KARELTRUST V WALLACE & COOPER ENGINEERING (LYTTELTON) LTD AND WALLACE & COOPER ENGINEERING LTD (CA)

IN THE COURT OF APPEAL OF NEW ZEALAND

CA192/99, CA211/99

BETWEEN

KARELTRUST

Appellant

A N D

WALLACE AND COOPER ENGINEERING (LYTTLETON) LIMITED AND WALLACE AND COOPER ENGINEERING LIMITED

Respondents

Hearing: 3 November 1999

Coram: Richardson P, Gault J, Keith J, Blanchard J, Tipping J

Appearances: P W David and A N Tetley for Appellant

J G Matthews for Respondents

Judgment: 17 December 1999

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

Background

1. The respondents, Wallace and Cooper Engineering Ltd and Wallace and Cooper Engineering (Lyttelton) Ltd (together Wallace and Cooper) brought seven proceedings in the High Court against Karelrybflot JSC and four ships owned by Karelrybflot (the "Orlovka", the "Osha", the "Om", and the "Olenino"). There were proceedings *in rem* against each of the vessels, and *in personam* against Karelrybflot relating to work carried out by Wallace and Cooper on the vessels between 1 August and 8 December 1997.

2. These four vessels and one other have been in New Zealand since 1995, and were operated by Abel Fisheries Ltd (Abel) under charter from Karelrybflot. As a result of quota management offences committed by Abel and its directors in 1995 and 1996 all five vessels were seized, but were released on bond and were continuing to be operated by Abel on charter from Karelrybflot when Wallace and Cooper carried out the work on them in mid to late 1997. They were forfeited to the Crown on 23 February 1998 under s107B(2) of the Fisheries Act 1983 by reason of the offences.

3. On 12 June 1998 the vessels were released under s107C(2) on payment to the Crown of $500,000. Karelrybflot immediately sold them on to Kareltrust, the appellant in this Court, which had provided the

funds to make that payment pursuant to an agreement entered into in April 1998. Wallace and Cooper's proceedings were filed against Karelrybflot on 21 July 1998, and thus after the sale to Kareltrust.

4. Kareltrust was granted leave to file a conditional appearance out of time. It sought an order that the proceedings *in rem*against the fishing vessels be set aside or struck out.

The admiralty jurisdiction

5. Section 4 and 5 of the Admiralty Act 1973 provide in relevant part:

4. Extent of admiralty jurisdiction-

(1) The Court shall have jurisdiction in respect of the following questions or claims:

…

(l) Any claim in respect of goods, materials, or services (including stevedoring and lighterage services) supplied or to be supplied to a ship in its operation or maintenance:

5. Actions in rem-

…

(2)… the admiralty jurisdiction of the High Court may be invoked by an action in rem in respect of all questions and claims specified in subsection (1) of section 4 of this Act…:

Provided that-

…

(b) In questions and claims specified in paragraphs (d) to (r) of subsection (1) of section 4 of this Act arising in connection with a ship where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against-

(i) That ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

(ii) Any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid.

6. These provisions have recently been discussed by this Court in *Vostok Shipping Co Ltd v Confederation Ltd* (CA244/98, 7 October 1999).

The Fisheries Act

7. Section 107B(2) of the Fisheries Act 1983 provides that any property, including vessels, used in the commission of a quota management offence is to be forfeited to the Crown on the conviction of any person for that offence, unless the Court for special reasons relating to the offence thinks fit to order otherwise.

8. Section 107C reads (in relevant part):

107C. Provisions relating to forfeited property and quota-

(1) Where any property, fish, proceeds, quota, or interest in quota (hereafter in this section all referred to as property) is forfeit or ordered to be forfeit to the Crown under section 107B of this Act, the Minister may, subject to the provisions of this section, dispose of that property as the Minister thinks fit.

