RAUKURA MOANA FISHERIES LTD V THE SHIP "IRINA ZHARKIKH"

_IN THE HIGH COURT OF NEW ZEALAND

IN ADMIRALTY

CHRISTCHURCH REGISTRY

ADMIRALTY ACTION IN REM

AD NO 1/00

BETWEEN

RAUKURA MOANA FISHERIES LTD

Plaintiff

AND

THE SHIP IRINA ZHARKIKH

Defendant

AD NO 2/00

BETWEEN

RAUKURA MOANA FISHERIES LTD

Plaintiff

AND

THE SHIP KSENIA ZHARKIKH

Defendant

Date of Hearing: 7 and 23 March 2001

Judgment Released: 29 March 2001

Counsel: T J Broadmore for the Plaintiff

A N Tetley (on 7 March) and P David (on 23 March) for the Ship owners

RESERVED JUDGMENT OF YOUNG J

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Introduction

[1] This admiralty case raises many questions including one which is of considerable jurisprudential interest and practical importance: in an admiralty dispute in which the plaintiff has a statutory *in rem* claim which is apparently subject to a submission to arbitration contained in an agreement between the plaintiff and the ship owners, can the ship owners defeat the claim *in rem* by requiring the claim to be arbitrated under the provisions of the Arbitration Act 1996?

[2] The litigation has so far spawned two hearings before me: one on 7 March and the other on 23 March. I reserved my judgment on the issues discussed at the 7 March hearing and before I had an opportunity to deliver judgment, there were further developments which resulted in the hearing on 23 March.

[3] For reasons of convenience, I have decided to issue a single judgment resolving, as far as I can, all questions which have been argued before me so far.

Factual background

[4] The case primarily concerns two vessels, the *Irina Zharkikh* and the *Ksenia Zharkikh* which are owned respectively by Fishing Viv Ltd and Spratt Ltd. These companies are registered in Vanuatu. The companies are managed by a third company, Xtra Enterprises Ltd, also registered in Vanuatu.

[5] It seems reasonably clear that :-

1. The *Irina Zharkikh* is the only asset of any substance of Fishing Viv Ltd.

2. The *Ksenia Zharkikh* is the only asset of any substance of Spratt Ltd.

3. Fishing Viv Ltd and Spratt Ltd are linked in terms of their ultimate beneficial ownership.

That ultimate beneficial ownership also appears to be linked, in some way, to Prok Bank Ltd, a company which will be mentioned later in this judgment.

[6] It is not entirely clear to me just when dealings between Raukura Moana Fisheries Ltd and the ship owners began. It is, however, clear that, in September 1998, Raukura Moana Fisheries Ltd entered into charter arrangements with Fishing Viv Ltd (in relation to the *Irina Zharkikh*), Spratt Ltd (in relation to *Ksenia Zharkikh*) and two other Vanuatu companies in relation to two other vessels, *Kapitan Lomaev* and *Mys Chaykovskogo*. The two Vanuatu companies which own the *Kapitan Lomaev* and*Mys Chaykovskogo* are in the same ultimate beneficial ownership as Fishing Viv Ltd and Spratt Ltd.

[7] Under these arrangements the four vessels were to catch fish against quota held by the plaintiffs.

[8] These charters terminated on 30 September 1999 with the conclusion of the 1998-1999 fishing year. *Kapitan Lomaev* and*Mys Chaykovskogo* have since left New Zealand waters. The *Irina Zharkikh* and the *Ksenia Zharkikh* are, however, both laid up at Lyttelton and thus within the jurisdiction of this court.

[9] The Ministry of Fisheries has been investigating the fishing activities carried on from these four vessels during the 1998-1999 fishing year.

[10] These investigations culminated on 8 March this year in the laying, in the District Court at Wellington, of a number of charges against Raukura Moana Fisheries Ltd and two of its management staff associated with offences said to have been committed by the masters and/or crews of the four vessels which I have mentioned.

[11] I should explain briefly why Raukura Moana Fisheries Ltd may be held criminally liable for actions primarily committed by the ship owners and/or the masters and crews of the four vessels. This is because, in the circumstances of the case, any breaches of the fisheries legislation by those parties can be attributed to Raukura Moana Fisheries Ltd, see s 105C, Fisheries Act 1983.

[12] The four fishing vessels fished off the West Coast of the South Island. They were primarily targeting hoki. As I understand the material which has been placed before me, the Ministry's primary complaints relate to failures to declare by-catch and small and damaged hoki. The Ministry's allegations seem to rely, mainly, on a comparison of the fishing activities of the four vessels, as reported, and the catches which could fairly be expected. On the draft summary of facts which has been exhibited to one of the affidavits, it appears that the Ministry does attach some blame to Raukura Moana Fisheries Ltd and its management staff. In part this relates to a failure to allocate sufficient by-catch quota to the vessels so as to provide an appropriate incentive for vessel masters to report the taking of by-catch. As well, the summary of facts refers to a number of factors which the Ministry contends should have alerted Raukura Moana Fisheries Ltd to the fact that quota management offences were being committed.

[13] In these proceedings, Raukura Moana Fisheries Ltd seeks an indemnity against any adverse financial consequences which it may suffer as a result of breaches of the fisheries legislation by the masters and crews of the *Irina Zharkikh* and the *Ksenia Zharkikh*.

The plaintiffs' claims

[14] These claims are based on the charter agreements which were entered into by the plaintiff with Fishing Viv Ltd and Spratt Ltd.

[15] Each charter is in identical terms. It provides for the owner to charter the vessel to Raukura Moana Fisheries Ltd for the 1998-1999 fishing year. The relevant clauses of the agreements provide as follows:-

9. Owner's Responsibilities

The Owner shall be responsible for the following:

9.1 **Fishing plan** - The efficient organisation and management of fishing operations with a view to fully realising any fishing plan agreed between the parties. ...

9.9 **Identification of fish product** - Accurately identifying and marking all fish product produced by the vessel in full compliance with the requirements of the Fisheries Act 1983 and 1996 and Regulations.

...

11. Operation of vessels

11.1 Fishing methods and areas - The owner shall fish for the species and using the fishing methods authorised by the Charterer's quota and fishing permit and in the fishing areas designed [sic, semble designated] for that quota and species.

11.2 Compliance with New Zealand Laws - The Owner shall ensure that the master of each vessel, his officers and crew are fully aware of their strict obligations under all New Zealand laws and regulations pertaining to fishing operations within the EEZ and the master's, officer's and crew's strict liability for offenses under these laws including the Fisheries Act 1983 and 1996. ...

11.3 Reporting - The Owner shall ensure that the master of each vessel is fully aware of and carries out his strict obligations to comply with all the requirements to accurately complete as required, Catch Landing Returns, Trawl Catch Effort and Processing Returns as set out in the Fisheries (Reporting) Regulations 1990 and all other reports, returns and documentation as may be required by MFish, the Department of Conservation and the Charterer.

11.4 Excess of Quota - The Owner agrees to ensure that no vessel will take any fish species in excess of quota allocated to it in this charter agreement apart from unavoidable by-catch taken as a result of the lawful taking of quota allocated to the vessels in the charter agreement. Should any vessels unlawfully take any fish species being in excess of allocated quota the Owner will indemnify the Charterer against all losses, fines, penalties or costs, seizures and forfeitures imposed on the Charterer arising from any vessel over fishing or taking of fish without quota or howsoever.

11.5 By catch - The Charterer shall bear all costs of product seized by, or surrendered to, or penalties imposed by the New Zealand Government for by catch taken in excess of quota resulting from the lawful taking of fish species against quota allocated to charter vessels in this charter agreement.

11.6 Indemnity - The Owner shall bear all risk of the fishing operation and hereby indemnifies the Charterer against all costs, claims, demands, liabilities, expenses and any loss or damage incurred by the Charterer, or against the Charterer, including but not limited to fines, seizures and forfeitures ordered against the Charterer, or otherwise incurred by the Charterer arising howsoever out of any act, neglect or default of the Owner, master, officers or crew, ... The foregoing includes but is not limited to ...

11.6.3 Breach of the provisions of the Fisheries Act 1983 and 1996 and any regulations thereunder ... and any other laws, regulations or statutes applicable to fishing operations or the operation of fishing vessels.

...

12. Compliance with Charter Agreement and New Zealand Fisheries Laws

12.1 Compliance by masters and crew - The owner shall prior to the commencement and throughout the term of the charter:

12.1.1 Ensure that all masters and crews of vessels are fully informed of the terms and conditions of the charter agreement and the equipment, catch, vessel and forfeiture provisions of the fisheries laws and regulations of New Zealand.

