

**ICMA XV**

**Wrongful Arrest of Ships: A Revisit**

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## **Wrongful Arrest of Ships: A Revisit**

### **Introduction**

1. This is a revamp of a paper I gave in 1996 for the London Shipping Law Centre. I make no apologies for returning to this topic: the right of a shipowner to claim compensation for loss caused by the detention of his or her ship whilst under arrest.
2. I said then that the law needs to be changed the sooner the better. But it has not changed. Recent cases and the two leading text books continue to assert that such loss is only recoverable when the arresting party is guilty of *mala fides* or *crassa negligentia*.<sup>1</sup> But I would venture to suggest that this view is, at the very least, ripe for reconsideration.
3. This paper follows the format and includes much of what I said in my earlier paper; but it also includes certain new comments in particular with regard to the possible impact of the Human Rights Act 1998 originally suggested to me by my former pupil, Mr Peter Duffy. It is my hope that raising this topic at this international conference will generate further discussion and thus perhaps assist in bringing forward the day when the present state of the law in this area is overhauled.
4. In raising this matter - again - for debate, I recognise that the views which I hold are not necessarily shared by others. Indeed, I know that there are some who (still !) do not share my views - in particular, because any change in the law will, or at least may, have the result of making it less attractive for a would-be plaintiff to effect an arrest in this country; and because any such result should be avoided at all costs regardless of any injustice that might be caused in any particular case.
5. So I am fully aware of the fact that I am dipping my toes again into treacherous waters. But (as I have said before) that is no reason to refrain from paddling. And I draw some comfort from the fact that I am not entirely on my own in suggesting a reconsideration of this area of the

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<sup>1</sup>The Kommunar (No 3) [1997] 2 Lloyd's Rep 22; Armada Lines v Chaleur Fertilisers [1997] 2 SCR 617 (Canada Sup. Ct); Modern Admiralty Law, Aleka Manderaka Sheppard (2001), p132; Admiralty Jurisdiction and Practice, Nigel Meeson, 3<sup>rd</sup> Edition (2003), pp133-135.

law: see for example the invaluable articles by Stewart Boyd QC: "Shipping lawyers: land rats or water rats?" [1993] LMCLQ 317 @ 327-328 and Shane Nosel: "Damages for the wrongful arrest of a vessel" [1996] LMCLQ 368.

6. I also draw some further comfort from the judgment of Colman J in The Kommunar where the defendant shipowner sought to recover damages for wrongful arrest. In the event, that claim was dismissed. The case is of particular interest because of the comments made by Colman J. in drawing attention to the potential injustices and anomalies inherent within the present procedures:

*"The in rem jurisdiction of the Admiralty Court requires no undertaking in damages from a plaintiff who obtains the benefit of security for his claim by arresting a vessel. Even if the plaintiff's claim fails or he is found to have wrongly invoked the jurisdiction he will not have to compensate the shipowner for the expenses and losses arising out of the arrest unless mala fides or crassa negligentia is proved. This is a rule of English law which can bear very harshly on shipowners who for some special reason may be unable to obtain release of their vessel by putting up security. It is not a rule which is found in the Civil Law systems. The more widely used procedure for obtaining security for a claim in personam in English law is the Mareva injunction, but there is an undertaking in damages required and the liability in respect of that undertaking arises upon the basis that, if the underlying claim fails, the plaintiff is liable for all losses caused by the injunction. The absence of a similar facility in Admiralty proceedings in rem may thus leave without remedy an innocent defendant shipowner who has suffered loss by an unjustifiable arrest but who is unable to establish malice or crassa negligentia."*

### **The privileged position of the arrestor**

7. These comments are all the more forceful when one considers more generally the privileged position in which a would-be plaintiff stands when availing himself of the procedure of arrest in the Admiralty Court. The following features - at least - stand out:

### **No necessary "link" with the jurisdiction**

8. First, it is unnecessary, at least in the first instance, for the plaintiff to establish any link with the jurisdiction save that the vessel which is sought to be arrested is within the jurisdiction. Neither the plaintiff nor the defendant shipowner needs to be resident or domiciled within the jurisdiction. The vessel need not be registered here. The underlying claim need have no connection with the jurisdiction. For example, the fact that the claim is one based in contract governed by a foreign law is no bar to

an arrest. Nor is the fact that the claim is caught by an arbitration clause or a foreign exclusive jurisdiction clause. Of course, the plaintiff may be faced with an application for a stay of the proceedings - for example on the basis of any such arbitration clause or foreign exclusive jurisdiction clause or on the grounds of *forum non conveniens*. But in such a case the Court may, and generally will, require security to be put up in place of the ship as a condition of the grant of its release from arrest.