(2) Any person whose property has been forfeit to the Crown under section 107B of this Act or any person having a legal or equitable interest in such property may apply to the Minister within 30 days of the conviction for the release of the property so forfeited; and the Minister may order the release of such property on payment to the Crown of such amount (if any) as the Minister thinks appropriate, being an amount not exceeding the amount the items otherwise forfeited are estimated by the Director-General to realise if sold by public auction in New Zealand.

….

(4) Any forfeiture directed or redemption payment imposed pursuant to this section shall be in addition to, and not in substitution for, any other penalty that may be imposed by the Court or by this Act.

….

Judgment of Young J – 19 July 1999

9. To be able to bring proceedings *in rem* against the vessels pursuant to ss4(1)(l) and 5(2) of the Admiralty Act 1973, it was necessary for Wallace and Cooper to show that three conditions were met.

(a) They had a contract with Karelrybflot in respect of the work done on and the goods supplied to the vessels.

(b) Karelrybflot owned the vessels when the cause of action arose (August-December 1997).

(c) Karelrybflot beneficially owned the vessels when the proceedings were brought (21 July 1998).

10. Young J concluded that it could not be said that the claims in contract against Karelrybflot were untenable. The first condition is for the purposes of the present appeal to be taken to have been met. There is likewise no dispute about the second condition.

11. Kareltrust argued that any statutory claim *in rem* was extinguished by the forfeiture notwithstanding the later redemption of the vessels under s107C(2). In *Equal Enterprises Ltd v Attorney-General* [1995] 3 NZLR 293 this Court held that when a vessel is forfeited, it is open to the Minister to sell it under s107C(1) free of any existing encumbrances. But Young J distinguished the situation where the owner or some other person with a legal or beneficial interest in a vessel was able to redeem it under s107C(2). He was of the view that the property "released" is the property which became forfeit and that all the

legal and equitable interests in it are thereby revived. He said there is a distinction between "disposal" of property by the Minister under s107C(1) and "release" of property under s107C(2). The Judge said that the contrary approach contended for by Kareltrust would allow Karelrybflot to get the vessels back by redemption in a "better legal state" than when they were forfeited (i.e., free of any prior legal encumbrances).

12. It appears that only limited evidence and argument had been directed to whether Karelrybflot was the beneficial owner of the vessels when the proceedings were commenced in July 1998. Young J thought that it was "well open to argument" that at that time Karelrybflot was in substance acting as an owner might, or that the purported sale of the boats by Karelrybflot to Kareltrust was in reality a mortgage, or was voidable under s60 of the Property Law Act 1952 as being an alienation of property in an attempt to defraud creditors.

13. Section 60 reads:

60. Alienation with intent to defraud creditors-

(1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors.

14. "Well open to argument" was not enough, however, to discharge the plaintiffs' burden of proof. As Wallace and Cooper had not recognised that this was the case that they had to advance until the Judge suggested it, he concluded that it would be best to reconvene the proceedings to give Wallace and Cooper and Kareltrust the opportunity to deal with this issue.

Judgment of Young J – 20 August 1999

15. The hearing was resumed on 13 August 1999, but in the meantime Kareltrust had appealed against the judgment delivered on 19 July 1999 and sought a stay of the proceedings pending the outcome of that appeal. In a judgment delivered on 10 August Young J held that no appeal lay, as he had not finally determined the application to set aside the proceedings.

16. After outlining the background to the second hearing, Young J considered the circumstances of the sale of the vessels to Kareltrust.

17. An agreement was entered into between Karelrybflot and Kareltrust in April 1998, which provided that, should the vessels be released by the Minister of Fisheries, they would immediately be acquired by Kareltrust.

18. Karelrybflot is a fishing company based in the Karel Republic (Russian Federation). It has a 20% interest in Kareltrust, an open joint stock company incorporated in Belomorsk. Mr Zhuk is its general manager. There is another company called Kareltrust registered in Murmansk. One of its shareholders is also a shareholder in Karelrybflot, and another of its shareholders is a director of Karelrybflot. One of the directors of the Murmansk Kareltrust is also a director of the Belomorsk Kareltrust. Karelrybflot and Kareltrust have the same registered office in Belomorsk and also use the same solicitors in New Zealand. Young J concluded that, while there was no scope for finding that Kareltrust was the corporate alter ego of Karelrybflot, it did seem that they had a reasonably close association.