12.1.2 Inform masters and crew of the severe penalties (including fines up to $NZ250,000.00 and the seizure of vessel and cargo per offense) under New Zealand law for breach of or failure to comply with the fisheries law for breach of or failure to comply with the fisheries laws and regulations of New Zealand [sic].

12.1.3 Ensure strict compliance by masters and crews with the requirements of all New Zealand fisheries laws and regulations including the strict obligations to keep, maintain and furnish on demand, records, returns and documentation as required by the Mfish in respect of the catch and operations of vessels operating within the EEZ ...

12.4 Owner's Acknowledgement - The Owner on signing of this agreement acknowledges the strict obligations placed on vessels, masters, officers and crews to comply with all New Zealand legislation and the severe consequences to it and the Charterer in the case of a guilty conviction for any breach. ...

[16] If the offences alleged by the Ministry were, indeed, committed by the masters and crews of the *Irina Zharkikh* and the*Ksenia Zharkikh*, then, under the charter agreement, Fishing Viv Ltd and

Spratt Ltd must indemnify Raukura Moana Fisheries Ltd against the resulting adverse consequences. Further, breaches of the quota management system, on the part of the masters and crews of the two vessels, would necessarily involve breach of the charter agreements and would thus expose Fishing Viv Ltd and Spratt Ltd to claims for damages at the suit of Raukura Moana Fisheries Ltd. If, however, it is the case that Raukura Moana Fisheries Ltd (via its senior staff) were directly parties to any quota management frauds, then there may be an issue as to the enforceability of the indemnities.

[17] On the facts alleged by Raukura Moana Fisheries Ltd, it has claims against Fishing Viv Ltd and Spratt Ltd which, in each case, can be said, broadly, to arise out of an "agreement relating ... to the use or hire of a ship" which is accordingly within s 4 (1) (h), Admiralty Act 1973 and thus to give rise to a statutory action *in rem* pursuant to s 5 (2) of that Act.

The commencement of proceedings and the giving of security

[18] The plaintiff commenced claims *in rem* in relation to both vessels on 5 October.

[19] In each case, the notice of proceedings *in rem* contained the following averment:-

The plaintiff claims the sum of $37,801.54 being legal fees incurred to date, and such other sums as may be incurred by the plaintiff for its liabilities, costs, expenses and losses in respect of an investigation by the Ministry of Fisheries into alleged breaches of the Fisheries Act 1983 and 1996 by the owner and/or the Master and the crew of the Defendant vessel, in respect of which costs and expenses the owner of the Defendant vessel has agreed to indemnify the plaintiff under the terms of a Charter Agreement entered into in 1998.

[20] In each case, in the statement of claim clause 11.6 of the charter agreement is set out. There is then a pleading that the owner:-

[i]s required to indemnify the Plaintiff for all the costs referred to in paragraph 7 above, including all on-going costs.

The prayer for relief in each case seeks:

Judgment against the Defendant ship in the amount of all costs and expenses incurred as a result of the Ministry's investigation.

[21] I emphasise that at the time the proceedings were commenced, the Ministry had not laid any informations. Investigations, however, were underway and Raukura Moana Fisheries Ltd had, in turn, commenced its own investigations into the allegations of quota management fraud.

[22] The vessels were not arrested. But, under threat of arrest, the plaintiff and the owners entered into an arrangement under which the owners gave security, in respect of each vessel, in the sum of $150,000.

[23] This arrangement was recorded in joint memoranda of counsel dated 1 December 2000. These memoranda are in identical terms and provide:-

1. This consent memorandum is filed on behalf of the Plaintiff and the Defendant in respect of security for the Plaintiff's claim. It is filed to record the terms upon which the parties have agreed to address this issue.

2. The Plaintiff has sought security in the sum of $150,000 for its claim. The Defendant says:-

(a) That the Plaintiff is not entitled to security because its claim is based on a charterparty which is subject to an arbitration clause; and

(b) The security sought is excessive.

3. The Defendant wishes to ensure that it can deal with the Defendant vessel free from the Plaintiff's claim without further delay. The Plaintiff will not agree to withdraw its request for security.

4. In the circumstances, the Plaintiff and the Defendant are agreed that the Defendant will pay into court $150,000 with the Defendant reserving its rights in respect of 2(a) and 2(b). If those issues are not capable of agreement between the parties, the Defendant will make the appropriate application to the court.

5. Upon payment into court of the $150,000, the Plaintiff undertakes that it will not arrest or otherwise detain the Defendant vessel in respect of its claim in this proceeding.

[24] It will be necessary later to discuss exactly what is meant by this language and to refer in somewhat detail to the context (or factual matrix) in which the agreements as to security were entered into.

The initial applications by Fishing Viv Ltd and Spratt Ltd

[25] Having given security, the owners then applied for orders that:-

1. The proceedings be stayed; and that

2. The security for the claims (in the amounts of $150,000 plus interest in each proceeding) be paid back in part or in full to the owners.

[26] These applications were heard by me on 7 March 2001. At the conclusion of the hearing I reserved judgment.

Procedural steps taken since the hearing of 7 March 2001

[27] On 8 March (that is the day after the hearing on 7 March) the charges to which I have referred were laid.

[28] The plaintiff then amended its claims. Very broadly, the differences between the claims as amended and the claims as filed are as follows:-

1. The claims as amended expressly seek separate relief in relation to costs associated with the Ministry's investigation, costs associated with prosecution and deemed value assessments.

2. As well as claims on the indemnity provisions, the plaintiff now seeks damages (in a way which effectively mirrors its asserted rights to indemnity).

[29] The plaintiff arrested the two vessels on the basis of the amended claims and obtained a *Mareva* injunction, on an *ex parte* basis, based on evidence that sales, or possibly charter arrangements, were in the process of negotiation between the owners and third parties.

Further application by Fishing Viv Ltd and Spratt Ltd

[30] This produced, in turn, further applications by Fishing Viv Ltd and Spratt Ltd seeking release of the vessels from arrest, the discharge of the *Mareva* injunction and costs on an indemnity basis.

[31] I heard this application on 23 March.

Overview of the arguments for the ship owners

[32] The argument for the owners in relation to the application for stay and release of security proceeds along these lines:-

1. By reason of submissions to arbitration contained in the charter agreements (to which I will refer shortly), the proceedings must be stayed pursuant to the Arbitration Act 1996.

2. If arbitral awards are made, this would result in the underlying causes of action merging in the awards.

3. This means that there will never be a judgment *in rem* in relation to the vessel with the result that there is no justification for retaining, in court, the $300,000 paid in by way of security.

4. This court does not have jurisdiction to require the owners to provide security against awards which might eventually be made against them in arbitrations to be commenced under the charter agreements.

5. In any event, the security demanded and paid is excessive.

[33] In support of the application seeking release of the defendant vessels and discharge of the Mareva injunction and costs, the argument for the owners proceeds, broadly, along the following lines:-

1. The earlier arguments just referred to are relied on.

2. In any event, by the 1 December 2000 joint memoranda of counsel, Raukura Moana Fisheries Ltd agreed not to arrest the vessels in respect of its claims in these proceedings and its subsequent arrests of the vessels were in breach of the undertakings.

3. The *Mareva* injunction ought not to have been granted (either at all or in their terms as granted) because the necessary criteria had not been satisfied and/or the seeking of the *Mareva* injunction was inconsistent with the undertaking contained in the joint memoranda of counsel.

4. In any event, on general considerations of justice grounds, the *Mareva* injunction ought to be discharged.

[34] The arguments, particularly those developed on 7 March, related very much a consideration of the English decisions, *The Rena K* [1979] QB 377 and *The Republic of India v India Steamship Co (The Indian Grace) (No 2)* [1998] AC 878. The arguments also involved debate as to the continued existence of a rule established in the admiralty jurisdiction in the nineteenth century that an unsatisfied *in personam* judgment does not exclude a subsequent *in rem* claim.

[35] I propose to address the arguments raised by the ship owners, and the countervailing arguments put forward by Raukura Moana Fisheries Ltd, under the following headings:-

1. Are the ship owners entitled to an unconditional stay of the *in rem* proceedings?

2. Where there is an arbitral award does the underlying cause of action merge in the award so that there is no longer any entitlement to sue on that cause of action?

3. The rule that an unsatisfied *in personam* judgment does not exclude a subsequent *in rem* claim.

4. *The Rena K* [1979] QB 377

5. *The Republic of India v India Steamship Co (The Indian Grace) (No 2)* [1998] AC 878

6. The continued applicability of *The Rena K* principles in New Zealand

7. The application of *The Rena K* principles in this case

8. Was the security excessive?

9. Were the subsequent arrests of the vessels in breach of the undertaking in the joint memoranda of counsel?

10. *Mareva* injunction

11. Disposal of applications

Are the ship owners entitled to an automatic stay of the *in rem* proceedings?