### **No advance notice of arrest**

9. Second, it is generally unnecessary for the would-be plaintiff to give any advance of notice of the intention to arrest. In the context of the commencement of an "ordinary" action, this causes little, if any, hardship. But in the context of the commencement of an action in rem coupled with the arrest of the relevant ship, the detention of the vessel can often cause substantial loss. Although the shipowner can put up bail or other security to obtain the release of the ship, this inevitably takes some time to arrange. Even if the actual period of detention is short, the losses can be substantial.

### **Strength of case**

10. Third, unlike an application for permission to issue a Writ for service out of the jurisdiction, it is not necessary for the plaintiff to show that he has a "good arguable case" or that the claim is one which otherwise has a certain minimum strength. It is generally sufficient that the claim is not "hopeless" - in which case the action/arrest may be set aside. The decision of the Court of Appeal in The Varna [1993] 2 Lloyd's Rep 253 has highlighted this feature of the arrest procedure. As appears from that case, under the then RSC Order 75 r.5 as amended in 1986 a would-be plaintiff was entitled as of right to the issuance of a warrant of arrest provided that the formal requirements of that rule had been complied with - in particular that the requisite affidavit had been filed so as to demonstrate that the plaintiff had a claim falling within the admiralty jurisdiction against the relevant ship.
11. Until the change of the rules in 1986, it was generally thought that the application for the issue of a warrant of arrest was in the nature of an application for a discretionary remedy which lay in the power of the Court to grant or refuse - and so held by Lord Justice Robert Goff in The

Vasso [1984] 1 Lloyd's Rep 235. It followed that any affidavit in support of such an application had to be "full and frank", failing which the warrant of arrest might be set aside like any other *ex parte* order which was in the discretion of the Court. This view continued to prevail even after the change in the rules: see eg The Nordglimt [1987] 2 Lloyd's Rep 470 and The Kherson [1992] 2 Lloyd's Rep 261. However, as decided in The Varna, the effect of the change in the rules was to transform what had previously been (or been perceived to be) a discretionary remedy into a remedy to which the plaintiff was entitled (ie as of right) if he had complied with the requirements of the order.

12. This position remains under the new C.P.R. rules: see Admiralty Practice and Jurisdiction, Meeson, p.137 para 4.42. In consequence, there was - and is - no longer any requirement for the plaintiff's affidavit in support of the application for arrest to be full and frank. Whether or not that was the intention behind the change in the rules, I do not know. But that is the position as it stands at present.
13. Of course, the procedure culminating in the stamping of the warrant of arrest by the stamping officer is not without scrutiny by the Court. The Admiralty Marshal - or the appropriate officer - must and will ensure that the requirements have been complied with. To that extent, the issuance of a warrant of arrest is not automatic. But such scrutiny does not, as I understand, extend to an assessment of the strength of the plaintiff's case - in particular whether the plaintiff's claim can be said to exceed a certain minimum strength.

### **“Character” of the Defendant**

14. Fourth, the plaintiff's right to arrest does not depend upon the "character" of the defendant; or otherwise persuading the Court that the defendant is a "debt dodger"; or that the defendant is otherwise unlikely to meet the plaintiff's claim. This position is, of course, in stark contrast to that of a plaintiff applying to the Court for a Mareva injunction.

### **Size of claim**

15. Fifth, the right to arrest is not (generally) limited by the amount of the claim. Thus, a plaintiff with a claim for \$100,000 may arrest a ship worth

\$10m although if a reasonable amount of alternative security is offered in place of the ship, the plaintiff will not be entitled to maintain the arrest.