19. The Judge said that it was reasonable to assume that Karelrybflot was aware that it might face *in rem* claims from Wallace and Cooper if it redeemed the vessels. Mr Zhuk stated that Kareltrust had received legal advice as to whether forfeiture and redemption would extinguish mortgages and other claims on the vessels. It seemed reasonable to assume that Karelrybflot received similar advice.

20. The "purchase price" was approximately $800,000, consisting of the $500,000 which had to be paid to redeem the vessels, and $300,000 for wages. The agreement specifically acknowledged the claims of unpaid crew members, and that two of the vessels were subject to mortgages registered in Russia. The purchase was conditional on the vessels being redeemed to Karelrybflot, and on Karelrybflot accepting the redemption price and agreeing to redeem them. The agreement gave Karelrybflot the right to repurchase the vessels "at any time *following* six months from the date of completion". (emphasis added) That right had not yet been exercised.

21. At the same time as the sale agreement was entered into, a management agreement was also concluded. The agreement is of indefinite duration, and requires Karelrybflot to undertake the day to day management of the vessels.

22. Mr Zhuk of Karelrybflot deposed that it was having financial problems and approached Kareltrust for assistance. Kareltrust was interested in acquiring the vessels. There was no explanation given to the Court for the form of the transaction from Karelrybflot’s point of view.

23. Conflicting valuation evidence had been given. Young J preferred the evidence for the plaintiffs, and concluded that the total of $800,000 paid for the vessels made an "appreciable contrast" with the valuations proffered for the plaintiffs. The purchase price was based on what was required to free the vessels from forfeiture and any possible maritime lien claims from crew members. Any resemblance to the actual value of the vessels would be "purely coincidental."

24. It appeared that Kareltrust had borrowed $US400,000 from a Swedish company at an interest rate of 18% per annum. This was broadly equivalent to the NZ$800,000 purchase price. Karelrybflot has the right to repurchase the vessels, with perhaps no more than a 12% return on the funds invested.

25. The Judge noted that Kareltrust had been slow to assert itself as the owner of the vessels when the proceedings were issued.

26. The Judge concluded that the arrangement between Karelrybflot and Kareltrust was entered into with intent to defraud the creditors, and that Karelrybflot must be treated as the beneficial owner of the vessels when the proceedings were commenced. He thought that there were really three issues:

(a) *Should the corporate veil be pierced so as to treat Kareltrust, in effect, as the alter ego of Karelrybflot?* In the circumstances, Kareltrust could not be considered the alter ego of Karelrybflot. They were separate companies with distinct shareholding and management structures.

(b) *Should the transaction between Karelrybflot and Kareltrust be treated as a mortgage?* The Judge said that the arrangement was an "in-substance financing transaction" but was not consistent with a mortgagor/mortgagee relationship.

(c) *Should the transaction between Karelrybflot and Kareltrust be treated as voidable under s60 of the Property Law Act as being intended to defraud creditors?* Young J held that the arrangement did fall foul of s60. He did not find that it was a sham but held that it had been entered into with a view to defrauding creditors. It could be inferred that Karelrybflot and Kareltrust knew claims might be enforced against the vessels by *in rem* proceedings when the vessels were redeemed, and that those *in rem* claims had not necessarily been extinguished by forfeiture. It could also be inferred that they knew that a prior "sale" would provide a defence additional to the extinction by forfeiture argument. The Judge said that the transaction was at best, for Kareltrust, a financing arrangement. There had been no real change as to the externalities with regard to the vessels by reason of their sale. The agreement specifically provided for claims by crew members and existing mortgagees, but deliberately, it must be inferred, did not provide for the payment of those with statutory *in rem* claims. The sale would apparently never have been mentioned, except between the parties, if these *in rem* proceedings had not been brought. It was unrealistic to suggest that the plaintiffs could have proceeded against other boats belonging to Karelrybflot which were currently operating in the Barents Sea. Young J thought it seemed likely that Karelrybflot had set about creating a situation in which it could "deploy, against Wallace and Cooper, commercial arguments based on a practical inability to enforce in New Zealand any judgment which might ultimately be obtained."