[36] Each of the charter agreements provides:-

18. Arbitration and mediation

18.1 Any dispute between the Charterer and the Owner arising out of or in connection with this agreement shall be referred to arbitration in accordance with the Arbitration Act 1996, and except as herein expressly provided, the provisions of that Act shall apply. ...

18.5 Schedules 1 and 2 of the Arbitration Act 1996 shall apply, save as amended by this Agreement. ...

18.6 The provision for arbitration shall survive the expiration or early termination of this agreement but shall not prevent either party from exercising any express right of termination provided for at clause 19 of this agreement.

[37] Mr Broadmore sought to argue that clause 18.1 should not be read as providing for arbitration to be the only method of resolving legal disputes between the parties. His argument relied heavily on clause 19.5 of the charter agreements which provides as follows:-

Termination of this agreement shall not prejudice the legal rights of the Charterer to take such steps available at law and to pursue alternative remedies against the Owner.

His contention was that this clause pointed to the possibility of legal steps being taken by the parties otherwise than pursuant to arbitration. From this he argued that the submission to arbitration should not be treated as being exhaustive.

[38] This argument places more weight on clause 19.5 than it can fairly bear. The provisions of clause 18.1 are simple and direct and (subject to certain difficulties which I am about to discuss) it seems to me that the clause was intended to be exhaustive in the relevant sense. The existence of a clause such as 18.1 does not, of course, preclude the issue of proceedings. If there is no genuinely arguable issue associated with those proceedings then they may be taken to judgment notwithstanding the submission to arbitration. As well, if both parties to any legal proceedings are content for the matter to proceed by way of litigation, rather than through the arbitral process provided for, then those proceedings may continue to be prosecuted through the court. Further, clause 19.5 was probably intended simply to make it clear that legal rights associated with the agreements, which accrue prior to their termination, continue to enure after that termination. So, having regard to all those factors, I am of the view that clause 19.5 does not warrant the argument advanced by Mr Broadmore and I put it on one side.

[39] The ship owners' contention that they can invoke the submissions to arbitration so as to require unconditional stays of the proceedings rests on the Arbitration Act 1996. It is appropriate, therefore, that I should refer to the provisions of that Act which are relevant to the present case.

[40] Section 5 provides:-

The purposes of this Act are-

(a) To encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and

(b) To promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and

(c) To promote consistency between the international and domestic arbitral regimes in New Zealand; and

(d) To redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and

(e) To facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and

(f) To give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927), and the Convention

on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in the Third Schedule).

[41] Section 10 provides:-

(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

[42] Section 12 provides:-

(1) An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal-

(a) May award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court:

(b) May award interest on the whole or any part of any sum which-

(i) Is awarded to any party, for the whole or any part of the period up to the date of the award; or

(ii) Is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

(2) Nothing in this section affects the application of section 10 or article 34(2)(b) or article 36(1)(b) of the First Schedule.

[43] Clause 8 of the First Schedule provides:-

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

(2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[44] Clause 9 of the First Schedule provides:-

(1) It is not incompatible with an arbitration agreement for a party to request before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

(2) For the purposes of paragraph (1), the High Court or a District Court shall have the same power as it has for the purposes of proceedings before that court to make-

(a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or

(b) An order securing the amount in dispute; or

(c) An order appointing a receiver; or

(d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

(e) An interim injunction or other interim order.

(3) Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

[45] The fundamental problem in this case is that arbitral tribunals established pursuant to the charter agreements would not have an *in rem* jurisdiction in respect of the ships. The reason is simple enough: judgments *in rem* in respect of these vessels would bind parties who are, themselves, not subject to the arbitration agreement. An arbitral tribunal does not have the power to bind parties who are not subject to the arbitration agreement.

[46] The parties did not seek to argue otherwise. Nonetheless, and for the avoidance of any doubt, I record that, in reaching this view, I have had regard to ss 10 (2) and 12 (1)(a), Arbitration Act.

[47] In my view, s 10 (2) should be construed as applying only to legislative provisions that apply inter partes (eg as to an entitlement to claim interest under the Judicature Act or the particular provisions which may govern contractual rights pursuant to, for instance, the Illegal Contracts Act, the Contractual Mistakes Act, and the Contractual Remedies Act). The same is true of s 12 (1)(a).

[48] In the course of the argument before me, I raised with counsel the possibility that the inability of an arbitrator to make an award *in rem* meant that the present claims by the plaintiff were not properly justiciable by way of arbitration. Such a result could be reached by one or more of the following analyses:-

1. Under s 10, Arbitration Act 1996, the present dispute is not capable of determination by arbitration because an arbitrator cannot make an award *in rem*.

2. Pursuant to clause 8 (1), First Schedule, the arbitration agreement is "inoperative, or incapable of being performed" in respect of a statutory claim *in rem*.

3. The word "dispute" in clause 18.1 of the charter agreements must be construed as being confined to a dispute which is capable of resolution by arbitration and a dispute as to the existence, or otherwise, and/or the quantum of a statutory *in rem*claim is not such a dispute.

[49] If this line of argument is taken on to its logical conclusion, it means that there would be no overall stay of the proceedings albeit that, in the context of the two claims, disputed issues of fact and law might be subject to arbitration. The existence and quantification of any in personam claim as between Raukura Moana Fisheries Ltd and the ship owners can be regarded, fairly, as being a subset of the ultimate issue as to the existence or otherwise of an *in rem* claim. So it may be that, on this analysis of the situation, the proceedings should be stayed pending determination by arbitration of all *in personam*issues but on the basis that, once these issues are resolved by arbitration, Raukura Moana Fisheries Ltd, if successful, can continue to pursue the *in rem* claims.

[50] This is the simplest approach to the problems thrown up in this part of the case. But it was not relied on by Mr Broadmore as a discrete ground of opposition to the stay application. The point was effectively dropped on counsel by me and they had no opportunity to reflect upon it and consider any relevant authorities. Furthermore, I am conscious of the fact that this argument, if it is sound, could well have been deployed in other cases which have been decided on other grounds, notably *The Rena K* [1979] QB 377.

[51] In those circumstances, I simply note that my preliminary view is along the lines set out in paragraphs [48] and [49].

[52] In the balance of this judgment, I will assume that counsel were right to approach the case on the basis that the ship owners are entitled to an unconditional stay of the proceedings - an approach which was, of course, subject to Mr Broadmore's argument based on clause 19.5 of the agreement which I have rejected.

Where there is an arbitral award does the underlying cause of action merge in the award so that there is no longer any entitlement to sue on that cause of action?

[53] Mr Tetley's argument was that, in general, an arbitral award exhausts the underlying cause of action. So, even if the award is not performed, there is no right to sue on the underlying cause of action. This proposition is supported by *Gascoyne v Edwards* (1826) 1 Y & J 19; 148 ER 569. In that case, two causes of action were alleged, the first upon a lease and the second upon a submission to arbitration by deed which had been intended to resolve the dispute over the lease. The defendant by way of defence to the first cause of action pleaded the arbitral award. There was no plea of performance and it is, therefore, to be inferred that the award had not been complied with. The Court of Exchequer held that the defence was good and that the parties were confined to a claim on the award.

[54] Where a claim which can be the subject of the *in rem* procedure is referred to arbitration and is the subject of an award, the *in rem* procedure cannot then be invoked by way of an action on the award, see *The Bumbesti* [1999] 2 Lloyd's LR 481. That decision was to the effect that a claim on an award pursuant to a submission to arbitration contained in a charter agreement was not, itself, a "claim arising out of any agreement relating ... to the use or hire of a ship", within the meaning of the English provision corresponding to s 4 (1) (h), Admiralty Act.

[55] So, relying on these cases, Mr Tetley was able to argue that if the present proceedings were stayed, there would never be a judgment *in rem* because the eventual award of the arbitral tribunal would exhaust the *in rem* claims and the award, itself, could not be the subject of *in rem* claims.

[56] Mr Broadmore, in his submissions, pointed out that law as to merger of underlying causes of action in arbitral awards was of some difficulty. But he did not seek to dispute Mr Tetley's contentions as just set out. I have to say, however, that the underlying legal principles are not necessarily quite as simple as Mr Tetley contended.

[57] It is certainly arguable, on the authorities, that an award on an arbitration which merely establishes the existence and quantification of a debt does not exhaust the underlying cause of action. This was, indeed, the conclusion reached in *The Argo Hellas* [1984] 1 Lloyd's LR 296. In *F J Bloemen Pty Ltd v Gold Coast City* [1973] AC 115, Lord Pearson referred to:-

[t]he distinction between an award which merely establishes and measures a liability under the contract and so does not create a fresh cause of action and an award of damages which supersedes the liability under the contract and creates a fresh cause of action ..."