### **No cross-undertaking in damages**

16. Sixth, there is no requirement that the plaintiff provide any cross-undertaking in damages. I assume that this is correct. Certainly, the absence of such a facility is noted by Colman J as one of the features distinguishing admiralty proceedings from applications for a *mareva* injunction. And I know of no case in recent times in which a plaintiff has been required to give a cross-undertaking in damages - still less put up security - to meet any liability for wrongful arrest as a precondition of the arrest of a ship.

17. So far as I am aware, there is only one case in which an attempt was made to force a plaintiff to put up security (ie The D H Peri Lush 543) - and the attempt was dealt with robustly by Dr Lushington:

*"To order security as for a wrongful arrest would be an innovation on the practice of the Court, and would form a serious bar to foreigners suing in this Court."*

18. Until the change in the rules in 1986, I suppose it might have been arguable that since the issuance of the warrant of arrest was not as of right but discretionary the Court would have had jurisdiction, inherent in the exercise of the discretion, to require a plaintiff to give an undertaking in damages - and, if necessary, fortify such undertaking by appropriate security - as a precondition to the issuance of the warrant of arrest. Even so, the answer might well have been that the requirement of such an undertaking and provision of security was not consistent with the practice of the Court - regardless of whether or not there was jurisdiction to do so. But since the change in the rules, if the issuance of the warrant of arrest is no longer discretionary but as of right, such an argument must be untenable.

19. I have set out above what I consider to be some at least of the main features of admiralty proceedings which place a would-be plaintiff in a privileged position when seeking to arrest a ship. It is against that background that I now turn to consider what, if any, compensation a shipowner is, or should be, entitled to receive for wrongful arrest.

20. It is convenient to start by considering what the law is - or at least what the law in this area is perceived to be.

### **The law**

21. For more than 100 years, it seems to have been generally accepted that a shipowner cannot claim damages for wrongful arrest save in limited circumstances. Thus, in The Volant (1864) Br. & L 321, Dr Lushington stated in terms admitting of no doubt:

*"It is a well-established rule in this Court that damages for arresting a ship are not given except in cases where the arrest has been made in bad faith or with crass negligence."*

The precise origin of this so-called "well-established" rule remains unclear as does its basis or rationale. But its existence can hardly be doubted - and ever since the middle of the 19<sup>th</sup> century it has been treated almost without exception as if an immutable part of English law.

22. To suggest to an admiralty lawyer that that is not English law - or not what English law should be - is as shocking as the discovery by the Court of Appeal in 1977 that a Plaintiff might obtain an interlocutory injunction of a type that we now call the *Mareva*. For almost 100 years, it had generally been assumed that Lister v Stubbs was binding authority precluding the grant of such an injunction - and indeed that such an injunction was contrary to principle. What is perhaps more shocking is the fact that such an assumption existed unchallenged for so long. And the same might well be said of the assumption that a shipowner can only claim damages for wrongful arrest where the arrest is made in bad faith or with crass negligence.

### **The Evangelismos**

23. The leading case which is often regarded as establishing the rule is, of course, The Evangelismos (1858) 12 Moo PC 352 decided a few years before The Volant. In that case a vessel had collided with the plaintiffs vessel while the latter was at anchor. Boats from the plaintiffs vessel gave chase and subsequently lay close to the other vessel while it anchored off Southend, but it set sail and contact was lost. The following day, The Evangelismos was found in the West India Docks and was believed to be the vessel which had collided with the plaintiff's vessel. It was arrested but it was held at the trial not to be the same vessel. The owners of The

Evangelismos claimed damages for wrongful arrest during a period of nearly three months. The facts are important because this was not simply a case where it could be said that there was a claim against the ship in question which ultimately failed at the trial. Rather, this was a case where the ship arrested by the plaintiff was not the relevant ship.