27. The Judge was generally sceptical as to whether legal documentation prepared by the New Zealand solicitors who act for both Kareltrust and Karelrybflot represented the bargain as acted upon by them.

28. For these reasons Kareltrust's application to set aside the proceedings was dismissed. It now appeals to this Court.

Submissions for the appellant

29. It was submitted by Mr David that the Judge erred in finding that forfeiture and release did not extinguish the *in rem*claims. He said that the personal claims can still be pursued but no claim *in rem* survives forfeiture and release under s107C(2). The position is the same as under s107C(1) in respect of which this Court held in *Equal Enterprise Ltd v Attorney-General* [1995] 3 NZLR 293 that the forfeiture of a boat extinguished a mortgagee's security interest in the vessel. Young J wrongly considered that this casewas authority only for the proposition that where a vessel is forfeited *and sold* under s107(1), it is sold free of any encumbrances, and that the judgment did not address the position under s107C(2). The case arose from a disappointed applicant under s107(2), not a purchaser under s107(1), as Young J appears to have assumed. The Court was not concerned with any future grant of relief or sale under s107C in determining the effect of forfeiture under s107B. It focussed on the effect of forfeiture at the time it occurred. The proposition that the effect of forfeiture depends on whether the property is released or disposed of would be contrary to *Equal Enterprise*, as the declaration in that case could not have been made if the outcome depended on what the Minister did under s107C.
30. Counsel argued that it was open to the Minister to sell the vessel and use the proceeds to pay creditors. The parties retained their *in personam* rights. It could not be said that the owner in this case got the vessels back in a better legal state than when they were forfeited. The owner was required to pay $500,000, lost the use of the boats for almost four months, and remained liable *in personam*.
31. It was also submitted that the Judge erred in declining to give a final decision on the basis of the evidence and the submissions made on 18 May 1999 and adjourning the proceedings for further hearing. The Judge departed from his judicial role and, in effect, assumed the role of advocate for Wallace and Cooper and formulated arguments (s60 of the Property Law Act, mortgage and sham) that were neither pleaded nor argued by them. As a result of what the Judge did, the appellant found itself meeting a wholly new case. A reasonable objective observer knowing the circumstances would consider that there was a reasonable possibility of bias.
32. Turning to the second judgment, Mr David said that the Judge had erred in finding that s60 of the Property Law Act applied and in finding that the respondents had established the necessary intention to defraud.
33. The respondents had raised a general allegation of fraud at the resumed hearing. This allegation was neither pleaded nor particularised at the first hearing, and they should not have been allowed to raise it at the second hearing. Counsel submitted that, in any event, there was no evidence of fraud. Wallace and Cooper relied on an affidavit relating to the value of the vessels. It was not necessary, however, to show that full value had been given, although it must be more than nominal. Valuable consideration was provided. There could be no intent to defraud if, as was said to be the case, at the time Karelrybflot had sufficient assets to pay its creditors. There could also be no intent to defraud because the respondents

would not have been entitled to the assets in the absence of the sale and purchase agreement between Karelrybflot and Kareltrust. At the time of the agreement Karelrybflot no longer owned the vessels. They had been forfeited. Kareltrust paid to have them redeemed back from the Crown.

34. Even if s60 were to be applied, it was submitted that Kareltrust and not Karelrybflot would remain the beneficial owner. To bring a statutory claim in Admiralty in these circumstances the respondents needed to establish that the transaction was a sham; only then could it be said that the beneficial owner of the vessel was the same when the cause of action arose and when the proceedings were commenced.

35. Mr David submitted that s60 is not applicable in Admiralty. It does not disturb the effect of the transaction between the parties or as respects persons other than creditors who have been prejudiced. It does not avoid the transaction ab initio. There is no relation back to any act of avoidance. The proceedings were in any event commenced before the transaction had been avoided. There had been no notice of avoidance to Karelrybflot.