[58] So the cases do seem to draw a distinction between claims for damages which are settled by arbitral award (in which case there is judicial unanimity that the underlying cause of action merges in the arbitral award) and claims for debt (where the prevailing view is, rather, that there is no merger).

[59] As I have already indicated, there are different ways in which the claims by the plaintiff can be analysed. It is certainly well arguable that, at least to the extent to which the plaintiff seeks to rely on the indemnity provisions, an arbitral award determining what is owed to it by the ship owners would be in the nature of claim in debt (ie being for a liquidated amount, that is a sum which would be liquidated at least as at the date of trial) and would not exhaust the underlying cause of action. If so, an award by arbitrators would not preclude the plaintiff, after the award had been issued, enforcing that debt (and thereby indirectly the award) by continued prosecution of the *in rem* proceedings. On the other hand, as I have indicated, the plaintiff may well have claims in damages against the ship owners, claims which, in effect, can be regarded as being the same as the claims based on the indemnity provisions. An arbitral award fixing damages would exhaust the underlying causes of action.

[60] On the face of it, it would be open to Raukura Moana Fisheries Ltd to avoid the merger arguments by abandoning claims for damages and focusing solely on its claims in relation to the indemnity provisions.

[61] The absence of argument focused on this issue means that I am reluctant to decide the case on the basis of the distinction between an arbitration award which determines liability in relation to a debt as opposed to one which fixes damages. However, if it is the case that an arbitrator's award determining the existence and quantum of a debt does not preclude the creditor suing in the courts for that debt, then the possibility of there being eventually *in rem* judgments in these cases would not be able to be excluded.

The rule that an unsatisfied in personam judgment does not exclude a subsequent *in rem* claim

[62] Mr Broadmore, while not really challenging the contention that, in general, an arbitral award precludes a claim on the underlying cause of action, relied on what he says is the rule that an unsatisfied *in personam* judgment does not exclude a subsequent *in rem* claim, a rule which he says is applicable to arbitral proceedings.

[63] There are, indeed, many cases in which earlier *in personam* proceedings and judgments have been held not to preclude a subsequent *in rem* claim. Cases in this category include *The Bengal* (1859) Swab 468; 166 ER 1220, *The John and Mary*(1859) Swab 471; 166 ER 1221, *Yeo v Tatem (The Orient)* (1871) LR 3 PC 696 and *The Cella* (1888) 13 PD 82.

[64] Because the point will be material later, I note that most of these cases involved maritime liens rather than statutory *in rem* claims. *The Cella*, however, undoubtedly involved a statutory *in rem* claim.

[65] Mr Broadmore's argument was that this rule should be applied in cases where there is an unsatisfied arbitral award as well as where there is an unsatisfied *in personam* judgment. In this regard he relied on *The Sylph* (1867) LR 2 A & E 24 a case concerning an arbitration. The submission to arbitration had expressly reserved all rights and remedies of the plaintiff in the event that the award of the arbitrator should not be performed (which turned out to be the case). So the contention which was raised in opposition to the plaintiff's subsequent *in rem* claim, that it was barred by the award, was not long on merit. The reservation of all rights, in the submission to arbitration, was probably decisive against this argument. But Sir Robert Phillimore, in rejecting the argument, went on to say that:-

I have borne in mind also the other objections which were stated by the counsel for the plaintiff, among them, that arbitration could not be put higher than a judgment; and the case of *Nelson v Couch* 15 CB (NS) 99 was cited, establishing the principle that a judgment in another court upon the question of personal damages would not prevent proceedings *in rem* in the Court of Admiralty.

So, as a matter of authority as well as logic, the rule that an unsatisfied *in personam* judgment does not exclude a subsequent*in rem* claim applies, by way of analogy, in the case of an unsatisfied arbitral award. Indeed, as will become apparent, this was the view taken in *The Rena K* [1979] QB 377 which I now turn to discuss.

***The Rena K* [1979] QB 377**

[66] The case closest to the present in terms of its underlying facts is *The Rena K* [1979] QB 377. This involved claims by cargo owners relating to damage to cargo. The agreement between the cargo owners and the ship owners provided for any dispute to be settled by arbitration in London. The cargo owners commenced *in rem* proceedings and had the vessel arrested. This resulted in an arrangement under which security was provided on terms that it would be cancelled if the court should subsequently decide that the ship owners were entitled to a stay of the action and, as at the date the ship was arrested, had been entitled to the unconditional release of the ship from arrest and that the cargo owners were not entitled to a *Mareva*injunction by way of alternative security.

[67] Section 1 of the Arbitration Act 1975 (United Kingdom) was in terms which were, in substance, the same as clause 8 to the First Schedule to the Arbitration Act 1996. So the ship owners claimed that a stay of the proceedings was mandatory and that there was no jurisdiction to make such stay conditional on the provision of security. They further argued that this meant that their entitlement to an unconditional stay meant that they had been entitled to secure the release of the ship from the moment it was arrested. They also contended that the in rem procedure did not provide a mechanism by which claimants could obtain security to ensure payment of arbitral awards. Their contention was that security could only be provided against what might later be awarded in the *in rem* proceedings and, because of their entitlement to a stay, there never would be an *in rem* judgment. So their argument was very much the same as that which has been advanced to me for the ship owners in the present case.

[68] No argument was advanced to Brandon J along the lines indicated in paragraphs [45]-[49] of this judgment. The cargo owners, however, did argue that the impecuniosity of the ship owners (which they alleged) meant that the arbitration agreement was "incapable of being performed", a contention which was rejected by the Judge in these terms:-

It follows ... that the context in which the words "incapable of being performed" are used is the context of the recognition and enforcement or [*sic semble* of] arbitration agreements which, if valid and effective, will result in awards being made; and not the context of the recognition and enforcement of such awards themselves after they have been made. Having regard to that context it appears to me that the words 'incapable of being performed' should be construed as referring only to the question whether an arbitration agreement is capable of being performed up to the stage when it results in an award; and

should not be construed as extending to the question whether, once an award has been made, the party against whom it is made will be capable of satisfying it.

The Judge also rejected, on the facts, the contention that such impecuniosity had been proved.

[69] Brandon J, having, therefore, on the basis of the arguments addressed to him (which did not extend to the arguments which I have identified in paragraphs [45]-[49] of this judgment) concluded that the ship owners were entitled to an unconditional stay of the proceedings from the moment they were commenced.

[70] Brandon J then addressed a number of background issues which enabled him to identify the fundamental issue which required determination in the case. As part of this exercise he concluded that:-

1. The court had no jurisdiction to keep the ship under arrest in order to provide the cargo owners with security for an award in the arbitration. It only had jurisdiction to keep the vessel under arrest in order to provide security for a judgment or settlement in the action.

2. The possibility that the stay might later be removed because supervening events would render the arbitration agreement inoperative or incapable of performance was too remote to justify the keeping of a vessel under arrest.

3. A failure by the ship owners to satisfy any award which the cargo owners might later obtain in the arbitration would not "necessarily be good cause for removal of the stay". In the view of the judge, the charterers would be entitled to either enforce the award as a judgment or to sue for breach of the arbitration agreement. In any event, he was not satisfied that there was sufficient evidence before the court to show that the ship owners would not meet an award against them.

4. Upon a stay of proceedings being granted, the issue as to what should happen to any security which had been provided was a matter of discretion under the relevant rules of court. In a case in which, in all probability, there would be no judgment in the *in rem* proceedings, the security ought to be unconditionally released. But in a case where this was not the case, the court, in its discretion, might retain the security.

[71] That background analysis meant that the fundamental issue which the judge had to address was whether there was any significant prospect of a judgment *in rem* ever being obtained by the cargo owners. If there was no such prospect, there could be no basis for the cargo owners retaining security. If there was such a prospect, then the court, in its discretion, could retain the security.

[72] The Judge then concluded that there was, indeed, a significant prospect of a judgment *in rem* ultimately being obtained. His reasons were as follows:-

Mr Howard for the shipowners contended that it was wrong to suggest that, if an award should be made against the ship owners and they should be unable to satisfy it, the cargo owners' would then be in a

position to have the stay of the action removed and to obtain a judgment *in rem* in it. It was wrong, he said, because, once an award was made, the cargo owners' cause of action would become merged in the award and would therefore no longer be available to them for prosecution in the action. In these circumstances the whole argument for the cargo owners broke down, and the whole basis for keeping the ship under arrest, or only releasing her subject to a term for the provision of alternative security, disappeared.