24. The obvious argument was that there was no jurisdiction to arrest the Evangelismos at all - although it does not appear from the argument as reported that the case was advanced on this basis. Nevertheless, the claim for damages for wrongful arrest was dismissed by Dr Lushington on the basis that the arrest had been made in the bona fide belief that the Evangelismos had been in the collision and that there had been no mala fides in the proceedings.
25. An appeal to the Privy Council was dismissed. In giving judgment, the Rt. Hon. T Pemberton Leigh said this:

*"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.*

*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 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? Their Lordships are of opinion, that there is nothing whatever to establish the Appellant's proposition. It is true the identity of the ship was not proved, but there were circumstances which afforded grounds for believing that this ship was the one that had been in collision with the barge."*

26. This passage was considered by Colman J in The Kommunar in the following terms:

*"Two types of cases are thus envisaged. Firstly, there are cases of mala fides which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel. It is, as I understand the judgment, in the latter sense that such phrases as "crassa negligentia" and "gross negligence" are used and are described as implying malice or being equivalent to it. The reference at the end of the passage from the judgment just cited to there being circumstances which afforded grounds for believing that the arrested ship was the one that had been in collision suggests*

*that if on the evidence there is a genuine but understandable mistake as to the identity of the vessel, that will not amount to crassa negligentia, Taking the judgment as a whole, it would not appear that mere absence of reasonable care to ascertain entitlement to arrest the vessel would necessarily amount to crassa negligentia in the sense there used."*

27. This analysis suggests that the concept of "crassa negligentia" is very limited indeed. In the course of argument in The Evangelismos, the point is made that no authority could be found in the Admiralty Court where damages had been awarded unless there was mala fides or fraud in the transaction. I have spent some time searching to find otherwise - without success. And since the decision in The Evangelismos it does not appear that anyone else has been any more successful.

### **Other cases**

28. Nevertheless, it is not uninteresting to note that both before and after The Evangelismos there are numerous cases in which damages have been awarded even though it is at least sometimes difficult to say that the conduct of the plaintiff involved actual mala fides or conduct from which mala fides might be implied.
29. Thus, as a footnote to the report of The Evangelismos, there are three cited cases viz The Orion (1852), The Glasgow and The Nautilus in which damages were awarded - but it is impossible to identify from the short notes of those cases the basis upon which this was done. From the terms of the judgment in The Evangelismos they appear to have been treated as cases of mala fides or crassa negligentia.
30. The Victor (1860) Lush 72 was a collision case in which the plaintiff endeavoured to make the cargo of the opposing ship liable for his loss. Dr Lushington described this endeavour as *"...all experiment and an experiment contrary to the long practice of the Court and the elementary principles of law..."* and, on this basis, awarded damages for wrongful arrest.
31. The other important cases after The Evangelismos were considered by Colman J. in The Kommunar. The first, The Cheshire Witch (1864) Br & L 362, concerned a claim by a shipowner for damages while his ship was detained for a period of 12 days after the plaintiffs claim was dismissed pending consideration of an appeal. This is treated by Colman J as a case where the appeal was manifestly so hopeless as to deprive the plaintiff of

all reasonable grounds for continuing the arrest.

32. The Cathcart (1867) LR 1 Ad and E 333 concerned a claim by a mortgagee who arrested the vessel on grounds of non-payment and what were, in effect, charges of fraud against the shipowner. On the facts, it was held that it must have been obvious that non-payment did not entitle the mortgagee to arrest the vessel; and the mortgagee "quite failed to prove" the charges of fraud. It was on this basis that damages were awarded.
33. In The Strathnaver [1875] 1 App Cas 58, the Privy Council held that damages were not recoverable in respect of a mere error of judgment in arresting the vessel where there was no mala fides. And in The Walter D Wallett [1893] P 202 it was held that the test for entitlement to damages for wrongful arrest of a vessel at common law was substantially that for malicious arrest of a person, namely whether there was want of reasonable or probable cause which was equivalent to the admiralty test of mala fides or crassa negligentia as in The Evangelismos.