36. The respondents could not satisfy the requirements of s5 of the Admiralty Act, and the *in rem* jurisdiction could not be invoked.

Submissions for the respondents

37. Wallace and Cooper had applied to have the appeal against the judgment delivered on 19 July 1999 struck out, arguing that the decision was not a "judgment, decree or order" in terms of s66 of the Judicature Act 1908 and could not be appealed. But Mr Matthews accepted that the issues raised in that appeal also necessarily arose in the appeal from the second judgment. He therefore did not press the strike out application, which can be treated as dismissed.

38. Counsel submitted that forfeiture did not extinguish the respondents' claim. The respondents' statutory *in rem* right did not come into existence until the proceedings were issued, so there was no right to lose upon forfeiture. The respondents' statutory lien is quite different to a maritime lien. The rights associated with a maritime lien can be exercised notwithstanding a transfer of ownership. The respondents' claim for repairs to the ships does not give rise to a maritime lien. The Admiralty Act requires only that ownership is the same at both the point when liability is incurred and the point when proceedings *in rem*are issued. It is not necessary to have uninterrupted ownership in the intervening period. Forfeiture followed by sale or redemption is irrelevant, because no right in the ship is created before the arrest. All that is lost on forfeiture is the potential, for the time being, to issue proceedings. *Equal Enterprise* dealt with a quite different situation.

39. Alternatively, if the respondents' *in rem* right was an interest prior to forfeiture, it was revived upon redemption. Section 107C(2) provides for release of the property forfeited on payment of an amount "not exceeding the amount the items*otherwise forfeited*" might be expected to receive at auction. The words "otherwise forfeited" suggest that if the articles are redeemed the forfeiture is cancelled. This can

be read together with the reference to persons "having" a legal or equitable interest in the property. Counsel also questioned why, if an encumbrancer's interest in the vessel is extinguished upon forfeiture, subs(2) gives the holder of an interest in the vessel the right to apply to the Minister for release of the property.

40. The appellants knew of the intention to rely on s60 of the Property Law Act well before the second hearing. It had been raised in the first judgment, and in telephone conferences. Young J was entitled to make his decision on the basis of the whole of the evidence before him. It was not until some time after the respondents had issued proceedings that they were actually informed of the transaction between the two Karelian companies, which, if genuine, would have been a complete answer to the claims. The respondents had no way of knowing about the transaction or its bona fides until it was disclosed and matters of fact made known. Most if not all of the information about the transaction was known only to the appellants and Karelrybflot and their advisors. Discovery and inspection were declined in this case, and the respondents were in the position of having to prove fundamental jurisdictional issues on an interlocutory application without cross-examination, and in considerable haste. (The judgment of 20 August 1999 preceded this Court's decision in *Vostok Shipping Co Ltd v Confederation Ltd*, (CA244/98 7 October 1999) which suggests how this problem may be overcome.) The appellants made limited information available at a late stage. The Judge was entitled to use the evidence before him.

41. Young J was not wrong to adjourn the proceeding for a further hearing. In accordance with his duty to consider the application on the applicable legal principles, he was entitled to consider whether the true nature of the transaction was a mortgage, or a sham, or whether s60 applied, and it was appropriate to give the parties an opportunity to be heard on these points.

42. Mr Matthews supported Young J's reasoning on s60. Counsel submitted that there is no proof that Karelrybflot was able to pay all its creditors at the time the deal was entered into, and that there is evidence of financial difficulties. He argued that the application of s60 does affect beneficial ownership. If the assignment is set aside, ownership revests in the assignor, here Karelrybflot. He said it was not necessary to argue sham. There is no reason not to apply s60 in the admiralty context but in any event *The "Maritime Trader"* [1981] 2 Lloyds Rep 153 and *The "Tjaskemolen"* [1997] 2 Lloyds LR 465 support the proposition that the transferor may be regarded as the beneficial owner of a vessel where ownership is transferred with a view to defeating the interests of the creditors.