This contention involves a consideration of the law of merger in relation, firstly, to arbitral awards, and, secondly, to causes of action *in rem*. I am prepared to assume, without finally deciding, that, just as a cause of action *in personam*which is adjudicated upon by an English court merges in the judgment of that court, so also a similar cause of action which is adjudicated upon by an English arbitral tribunal merges in the award of the tribunal. ...

It has, however, been held that a cause of action *in rem*, being of a different character from a cause of action *in personam*, does not merge in a judgment in personam, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied: *The Bengal* (1859) Swab 468; *The John and Mary* (1859) Swab 471; *The Cella* (1888) 13 PD 82; see also *The Sylph* (1867) LR 2 A & E 24 (although this may have turned partly on an express reservation made in the submission to arbitration concerned) and *Yeo v Tatem (The Orient)* (1871) LR 3 PC 696. The situation must, in my view, be the same as in the case of an arbitral award, which is likewise based on a cause of action *in personam*.

It was argued for the shipowners that this exception to the general rule of merger applied only when the cause of action *in rem* was founded on a maritime lien, which the cargo owners' claim in the present case is not. The first two cases referred to above, *The Bengal* Swab 468 and *The John and Mary*, Swab 471 were certainly maritime lien cases, the claim in the former being for wages and in the latter for damages by collision. But the observations of Sir James Hannan P. in the third case, *The Cella*, 13 PD 82, 85 related to a claim for repairs and necessaries made under section 4 of the Admiralty Court Act 1861, in respect of which the plaintiff had no maritime lien, but only, like the cargo owners in the present case, a statutory right of action *in rem*. I cannot see any good reason in principle for distinguishing in this respect between a cause of action founded on a maritime lien and one founded on a statutory right *in rem*. It appears to me, therefore, both on principle and authority, that the distinction suggested is not a valid one.

[73] On the basis of this reasoning, the judge concluded that the ship owners were not entitled, as at the date the vessel was arrested, to its unconditional release. This resolved this particular issue in favour

of the cargo owners. It left the judge in a situation where, upon the grant of a stay, he had a discretion whether or not to retain the security.

[74] This issue of discretion turned on the judge's assessment of the likelihood of the ship owners being able to meet an award made against them in the arbitration proceedings. It is apparent from the way the judge dealt with this issue that he did not consider there was any particular onus of proof on the cargo owners. He had earlier identified, in relation to the arguments and considerations identified in paragraphs [68] and [70] hereof, issues of fact which, broadly could be said to relate to the claim by the cargo owners that if they were successful at the arbitration, any resulting award would not be satisfied. He held that the cargo owners had not made out that contention because "the evidence shows a clear possibility" that the award would be met. But when he came to address the issue at hand, he said:-

I have no hesitation in concluding that this is a case in which, if the cargo owners should obtain an award in respect of the full amount of their claim, the shipowners might well be unable to satisfy it, either themselves or through the medium of the club.

[75] *The Rena K* has been followed in New Zealand and Australia, see *Marine Expeditions Inc v The Ship "Akademik Shokalskiy"* [1995] 2 NZLR 743 and *Ocean Industries Pty Ltd v Owners of the Ship "Steven C"* [1994] 1Qd R 69. It was also approved and applied by the English Court of Appeal in *The Tuyuti* [1984] QB 838. The approach taken in *The Rena K*, however, has now been overtaken by legislation in the United Kingdom. The reasons why this legislation was passed were explained by Lloyd LJ in *The Bazias 3* [1993] QB 673:-

The decision in *The Rena K* [1979] QB 377 was very welcome at the time and the principle was, as I understand it, frequently applied. But it was in a sense a compromise and, although the solution found by Brandon J. was ingenious, it was over-cumbersome. In particular it had this disadvantage that much time was taken up at the early stages of every dispute, where a vessel had been arrested and where the claim was subject to arbitration, in determining on affidavit evidence whether an award was likely to be met or not. It was to deal with those disadvantages, as well as to bring proceedings in arbitration in line with proceedings in foreign courts, that Parliament enacted section 26 of the Act of 1982.

***The Republic of India v India Steamship Co (The Indian Grace) (No 2)* [1998] AC 878**

[76] Mr Tetley's principal argument to me was that the legal premises which underpinned the conclusions of Brandon J in *The Rena K* had been so undermined by the judgment of the House of Lords in *The Republic of India v India Steamship Co (The Indian Grace) (No 2)* [1998] AC 878 that *The Rena K* must now be regarded as having been overruled. So I must discuss this later case in some detail as well.

[77] The case concerned a cargo of munitions loaded on board the vessel *Indian Grace* in Sweden for carriage to Cochin in India. The cargo owner was the Republic of India and the owner of the vessel was India Steamship Co Ltd. On the course of the voyage there was a fire on board which the crew managed to extinguish. As a direct result of the fire, a small part of the ammunition cargo (amounting to only 51 artillery shells and 10 charges) was thrown overboard. As well, at least on contention of the Indian Government, there was also extensive damage to the balance of cargo caused either by the fire or the fire-fighting efforts of the crew.

[78] The Indian Government commenced proceedings in a court at Cochin against the ship owners in respect of the cargo shortage (that is the munitions which had been thrown overboard). This was on 1 September 1988. On 25 August 1989, a writ*in rem* was issued in England against the *Indian Grace* and fifteen other vessels in the same ownership. The claim was for loss of, or damage to, the cargo. The amount claimed was £2,600,000. The proceedings in Cochin came to trial and resulted, on 16 December 1989, in judgment for the full amount claimed (which was approximately £7,500). The ship owners then applied to have the English proceedings struck out on the basis of s 34 of the Civil Jurisdiction and Judgments Act 1982. This section provides:-

No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court in an overseas country, unless that judgment is not enforceable or entitled to recognition in England or, as the case may be, in Northern Ireland.

[79] Broadly, the argument for the ship owners was that the cause of action in Cochin was the same as the cause of action in the *in rem* proceedings in England and, further, that the proceedings were between the same parties or their privies.

[80] I will not set out in detail the convoluted history of the proceedings in England (where the litigation went through the High Court, Court of Appeal and House of Lords not once but twice). It is sufficient to say that in the second round of the litigation, Clarke J held, at first instance, that s 34 did not apply because the parties to an action *in personam* were not the same as the parties to an action *in rem* even though the cause of action was the same. In reaching this conclusion he relied on, inter alia¸ *The Rena K* and *The Cella* and, in reliance in particular upon *The Cella*, he rejected the contention that the cases referred to in paragraphs [63]-[65] establish a principle of relevance only to claims involving maritime liens.

[81] The ship owners' appeal to the Court of Appeal was allowed and a further appeal by the cargo owner in the House of Lords was dismissed.

[82] In the Court of Appeal, Staughton LJ noted:-

It is well established since the time of Dr Lushington that a plaintiff who has an unsatisfied judgment in personam can proceed by an action in rem. Presumably there would be no advantage in doing so unless there had been a change in ownership of the vessel; otherwise the plaintiff could employ ordinary methods of execution. ... Similarly a plaintiff who has proceeded in rem, recovered judgment against the vessel, and is left with it only partially satisfied, may start a second action in personam. Those two propositions emerge from The John and Mary (1859) Swab 471; Nelson v Couch (1863) 15 CB (NS) 99, The Cella (1888) 13 PD 82, The Joannis Vatis (No 2) [1922] P 213 and The Rena K [1979] QB 377. In the last case Brandon J said, at p 405 :

It has, however, been held that a cause of action *in rem*, being of a different character from a cause of action *in personam*, does not merge in a judgment in personam, but remains available to the person who has it so long as, and to the extent that, such judgment remains unsatisfied ... .

...

Can it be that by section 34 Parliament has, in a case where the first of two actions is brought in a foreign court ... abolished the well established rule that a judgment in personam is no bar to an action in rem and vice versa? If so, it is hard to see the rhyme or reason of it. We are however convinced that section 34 must have been intended ... to prevent the same cause of action being tried twice over between those who are, in reality, the same parties. Where the owners of the vessel served in an Admiralty action *in rem* are the same persons as would be liable in an action *in personam*, that test is satisfied, as it is in this case. We therefore hold that the Government's claim is barred by section 34. The effect of section 34 where an action *in rem* is brought against a ship in new ownership, or where for any other reason some other person acknowledges service in such an action, can be left until another day. (Emphasis added)

[83] This is a suitable point at which to pause. The judgment of the Court of Appeal proceeds on the basis that s 34 of the Civil Jurisdiction and Judgments Act 1982 reversed the old rule that an unsatisfied judgment *in personam* did not prevent a subsequent claim *in rem* in respect of the same cause of action. Such an approach has no implications for the continued application of *The Rena K* principles in New Zealand and, in particular, in respect of this case. This is because there is no legislation in New Zealand analogous to s 34 of the Civil Jurisdiction and Judgments Act.