### **Damages as "costs" ?**

34. For the avoidance of doubt, it seems plain from these authorities that the loss suffered by a shipowner as a result of an arrest cannot be recouped as part of any order of the costs in the shipowner's favour at the end of the action although, as appears in The Kornmunar, it may be that the Court can utilise its discretion on costs to redress what might otherwise be injustice on a shipowner. A difficult question arises as to whether a shipowner can recover, as part of his "costs", the cost of putting up bail to obtain the release of the ship. There is authority to the effect that a party who has demanded excessive bail will be ordered to pay the costs of the excessive bail: The George Gordon (1884) 9 PD 46, The Irish Fir (1943) 76 LI L Rep 51. But I know of no authority which deals with the position of the costs of bail which is not excessive; and I regret to say that I do not know what, if any, practice there may be on this subject.

### **Underlying rationale ?**

35. As I have already stated, I have found it difficult to understand the basis or rationale of the rule that a shipowner should not be entitled to damages save in the case of mala fides or crassa negligentia. There is little, if

anything, in the reported cases to explain the basis of the rule. Some attempt to provide an explanation may be found in The Volant (see above) where Dr Lushington said:

*"...One reason for this may be that the appointed mode of suing in this Court is by arresting the property; another that the property may be released at once upon bail and therefore the damages are usually inconsiderable. "*

36. These two reasons are hardly very persuasive. The reference to "mode of suing in this Court" is not easy to understand. So far as the modern procedure is concerned, the mode of suing in the Admiralty Court certainly includes the action in rem which is, of course, invoked by the requisite service of the writ on the ship. But the commencement and pursuit of such a procedure does not necessarily involve the arrest of the ship in question. The issuance and execution of the warrant of arrest operate independently of the issuance and service of the writ in rem - although in practice these two procedures will usually go hand in hand. It may be that originally the mode of suing in the Admiralty Court was by arresting the ship in question - although my own researches suggest that by 1864 (ie when it was decided) the distinction between the writ in rem and the warrant of arrest was well in place.
37. As to the second reason given by Dr Lushington, it may well be that since the vessel might be released at once on bail the damages are usually inconsiderable. But this is not always so. Even when the period of detention is short, the loss suffered by a shipowner can be considerable. In many cases, the shipowner cannot - or cannot easily - put up bail or other security. Why should not the shipowner be protected in such cases?
38. Another reason sometimes suggested for the rule is founded upon a conceptual analysis of the nature of the arrest procedure. A comparison with liens is perhaps useful. Where a person purports to exercise a contractual lien in circumstances where the exercise of such lien is held to be uncontractual, it is not difficult to say that the exercise of that lien was a breach of contract and therefore "wrongful" even in the absence of mala fides or crassa negligentia. In the usual way, breaches of contract do not depend upon showing that the defendant acted with malice or stupidly. It is sufficient to show that the defendant acted in breach of his contract.
39. In certain circumstances, it is possible that arrest proceedings (even for the sole purpose of obtaining security for the plaintiffs claim) may

constitute a breach of contract giving rise to a claim for damages see eg Marazura v Oceanus [1977] 1 Lloyd's Rep 283 and The Lisboa [1980] 2 Lloyd's Rep 546. But this is wholly exceptional; and the law concerning the arrest of ships may be said to operate in an entirely different way. In such a case, the arrest is effected not by the plaintiff himself but by the Court. Certainly, it will only be effected by the Court on the application or at the instance of the plaintiff. But, as a matter of analysis, it is the Court not the plaintiff which effects the arrest. Thus CPR 61.5(8) provides that property may only be arrested by the Marshal or his substitute. It is in this context that the analogy with the common law cases on malicious prosecution can be said to be relevant.

40. Similarly, it can be said that a would-be plaintiff has a statutory right both (a) to commence proceedings in rem provided that the "claim" is one falling within a recognized category and (after the change of the rules in 1986) (b) to the issuance of the warrant of arrest. The claim may ultimately be held to be "good" or "bad"; but the fact, for example, that the claim is subsequently dismissed does not of itself mean that the plaintiff did not - at the time of the arrest - have a claim which entitled him to arrest the relevant ship. On this basis, it is difficult, if not impossible, to describe the arrest as "wrongful" save in circumstances of mala fides or crassa negligentia.
30. This analysis does not, however, explain why the Court should not necessarily insist upon some kind of cross-undertaking in damages from the plaintiff as a precondition of lending its assistance to the arrest of the relevant ship.