43. In his oral submissions Mr Matthews concentrated on the argument that avoidance is "automatic" once a creditor gives notice of avoidance or does an overt act which amounts to an act of avoidance. When the Court makes an order under s60 there is a relation back to that point. Counsel submitted that in this case the overt act was the filing of the statements of claim against Karelrybflot. In each statement of claim it had been pleaded that the ship in question was and had at all material times been

owned by Karelrybflot. Such continued ownership was inconsistent with the sale to Kareltrust (of which the respondents were then unaware.) Mr Matthews accepted that it could not be said that the notice or overt act preceded the filing of proceedings but argued that it was sufficient if there would upon the future making of an order by the Court under s60 be a relation back to that moment; it was enough if the ownership existed simultaneously with the invoking of the jurisdiction under s5 of the Admiralty Act.

44. As an alternative argument, counsel said that the findings made by the Judge demonstrated that the transaction was a sham and that accordingly title to the ships had never passed away from Karelrybflot. The transaction was void or a nullity.

Effect of release or redemption under s107C(2)

45. Sections 107B and 107C(1), which in their present form date from 1986, provide for the forfeiture of a vessel and other property involved in quota management offending. In *Equal Enterprise Ltd v Attorney-General* [1995] 3 NZLR 293 this Court held that such a forfeiture extinguishes all ownership interests, including security interests in the vessel. It said that it is only after a forfeiture that the adverse consequences for those who have legal or equitable interests in the property fall for consideration. To make a forfeiture subject to a security interest would frustrate the purpose of the legislation. Section 107C(1), providing that the Minister can dispose of the property as he or she thinks fit, proceeds on the premise that the property has passed to the Crown. The Minister's ability to sell the property is inconsistent with the continued existence of the mortgagee's rights in relation to the property. In our view that must be true also in respect of lesser interests.

46. The Court saw s107C(2) as consistent with and supportive of that interpretation. It regarded that provision as one for "relief against forfeiture", and the reference to "any person having a legal or equitable interest" in the forfeited property as being capable of being read in the past tense, the right to apply for relief giving a "contingent legal or equitable interest" in the property.

47. The Court in *Equal Enterprise* was *not* considering the effect of a release under s107C(2) (also described as a "redemption" in subs(4)). The Minister had refused the mortgagee bank's application for relief under subs(2). The case was therefore concerned with the situation after forfeiture but before disposal (sale) under subs(1) or release under subs(2). The Court found that the Crown had ownership of the vessel free of security interests. That put the Crown in the position where it could dispose of the vessel, if it chose to do so, without having to account to the bank. Or it could simply hold and use the vessel itself.

48. It does not follow, however, that if the Minister had negotiated with the owner or the bank and had accepted a sum of money in exchange for releasing the vessel, it would have been restored to the owner free of the mortgage, or that, alternatively, it would have passed to the bank as owner.

49. The Court was correct to characterise the process under s107C(2) as a relief against forfeiture. This is a concept familiar from the law of landlord and tenant. The defaulting tenant, upon remedying the default, has the leasehold interest restored, subject once more to any security interests. It is as if forfeiture had never occurred.

50. The differences in the case of a forfeiture under the fishing legislation are that it is the party benefiting from the forfeiture, the Crown, which decides whether there is to be relief under subs(2), and that the Crown is entitled to receive a negotiated payment in return for granting relief. The Minister of Fisheries, the Hon Colin Moyle, said in moving the Second Reading of the Fisheries Amendment Bill in 1986 that it was "up to the Minister to decide whether to retain the forfeited property or to return it to its owner for a fee." He described what could happen after a forfeiture in the following way:

The Minister will dispose of the forfeited gear or vessels as he thinks fit. They will be kept by the Crown, be returned by way of a redemption fee – which is the present practice [since 1983] – or be sold. (1986) 472 NZPD 2884

51. If an analogy is made with redemption under a legal mortgage, that also is a situation in which the ownership of the subject property is restored to the mortgagor, subject always to any charges or encumbrances.