[84] In the House of Lords, the principal speech is that of Lord Steyn (with all other law lords expressing concurrence in his conclusions). So, in effect, Lord Steyn was speaking for the House of Lords and, plainly, I must pay considerable respect to what he said. For all that, however, it is also true that what he said in that speech must be read *secundum subjectam materiam*.

[85] The fundamental argument which Lord Steyn addressed and rejected was the Indian Government's contention that the proceedings in Cochin did not involve the same parties as the proceedings in England because the proceedings in England were against the ship. By arguing that the proceedings were against the ship, the Government of India invoked what has been referred to as "personification theory of maritime liability". That theory is not purely metaphorical. In the event that the ship owners had not entered an appearance in the *in rem* proceedings, there would have been no possibility of judgment against them in those proceedings but the ship itself would have been sold.

[86] The cases establishing the rule that an unsatisfied *in personam* judgment does not preclude a later *in rem* claim were not directly relevant. This is because the Cochin judgment had, in fact, been satisfied. They were indirectly relevant to the issue which Lord Steyn determined for two reasons. First, counsel for the Indian Government relied on these cases as being exemplars of the personification theory of maritime liability. Secondly, as Staughton LJ had recognised, the existence of the rule established by these cases sat uneasily with a literal approach to s 34. S 34, on a literal interpretation, would exclude application of the rule in the case of prior *in personam* judgments in foreign jurisdictions but not where the prior *in personam*judgment was in English proceedings.

[87] In his speech, Lord Steyn unequivocally rejected the personification theory of maritime liability. So, for this (and indeed) other reasons, the arguments of the Indian Government were rejected.

[88] Lord Steyn did, however, as well, deal with the cases which established the rule that an unsatisfied *in personam* judgment does not preclude a later *in rem* claim. He did this by setting out those parts of the judgment of Staughton LJ, which I have italicised in the extract set out in paragraph [82] and then saying:-

Counsel were agreed that the rule to which Staughton LJ referred was established in cases involving maritime liens. The House was not referred to authority extending the rule beyond maritime liens. It is an ancient and strange rule which I would not wish to extend beyond the limits laid down by authority. To that extent the scope of any anomaly is less than may have been apparent in the Court of Appeal.

Then, after addressing an issue upon which he, in the end, expressed no view on, Lord Steyn went on:-

Finally I must point out that there is an argument that the old rule has simply been abolished by section 34; see *Briggs and Rees, Civil Jurisdiction and Judgments*, 2nd Ed (1977), p359. Since this point has not been explored in argument, I will express no final view on it. If any anomaly exists, it is quite insufficient to displace the compelling arguments in favour of the applicability of section 34 in the present case.

[89] Understandably, Mr Tetley, for the ship owners, relied heavily on Lord Steyn's speech. Lord Steyn was of the view that the rule that an unsatisfied in personam judgment did not preclude a subsequent *in rem* claim was confined to cases involving maritime liens. If that is the case, *The Cella* was wrongly

decided. Indeed, if it is the case the rule applies only in the case of maritime liens, then an essential step in the reasoning of Brandon J in *The Rena K* was also wrong. So Mr Tetley was able to argue that, in substance, *The Rena K* has been overruled.

[90] The remarks made by Lord Steyn which were relied on by Mr Tetley, however, are, at least to my mind, puzzling. Lord Steyn said:-

The House was not referred to authority extending the rule beyond maritime liens.

Yet, two cases (*The Cella* and *The Rena K*) in which the rule was applied beyond maritime liens, are referred to in the passage from Staughton LJ's judgment which Lord Steyn set out. Indeed, the proposition that the rule was confined to maritime liens cases had been considered at first instance by Clarke J and rejected by reference to *The Cella* and *The Rena K*.

[91] Mr Tetley's argument relies essentially on the following two sentences in the speech of Lord Steyn:-

The House was not referred to authority extending the rule beyond maritime liens. It is an ancient and strange rule which I would not wish to extend beyond the limits laid down by authority.

[92] At the very best, this is an overruling by implication of *The Rena K*. But the words used by Lord Steyn indicating that he was not aware of any authority which extended the rule "beyond maritime liens" would be an odd way of overruling a case which had, in fact, extended the rule beyond maritime liens.

[93] Further, if Lord Steyn had appreciated that the rule had been applied in cases dealing in statutory *in rem* claims, it is far from clear to me that he would have seen the need to overrule those cases. His view would presumably still have been that:-

[I]f any anomaly exists, it is quite insufficient to displace the compelling arguments in favour of the applicability of section 34 in the present case.

[94] Finally, I note that the demolition of the personification theory of maritime liability does not, in itself, undermine the continued applicability of *The Rena K*. Although it is possible to read some of the cases establishing the rule that an unsatisfied*in personam* judgment does not exclude a later *in rem* claim as at least referable to the view that a claim *in rem* is against the ship, there is also the view, which also runs through the cases, that a claimant who has an *in rem* claim should be regarded as having a "two-fold security" and when the first, a claim *in personam*, fails to produce any tangible result, is entitled to resort to the second (namely the *in rem* claim). This is the way the situation was analysed by Dr Lushington in *The John and Mary*,*supra*.

The continued applicability of the *Rena K* principles in New Zealand

[95] There are other reasons why I should be slow to hold that *The Rena K* is no longer good law in New Zealand:-

1. It has been followed in New Zealand.

2. It is highly likely that there has been legislative inaction in New Zealand largely because of the assumption of maritime lawyers that an arbitration submission does not exclude statutory *in rem* claims. There must be many submissions to arbitration which have been agreed to by parties whose legal advisers assumed that the *in rem* procedure will still be available.

3. The practical effect of Mr Tetley's submission is that, in any maritime case, contracting parties who agree to a submission to arbitration thereby exclude their right to pursue an *in rem* claim in the event that the other party to the submission invokes the Arbitration Act 1996. If this is correct, this would have the practical effect of allowing agreements as to procedure (that is to refer disputes to arbitration) to have considerable impact on the substantive rights of the parties, impact which was unlikely to have been appreciated when those agreements were entered into. I am reluctant, therefore, to uphold such a contention unless compelled by plain authority to do so. I do not believe that I am so compelled.

[96] In those circumstances, I am of the view that it would not be right for me, as a New Zealand judge, to conclude that *The Rena K* has been overruled.

Application of the *Rena K* principles in this case

[97] The issue as to whether the security must be returned to the owners therefore turns on whether I can say fairly that, assuming success by Raukura Moana Fisheries Ltd at arbitration, it might well not be paid by the ship owners, see paragraph [74] above. This test does not involve the imposition of a burden of proof on the plaintiff to show impecuniosity. I simply have to form a judgment on the issue based on the material I have before me.

[98] I have no doubt that it is the case that Raukura Moana Fisheries Ltd, if successful at arbitration, might well not be able to secure payment from the shipowners. The reasons for this conclusion are:-

1. The ship owners are shadowy entities, registered in a secrecy respecting jurisdiction. They have not made any disclosure of their assets or given any undertakings as to preservation of their assets pending determination of this dispute. They do not need to do so and I well know that fleet ownership is often enough organised through a structure of companies registered in such jurisdictions where each company owns only a single ship. However, it is inescapable that those who organise fleet ownership in this way make clear their intention to minimise exposure to creditors.

2. The ship owners and those behind them have no apparent continuing link with New Zealand other than the continuing presence here of the two vessels. If they go to arbitration and lose, and by then the vessels are out of the jurisdiction, there is no ground for confidence that any award will be able to enforced against the owners and little reason to suppose that the owners will voluntarily meet their obligations under such award.

3. Such limited material as has emerged (both before and after the hearing on 7 March) as to the financial circumstances of the two ship owning companies while, in part, answered, still leave me a little uneasy about the very limited and specific disclosure made on their behalf in these proceedings. For instance, taxes in Belize for the period 1998-2000 in respect of the vessels were unpaid as at late last year. According to affidavits now filed, all money now outstanding in Belize has been paid. Further, although it was asserted in affidavits filed on behalf of the ship owners that they had no debts, a search of the relevant company records in Vanuatu showed that each, on 19 March 1999, had granted security over their assets to Prok Bank Ltd, a company which, perhaps, has some involvement in their ultimate beneficial ownership. The response, again very specific, was simply that Prok Bank Ltd is being liquidated, no money is owing, and the charges are to be released. Yet there was no disclosure as to what the floating charges related to, how whatever money was originally secured came to be repaid and what, if any, implications the liquidation of Prok Bank Ltd may have for the two ship-owning companies. There is no evidence as to how the acquisition of the two vessels by these companies was financed or as to their underlying capital structure.