### **Courts of Equity**

41. It appears that a similar question arose - and the problem was faced - by the Courts of Equity in the last century when the law relating to the grant of injunctions was in its early stage of development. According to Lord Diplock in Hoffman-La Roche v Trade Sec [1975] AC 295 @ p360, the practice of exacting an undertaking as to damages from a plaintiff to whom an interim injunction is granted originated during the Vice-Chancellorship of Sir James Knight Bruce during the 1840s. This dating is apparently based upon an observation of Sir George Jessel in Smith v Day (1882) 21 CH D 421.

42. In fact, it appears that this practice probably originated well before the 1840s: see the recent Australian decision of Bond Brewing Holdings Ltd v National Australia Bank Ltd [1991] 1 VLR 580 @ 599 where Brooking J. draws attention to the earlier authorities. Whatever may be the precise date of origin of this practice, it remains of considerable interest. As explained in the Bond Brewing case:

*"It is because damage flowing from the act of a court is not compensable in damages unless one of the recognized causes of action exists that equity requires its undertaking or bond or other appropriate safeguard."*

43. Why should the Admiralty Court be any different? To assert that the practice in the Admiralty Court is - or at least was - different from the practice in the Courts of Equity is no justification for the difference in practice – still less the continuation of the practice. On the contrary, I would suggest that, in the absence of any cogent argument to the contrary, there can be little if any excuse for the failure of the Admiralty Court to follow the example of the Courts of Equity ie to change its practice to meet the requirements of justice.

### **Counter-arguments**

44. What possible arguments are there then for not following the early example shown by the Courts of Equity in, what I would suggest, are circumstances comparable to the arrest of a ship?
45. First, what I have just said is wrong ie the grant of an interlocutory injunction depends upon principles quite different from the issuance and execution of a warrant of arrest so that any "comparison" is simply untenable. To a certain extent, this is no doubt true. In particular, there can be no doubt that the grant of an interim injunction is discretionary; whereas, as I have already noted, post-Varna the present state of the law is to the effect that the issuance of a warrant of arrest is essentially as of right subject to the plaintiff complying with certain formal requirements. But this is as a result of the change of the rules of court in 1986; and there appears to be no reason in principle why, by a further change in the rules, we could not revert to the position before 1986.
46. Another possible way round the difficulty posed by the change of the rules in 1986 is to focus not so much on the initial procedure culminating in the arrest but rather on the procedure available to obtain the release of

the ship. The position appears to be that the Court has a power to order a release: see CPR 61.8. Such power will be exercised, for example, if the Court is persuaded that the plaintiff is seeking to maintain the arrest for an excessive amount. In an appropriate case – even if not in every case - why should not the Court say: the Court will exercise its power to release the ship unless the plaintiff gives a cross-undertaking in damages and, if necessary, fortifies that undertaking with appropriate security?

47. Second, there is the argument that whatever the rules may say, the fact is that the practice of the Admiralty Court has never been to extract a cross-undertaking in damages from an arresting plaintiff. That is probably right but that fact cannot of itself justify the continuation of the practice. If it was possible to "invent" the Mareva injunction, why is it not possible for the Admiralty Court now to adopt a practice of extracting a cross-undertaking in damages from an arresting plaintiff? There is nothing, so far as I am aware, in any statute prohibiting such practice. And, if necessary, the rules of court can always be changed to recognise the change in practice.
48. Third, it may be suggested that the authorities preclude such a course. However, any such suggestion is obviously incorrect. At most, the authorities are to the effect that in general no claim for damages lies absent mala fides or crassa negligentia. But any such rule of law does not preclude the Admiralty Court extracting a suitable cross-undertaking in damages from the arresting plaintiff as a precondition of the Court acceding to the plaintiff's request for the issuance and execution of the warrant of arrest. Indeed, it is because the law does not permit a claim for damages to lie absent mala fides or crassa negligentia that I would suggest that the Admiralty Court should, like the Courts of Equity, insist upon such a cross-undertaking in damages.
49. Fourth, it may be suggested that such a course is impracticable insofar as the day-to-day workings of the Admiralty Court are concerned. I do not know what, if any, weight, to give to such a suggestion; but this is obviously a matter which must be taken into account. I recognise that arrests often take place at very short notice - sometimes late at night or at weekends. And plainly the procedure for the issuance of writs in rem and warrants of arrest should not become over-cumbersome. But I can see no reason at present why there should be any practical difficulty in a procedure which requires, as a matter of standard form, a cross-