52. Similar provisions are found in s67S of the Forests Act 1949, s46 of the Conservation Act 1987, s39D of the Trade in Endangered Species Act 1989 (where s39F provides that upon the making of a release order the forfeiture order ceases to have effect) and s33 of the Submarine Cables and Pipelines Protection Act 1996. Section 235 of the Customs and Excise Act 1996 provides for an application for waiver of forfeiture where goods have been forfeited to the Crown under s225. Section 18H of the Marine Reserves Act 1971 and 62 of the Fisheries Act 1996 contain provisions for relief from the effect of forfeiture by the Crown. These various provisions use different language but they would all appear to be intended to have similar effect and we do not discern in the use of the expressions "release", "redemption", "relief" and "waiver" any differentiation in legislative intent.

53. On our reading of s107C(2), then, the release of a vessel restores ownership to the owner at the time of forfeiture. The*status quo ante* resumes. The mortgages, claims and other interests are likewise restored. It would be extraordinary if they were not. It would create a considerable anomaly, not to say unfairness and hardship, if an owner could pay the Crown a perhaps modest "redemption fee" and thereby obtain release of an unencumbered vessel. The personal debts would remain but the owner would be in a position to sell the vessel without accounting to the creditors.

54. Although it is directed only to quota and interests therein that have been forfeited, s107C(3)(h) seems to lend support to the view that all interests revive on redemption. It can be presumed that the

characteristics of forfeiture and redemption are the same both for quota and other property (ships). When considering the amount to be paid on redemption of quota the Minister is to have regard to "the interest of any other person in the quota concerned". Why should he do that if all interests are extinguished? If that suggests revival of interests in quota on redemption, there seems no reason why the position would be different in the case of other property.

55. It is said for the appellant that such a reading of the section, which we see as the natural one, will fetter the Minister's freedom to do as he or she likes with the vessel, and that owners will be unwilling to offer under subs(2) payments as high as they might be prepared to tender in exchange for unencumbered vessels. The short answer is that the Minister remains perfectly free, if a satisfactory offer is not forthcoming under subs(2), to dispose of the vessel under subs(1). He is not fettered in any way from obtaining as much as the vessel may be worth in the circumstances.

56. Nor, to answer an argument of Mr David, is a restoration of the vessel subject to all prior interests contrary to the concept of forfeiture, as seen, for example, in prize cases and judicial sales in admiralty, and in *Equal Enterprise*. There has been a forfeiture with the usual consequences, but the Minister, acting under statutory authority, has decided to grant relief – to waive the effect of that forfeiture – in exchange for a payment.

57. In some quarters it appears to have been thought that if the release is obtained by a mortgagee or other person who immediately before the forfeiture had a legal or equitable interest, the title passes to that person. But subs(2) does not say that it does, and we do not understand the subsection to so provide. The property is released from forfeiture. The idea of a "release" is that there is a restoration *to the owner* (as in the release of a mortgage). Subsection (2) does not authorise a sale to the interested person. There is no need for that, for it could be done under subs(1), and why should a party with a lesser interest be able to acquire a vessel without necessarily paying full value?

58. It seems to us that in authorising the Minister to negotiate with and accept a redemption fee from an interested person, the legislation is merely recognising that sometimes such a person will be faced with an uncooperative owner and will think it appropriate to proceed to make a payment independently of the owner in order to achieve restoration of the ownership and thereby of that person's interest which was forfeited along with the ownership. The terms of the security held by that party or the operation of equitable principles may give the party the right to recover moneys so expended in the restoration of the interest. In the case of a mortgage, the redemption fee might well qualify as an advance in preservation of the security.

Ability to bring *in rem* proceeding after release of vessel

59. Section 5(2) of the Admiralty Act stipulates the conditions which must exist before the admiralty jurisdiction of the High Court may be invoked by an action *in rem* in respect of what we will call statutory claims in *rem* (those specified in s4(1) of that Act).