4. The primary positive arguments of Mr Tetley for the ship owners as to their willingness and ability to meet any award relate to the payment in of security and the association between the ship owners and Raukura Moana Fisheries Ltd. But the payment of security was, in a sense, compulsory in the sense of being required if arrests were to be avoided. The pre-investigation relationship between Raukura Moana Fisheries Ltd and the ship owners, of course, occurred in a very different environment from the present.

I note that a broadly similar issue is discussed later in this judgment, see paragraphs [121]-[127].

[99] So for those reasons I am of the view that the security, in each case, ought not to be repaid. This does, however, leave outstanding the issue whether the security paid was excessive.

Was the security excessive?

[100] In accordance with the views which I have just expressed, the issue as to whether the security demanded and paid was excessive falls to be determined by reference to the test expressed by Brandon J in *The Moschanthy* [1971] 1 Lloyd's LR 37 at 44:-

The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case.

[101] Mr Tetley's argument to me on 7 March that the security demanded and paid was excessive focused on a very narrow view of the nature of the claim. He, in effect, sought to confine the claims to indemnity for investigation costs actually incurred up to 5 October 2000. If the claim by Raukura Moana Fisheries Ltd in the proceedings should be treated as being confined to investigation costs as at 5 October or, indeed, as at December 2000, there can be no doubt that the security was excessive.

[102] The ship owners have, however, now resiled from this narrow view of the claim as espoused by Mr Tetley on 7 March. This is because the apparent correlative of Mr Tetley's 7 March argument is that it would be open to Raukura Moana Fisheries Ltd to amend its proceedings (as it has done) to seek broader relief and arrest the vessels in relation to the amended claim (which it has now also done). In other words, Mr Tetley's 7 March argument is consistent with the view that the claims for which security was given were confined to investigation costs only. If so, the undertakings given by Raukura Moana Fisheries Ltd could hardly, fairly, be treated as precluding arresting the vessels for more extensive claims associated with the consequences of prosecution.

[103] For reasons which I am going to come to shortly, I am of the view that a narrow view of the claim, either generally or for the purposes of the joint memoranda of counsel, is not tenable. In turn this means that the argument that the security which was sought and paid was excessive is also untenable.

Were the subsequent arrests of the vessels in breach of the undertaking in the joint memoranda of counsel?

[104] The ship owners maintain that the subsequent arrests of the vessels by Raukura Moana Fisheries Ltd were in breach of the undertakings contained in the joint memoranda of counsel. Whether this is so depends upon whether the claims in the proceedings referred to in the memoranda should be construed as confined to reimbursement of costs associated with the pre-prosecution investigations conducted by the Ministry or whether the claims extended to reimbursement for all costs arising out of the Ministry's underlying complaint that the masters and/or crews of the two vessels breached New Zealand's fisheries laws and thereby exposed the plaintiff to the risk of criminal liability and associated financial and perhaps other loss. If the former is correct then the undertaking has not been breached. If the latter is correct then there has been a breach of undertaking.

[105] At the time the undertakings were given, Raukura Moana Fisheries Ltd had identified what "its claim" was, in respect of each of the proceedings. This was in two ways. The nature of the claim was referred to in the notices of proceeding *in rem* in these terms:-

The plaintiff claims the sum of $37,801.54, being legal fees incurred to date, and such other sums as may be incurred by the Plaintiff for its liabilities, costs, expenses and losses in respect of an investigation by the Ministry of Fisheries into alleged breaches of the Fisheries Act 1983 and 1996 by the owner and/or the Master and the crew of the Defendant vessel in respect of which costs and expenses the owner of the defendant vessel has agreed to indemnify the Plaintiff under the terms of a Charter Agreement entered into in 1998.

Further, in each case the statement of claim sought:-

Judgment against the Defendant ship in the sum of all costs and expenses incurred as a result of the Ministry's investigation.

[106] So, following down this line of reasoning, the issue whether the undertaking had been breached depends upon whether costs associated with the current prosecutions (and their possible consequences) can be said to be "in respect of an investigation by the Ministry of Fisheries into alleged breaches of the Fisheries Act 1983 and 1996", to use the phraseology used in the notice of proceeding in each case or, if the statement of claim is regarded as paramount, whether they are included in the concept of "costs and expenses incurred as a result of the Ministry's investigation".

[107] I am of the view that costs associated with the prosecution and the possible consequences of prosecution are a subset of costs incurred "in respect of" or "as a result of" the Ministry's investigation. So, as a matter of ordinary English, prosecution costs and expenses seem to me to be within the scope of the claim as it stood when the undertakings were given.

[108] There are a range of other considerations which point in the same direction. It was always likely that the proceedings would be amended to cope with events as they unfolded and the underlying, in substance, claims seem to me to have been for relief from the adverse consequences of the actions of the masters. Further, the amount of the security sought and paid suggested that it was intended to cover more than the investigation phase of the overall Ministry operation. I do, however, accept that the $300,000 sought could hardly have reflected a considered view as to Raukura Moana Fisheries Ltd's complete exposure associated with the activities alleged to have been committed from the two vessels in question.

[109] Mr Tetley, who appeared as counsel on 7 March, has now filed an affidavit in which he has set out in detail the background to the agreement which resulted in security being provided. I do not propose to review the law as to the admissibility of this material because it does, in fact, do no more than confirm the interpretation which I would have reached without this material. For the sake of completeness, however, I should refer to it.

[110] It is perfectly clear that the ship owners were seeking to be free to deal with the vessels as they chose and this was understood by Raukura Moana Fisheries Ltd's solicitors. There is absolutely nothing in the background material which suggests that the undertaking not to arrest would cease to apply if there was a prosecution. Indeed, the demand for security in the sum of $300,000 was backed up by reference to the possibility of prosecution costs being incurred. It is clear Raukura Moana Fisheries Ltd anticipated that the ship owners would be taking steps, involving the expenditure of money and possible transactions with third parties, on the faith of the undertakings.

[111] In saying that, I recognise that, at the time security was negotiated, there was no guarantee that freedom from arrest at the suit of Raukura Moana Fisheries Ltd would necessarily give the ship owners complete commercial freedom to deal with the vessels as they chose. Obviously, the possibility of a seizure and, later, forfeiture under the fisheries legislation was real enough. However, for reasons which are not entirely clear to me, the Ministry has not seized the vessels and it rather appears to me as though their owners took a calculated (and possibly informed) risk based on their assessment that the Ministry would not, in fact, seize the vessels.

[112] Mr Broadmore also suggested that if the issue of security had been determined by the court in December last year, it would have required security only in relation to the investigation costs. I doubt very much if that is so. In a situation where the practical effect of the availability of an *in rem* claim meant that the vessels were to stand as security against liabilities of which some would only crystallise in the future, I find it difficult to see why a judge would have directed the release of the vessels on any basis other than security in respect of all liabilities which could be regarded as being likely to accrue.

[113] This is not to say that Raukura Moana Fisheries Ltd necessarily acted foolishly in providing the undertakings. Given the possibility of seizure and forfeiture by the Ministry, the $300,000 provided by the ship owners by way of security did have a significant bird in the hand quality.

[114] Finally, I note two other points. The first is as to the possibility of release from the undertakings. I record that there has been no application by Raukura Moana Fisheries Ltd for release from the undertakings. I make no comment on whether such a release is likely to be granted. The other issue relates to whether the undertakings preclude post-judgment arrest. I do not need to determine this issue at the moment.

[115] The result will be that the vessels must be released.

The *Mareva* injunction

[116] I granted an *ex parte Mareva* injunction on 14 March. This was on the basis of evidence pointing to the proposed sale or charter of these vessels. The ship owners now seek the discharge of those orders.

[117] In the circumstances, it is appropriate that I start from first principles.

[118] Rule 236B (1), High Court Rules provides:-

Without limiting the generality of the Court's powers in relation to the granting of injunctions, it is hereby declared that the Court may grant an interlocutory injunction restraining a party from removing from New Zealand, or otherwise dealing with, assets in New Zealand whether or not the party is domiciled, resident, or present in New Zealand.

[119] In the context of this case, it seems to me that the following issues must be addressed:-

1. Whether there is an arguable case.

2. Whether there is a risk of dissipation of assets.

3. Whether, and if so to what extent, a *Mareva* injunction would be inconsistent with the undertakings given by Raukura Moana Fisheries Ltd in the joint memoranda of counsel.

4. General considerations of justice including issues as to non-disclosure and Raukura Moana Fisheries Ltd's ability to make good on its undertaking as to damages.

[120] Plainly, Raukura Moana Fisheries Ltd has a good arguable case.

