11 December 2018

PRESS SUMMARY

***Stallion Eight Shipping Co SA v Natwest Markets Plc* [2018] EWCA Civ 2760**
On Appeal from [2018] EWHC 2033 (Admlty)

Background: This appeal concerned the question whether the Admiralty Court should order the release of a vessel from arrest unless the claimant provided a cross-undertaking in damages akin to the cross-undertaking routinely given by claimants who obtain freezing orders.

Natwest Markets ("the Bank") issued in rem proceedings and applied for and obtained the issue of a warrant of arrest against the *M. V. Alkyon* ("the vessel"). The usual practice is that after a vessel is arrested those who have an interest in the vessel provide security to have the vessel released. However, here, the Owners alleged that they were unable to provide such security, with the result that the vessel remained under arrest, the Owners were unable to use the vessel and so were (allegedly) incurring substantial losses. They applied under CPR r. 61.8(4)(b) for an Order releasing the vessel from arrest unless the Bank provided a cross-undertaking in damages. The effect of such a cross-undertaking (akin to those routinely provided by applicants for freezing orders) would have been that if the Bank was not successful in the underlying dispute it would be exposed to a claim for compensation in respect of the losses caused by the arrest. Teare J refused the application. The Owners appealed to the Court of Appeal

Judgment: The Court of Appeal, in a judgment of the Court (Sir Terence Etherton MR, Gross and Flaux LLJ), dismissed the appeal.

Reasons for Judgment: The Court considered the decision of the Privy Council in *The Evangelismos* which held that damages for wrongful arrest could only be recovered if the arresting party acted in bad faith or with gross negligence,. It also considered the decision of the Court of Appeal in *The Bazias 3*. *The Evangelismos* was not strictly binding on the Court **[79]**, since the present application was not concerned with damages but with the power to order release. In *The Bazias 3*, the Court had said that it was the "usual practice" only to order the release of the vessel on the provision of sufficient security. The Court did not suggest that this was the invariable practice, so that case did not bind the Court to refuse to make the order sought **[80]**. Accordingly, the Court would have the power to change the practice and require a cross-undertaking in damages. There was no need for legislation or the intervention of the Rules Committee before such a change in practice could be made **[81]**.

The Court accepted that the limited circumstances in which damages for wrongful arrest are recoverable as laid down in *The Evangelismos* could leave shipowners with substantial losses uncompensated **[82.i]** and that the decision could no longer be defended by reliance on its original rationale. Since 1883, it is no longer necessary to arrest a ship in order to establish the jurisdiction of the Admiralty Court **[82.ii]**. Hence, it could be questioned why a cross-undertaking is not required to arrest a ship whereas such a cross-undertaking is routinely required for the grant of a freezing order **[82.iii]**. This was even more so given that a freezing order (unlike an arrest) has an exception for ordinary business expenses **[82.iv]**.

Nonetheless, a variety of considerations told in favour of maintaining the status quo and refusing to order the provision of a cross-undertaking: (i) there is a need for caution before restricting access to an Admiralty arrest **[85]**, (ii) if the present application succeeded, such requests for cross-undertakings would become routine **[86]**, (iii) arrest is a very effective way of procuring the provision of alternative security **[87]**, (iv) a ship arrest only freezes the whole business for one-ship companies, but it is precisely in such cases that incentives to provide alternative security are needed **[88]**, (v) the analogy between arrest and freezing orders is neither exact nor compelling **[89]**, (vi) arrest has not been needed to establish jurisdiction since 1883 yet there has been no significant pressure from the maritime industry for a change **[90-91]**. Furthermore, the maritime industry has put systems in place premised on the settled state of the law and practice; P&I Clubs and hull underwriters routinely give undertakings to secure release from arrest **[92]**. For these reasons, the case against an "overnight" change is overwhelming **[94]**.

Whilst it would be open to the Court to reconsider the position, it would only do so if properly informed of the views of the maritime community, of the practical ramifications of any proposed changes and of the consequences for England and Wales as an Admiralty jurisdiction if the status quo were to change. In short, the Court would wish and need to have a clear understanding of the industry implications of any proposed change before acceding to it. Furthermore, it would be for the Court entertaining such a challenge to consider the impact on the rule in *The Evangelismos* of a departure from existing practice **[95]**. For these reasons the Court dismissed the appeal.

Additionally, the Court dismissed the appeal on the narrow, fact-specific ground, that the Owners had not provided sufficient evidence that they were unable to provide alternative security from their direct and indirect shareholders **[89]**. The Court agreed that the enquiry should not have been focused solely on the one-ship owning company. To do so would give rise to obvious perverse incentives **[90]**.

The Court did not express any view about the merits of the underlying dispute between the parties **[101]**.

References in the square brackets are to paragraphs in the Judgment.