff and payment of his fees and costs.

489. Property shall be released from arrest on service of a release on the sheriff and payment of all fees and costs of the sheriff in respect of the arrest or custody of the property.

2.4 Sale

Rules 490-492 govern the sale of ships or other property under arrest. These rules will be considered in detail when we consider Liens and Priorities.

2.5 Caveats

Rules 493 – 495 deal with caveats of which there are three types: caveat warrant, caveat release and caveat payment.

493. (1) A person who desires to prevent the arrest of property shall serve and file a caveat warrant in Form 493A undertaking to give, within three days after being required to do so, bail in respect of any action that has been, or may be, brought against the property.

(2) A person who desires to prevent the release of any property under arrest shall serve and file a caveat release in Form 493B.

(3) A person who desires to prevent the payment of money out of court shall serve and file a caveat payment in Form 493C.

(4) A caveat under subsection (1), (2) or (3) shall be served on all parties and caveators.

(5) Where a person filing a caveat under this rule is not a party to the action, the caveat shall state the person's name and provide an address for service.

494. (1) A person at whose instance a warrant is issued for the arrest of property in respect of which there is a caveat warrant outstanding is liable to payment of all resulting costs and damages, unless the person can satisfy the Court that the person should not be liable therefor.

(2) A person who files a caveat release or caveat payment is liable to payment of all resulting costs and damages, unless the person can satisfy the Court that the person should not be liable therefor.

495. (1) A caveat expires one year after the day on which it was filed.

(2) A new caveat may be served and filed before or after the expiration of an existing caveat.

(3) A person who has filed a caveat may withdraw it at any time by filing a notice in Form 495.

(4) On motion, the Court may order that a caveat be set aside.

Caveats must be served and filed. Caveats expire one year after they are filed (Rule 495(1)) although a new caveat may be served and filed before or after the expiration of time (Rule 495(2)). A caveat may be withdrawn at any time or may be set aside by the court. (Rule 495(3)&(4))

The court registry maintains caveat books for each type of caveat which list all caveats and may be searched.

2.5.1 Caveat Warrant

A caveat warrant is governed by Rule 493 (1). It is a document that may be served and filed by a person who desires to prevent the arrest of a vessel or other property. Such person must undertake to pay bail within three days of being required to do so. A caveat warrant is in the following form:

CAVEAT WARRANT

TAKE NOTICE THAT I, (full name and address) apply for a caveat against the issue of any warrant for the arrest of the ship (name) (or description of other property) without notice first being given to me.

AND I UNDERTAKE, within three days after being required to do so, to give bail in this or any other action or counterclaim against that ship (or other property) in this Court in the sum of \$(amount), or to pay that sum into Court.

MY ADDRESS FOR SERVICE AND TELEPHONE NUMBER are:
(address and telephone number)

(Date)

The court registry staff will normally search the caveat warrant registry book prior to issuing a warrant for the arrest of any property and will advise the person requesting the warrant of the existence of any caveat warrant. The onus is then on that person to request bail from the caveator. If the person proceeds with the arrest notwithstanding the existence of the caveat warrant they can be liable for all resulting costs and expenses pursuant to Rule 494(1).

2.5.2 Caveat Release

A caveat release is a document served and filed by a person who wishes to prevent the release of property under arrest. A caveat release is in the following form:

CAVEAT RELEASE

TAKE NOTICE THAT I, (full name and address), apply for a caveat against the release of the ship (name) (or description of other property), now under arrest pursuant to a warrant issued (date) without notice first being given to me.

(If person applying for caveat is not a party to the action, add:)

MY ADDRESS FOR SERVICE is: (address)

(Date)

Pursuant to Rule 494(2) a person who files a caveat release is liable to payment of all resulting costs and damages, unless the person can satisfy the Court that the person should not be liable therefor.

2.5.3 Caveat Payment

A caveat payment is a document served and filed by a person who wishes to prevent the payment of money out of court. A caveat payment is in the following form:

CAVEAT PAYMENT

TAKE NOTICE THAT I, (full name and address), apply for a caveat against the payment of any money out of the proceeds of the sale of the ship (name) (or description of other property), now remaining in Court, without notice first being given to me.

(If person applying for caveat is not a party to the action, add:)

MY ADDRESS FOR SERVICE is: (address)

(Date)

Pursuant to Rule 494(2) a person who files a caveat payment is liable to payment of all resulting costs and damages, unless the person can satisfy the Court that the person should not

be liable therefor.