undertaking in damages from the plaintiff.

50. It may be said that this does not go far enough and that in addition the would-be plaintiff should fortify the cross-undertaking by providing some form of security. I would strongly support such a requirement; although I recognise again that this would involve some assessment of the form and amount of security to be provided which would introduce a potential element of delay. But similar matters arise for consideration in the context of the grant of a Mareva injunction. The difficulties, in that context, do not appear to be insuperable.
51. Fifth, there is, I know, a strong view that any such change in practice would place the English Admiralty Court at a disadvantage in the sense that it would discourage plaintiffs from effecting arrests in this jurisdiction. Of all the reasons advanced against any change in practice, it is this reason which probably carries most weight. Ultimately, it is an economic reason - not a legal reason. But I suppose it is none the worse for that. I am not sure that I am the best person to judge the "economics" of this argument.

### **The international perspective**

52. Plainly, it is important to consider the position outside the purely domestic (ie English) context and have regard to the wider international perspective. There had, apparently, been much (hot) debate in the lead-up to the International Convention on Arrest of Ships 1999 as to what should be included in that Convention with regard to the right of the owner of a ship to damages in cases of wrongful (or "unjustified") arrest: see Berlingieri on Arrest of Ships, 3<sup>rd</sup> Edition pp 192-200. As there appears, such debate has a long history-exemplified by the extract from the report quoted at p.193 n 111 highlighting the difference between Anglo-Saxon and continental laws in this context.
53. In the 1952 Arrest Convention, all questions whether in any case the Claimant was liable in damages for the arrest of a ship (and other related matters) were left to be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for. In the event, the same principle has now been retained in the 1999 Convention: see

Articles 6.2 and 6.3. The result is the situations in which liability arises continue to differ from country to country: see Berlingieri I. 782-784. Although further comparative analysis may be desirable, one can at least say that a requirement that the arresting party must be guilty of *mala fides* or *crassa negligentia* in order to be liable for damages is not one universally insisted upon in many other jurisdictions.

## **The Human Rights Act 1998**

54. Finally, and perhaps most importantly, I should mention a further point which would suggest that the law as stated in the textbooks requires to be reviewed. This turns on the effect of Article 1 of Protocol No 1 to the European Convention on Human Rights which now forms part of the “Convention Rights” given effect to by the Human Rights Act 1998. I should make plain that this is not an original thought of my own - but, as I have already mentioned was first suggested to me by Mr Peter Duffy when he was my pupil<sup>2</sup>. (Peter was, of course, one of England’s greatest legal minds particularly in the area of human rights until his untimely death.) There is no doubt that under that Article every natural or legal person (including a shipowner) is entitled to the peaceful enjoyment of his “possessions” - and this would seem to include a legal entitlement to the use of a ship.<sup>3</sup> Any interference with such peaceful enjoyment must satisfy what is described as the “fair balance” test: see HRP para 15.053 and following. On this basis, it seems to me at least fairly arguable that a law that prevents innocent shipowners from recovering compensation for the detention of their ship in the absence of being able to prove *mala fides* or *crassa negligentia* on the part of the arresting party fails to satisfy the “fair balance” test - in particular having regard to the particular features of existing admiralty law and practice referred to above which so favours the arresting party.

Bernard Eder QC

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<sup>2</sup> I am also grateful to Mr Tim Eicke for his assistance in pointing me in the right direction !

<sup>3</sup> See generally Human Rights Practice (“HRP”) Jessica Simor & Ben Emerson QC (2003) Chap 15.