[121] As to risk of dissipation of assets, the situation thrown up by this case is not unusual, at least at a reasonably high level of generality. There is a substantial absence of evidence as to the financial position of the ship owners. Instead of making a complete and frank disclosure as to their position and intentions, they have, instead, put Raukura Moana Fisheries Ltd to proof and, where specific instances have been provided by that company by way of evidence in support of its contentions as to the risk of dissipation, these have been answered but only in a very specific way. One of the cases cited to me, *The Niedersachsen* [1983] 2 Lloyd's LR 600 involved a broadly similar situation.

[122] It is perfectly clear that a judge must not infer a risk of dissipation merely because a foreign defendant has assets within the jurisdiction of the court. Nor is a risk of dissipation to be inferred merely because the defendant plays its financial cards close to its chest as in *The Niedersachsen*. On the other hand, the test which the plaintiff must satisfy is not unduly exacting. The plaintiff must point to circumstances from which a "prudent, sensible commercial man, can properly infer a danger of default". This phraseology comes from the judgment of Lawton LJ in *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645 at 671 .

[123] Here the ship owners are foreign companies with assets in New Zealand. They have not made full disclosure of their assets. On the authorities those factors do not warrant a conclusion that there is a risk of dissipation of assets. But the facts do, however, go a little further than that. I refer to what I have said in paragraph [98] above. For the reasons given there is no reason to suppose that the ship owners would meet any award voluntarily if they then had no assets subject to the jurisdiction of the New Zealand courts.

[124] In that context, I am of the view "that any prudent, sensible commercial man (or woman)" would infer a danger of default. I see the case as well within the principles stated by Lawton LJ in *Third Chandris Shipping Corporation* case.

[125] There are two additional matters I should mention.

[126] The first is that the underlying allegations relate to fraud, that is fraud on the quota management system. The Ministry's allegations are that the masters and crew of all four vessels, which were subject to charter arrangements and which have the same ultimate beneficial ownership, engaged broadly the

same fraudulent activities in the 1998-1999 fishing year. Assuming that the Ministry's case is correct, it would be perhaps an unusual coincidence that all four vessels with the same common ultimate beneficial ownership engaged in the same activities without the owners being implicated other than simply vicariously via the actions of the masters and crews. I invited Mr Broadmore to comment on whether this would, itself, be a factor which might be relevant to whether there was a risk of dissipation. He specifically disavowed any reliance on this argument and, accordingly, I put it to one side.

[127] The second argument is a related one. If it is the case that the proceedings result in convictions, then the vessels will be forfeited to the Crown. Since the vessels are the sole assets owned by the ship owners, such forfeiture would have a serious effect on the continuing financial viability of the ship owners. Mr Broadmore did not rely on this line of argument either. This is understandable. The risk of forfeiture is of debatable relevance in the present context, because such a forfeiture would take effect ahead of any *in rem* claim which Raukura Moana Fisheries Ltd might have in respect of the vessels. The practical effect of forfeiture would depend upon the vessels being within New Zealand's jurisdiction at the time of conviction. But the risk of forfeiture (and the possible necessity for the ship owners to come up with redemption payments if they are to secure the release of the vessels) may point perhaps, in a very general sense, to significant financial problems for the ship owners in the foreseeable future; this providing a context in which dissipation of assets might occur. This point, as I have noted, was not relied on by Raukura Moana Fisheries Ltd. I mention it here simply to note that I have not overlooked its possible relevance. Again, however, I put it on one side for the purposes of the present exercise.

[128] The third issue relates to the impact of the undertaking. Raukura Moana Fisheries Ltd's undertaking is not confined to not arresting the vessels but also to any other detention. Obviously I should not grant an injunction which has the practical effect of detaining the vessels if this would be a breach of Raukura Moana Fisheries Ltd's undertaking.

[129] Mr Broadmore accepted that this was so, but contended that any injunction as to the proceeds of any sale ought not to be regarded as being in breach of the undertaking. I agree. I do not see the *Mareva* injunction as granted as involving a detention of the vessels although I would be prepared to entertain argument as to amendments if the ship owners are concerned as to this. I am of the view that an order which requires the ship owners, upon the sale of the vessels (or either of them), to set aside those proceeds of sale and not to dissipate them, does not involve a detention of the vessels. I recognise that the proceeds of sale might not be an "asset in New Zealand" and so directly within Rule 236B, High Court Rules. But the vessels are assets in New Zealand and I think that, even within the confines of the language of the Rule, it would be open to me to make an order prohibiting the sale of the vessels otherwise than on terms which provided for the setting aside and retention of the proceeds of sale. Further, it is clear that Rule 236B is not an exclusive definition of the jurisdiction of the court and

a *Mareva* injunction may apply to assets that are not within the jurisdiction of the court, see *Zietlow v Simon* (1991) 4 PRNZ 373 and *Fitzherbert v Faisandier* (1995) 8 PRNZ 592.

[130] The evidence now available points to there having been conditional sale agreements entered into in respect of the vessels. No ground was advanced by the ship owners as to why there would be any injustice in funds produced as a result of completed agreements for sale being set aside to stand as security for Raukura Moana Fisheries Ltd's claims other than the issues which I am about to address.

[131] That leaves in issue the considerations relevant to ultimate justice including non-disclosure. Mr David for the ship owners was very critical of the failure of Raukura Moana Fisheries Ltd to make full disclosure relating to the strengths of the argument available to the ship owners in respect of the undertakings. He was also dissatisfied about the failure of Raukura Moana Fisheries Ltd to disclose details of its own financial position and the use to which Raukura Moana Fisheries Ltd has put the *Mareva* injunction in negotiations with the ship owners

[132] I am not troubled by the complaints relating to the undertakings. Given the hearing which had taken place on 7 March, I was well aware, in general terms, of the undertakings (although the hearing on 7 March did not focus, in any sophisticated way, on the scope or significance of those undertakings).

[133] Of more concern to me are issues associated with Raukura Moana Fisheries Ltd's own financial position and its negotiating stance vis-à-vis the ship owners.

[134] Mr Paki Rawiri, the general manager of Raukura Moana Fisheries Ltd, swore an affidavit on 23 March in which he discussed, in fairly general terms, the financial position of Raukura Moana Fisheries Ltd. He declined to make available, on an open basis, financial statements. He contended, however, that Raukura Moana Fisheries Ltd is in a reasonably sound financial position.

[135] This affidavit prompted a further affidavit from Mr Tetley referring to a without prejudice discussion which took place on 16 March 2001. He referred, in particular, to remarks made by the solicitor acting for Raukura Moana Fisheries Ltd in these terms:-

While I cannot now recall the exact words used, in the course of that meeting [the solicitor] said to me that if the Plaintiff could not recover its losses against the Defendants, it could plead guilty (thereby rendering forfeit the Defendants ships), and go into liquidation rather than pay the consequential fines or meet any obligations to make deemed value payments to the Crown. The clear threat made was that in those circumstances there would be no funds to meet any eventually successful claim by the vessel owners for unpaid charter hire and/or damages. [The solicitor] said that while there was some value in the name of the Plaintiff, if the numbers did not add up then the company could be wound up.

[136] Although this discussion took place at the without prejudice meeting, Mr Broadmore did not challenge the admissibility of the affidavit. Nor was leave sought to file an affidavit denying or explaining

away the remarks attributed to the solicitor. Mr Broadmore's position was that the solicitor was talking about a worst case situation in which convictions were entered which would mean that the plaintiff was then no longer a going concern. He said that Mr Rawiri was talking about the financial position of the company on the assumption that it remained a going concern.

[137] I am of the view that there has been a good deal of game playing on the part of the ship owners. The contrast between the contentions made on behalf of the ship owners at the hearing on 7 March and those advanced on 23 March provides an example of this. But there has also been a good deal of game playing on the part of Raukura Moana Fisheries Ltd. It was not my intention, when I granted the *Mareva* injunction, to facilitate a situation where threats of the kind attributed to the solicitor acting for Raukura Moana Fisheries could be made. If it is truly the case that Raukura Moana Fisheries Ltd is considering the course of action postulated by its solicitor, then that should have been disclosed to me when the *ex parte* order was made. Further, in a situation where convictions for these offences would invalidate the going concern assumption for Raukura Moana Fisheries Ltd, this should have been explained to me. I was, however, not told that Raukura Moana Fisheries Ltd was considering the course of action postulated by its solicitor. Nor was I told that the going concern assumption for Raukura Moana Fisheries Ltd was placed in jeopardy by the prosecutions.

[138] As the *McGechan* commentary to Rule 236B (para HR 236B.12) indicates, New Zealand courts have not attributed the same significance to non-disclosure as have English courts. So it would not be right simply to set aside the *Mareva* injunction by way of a sanction for non-disclosure.

[139] The fundamental problem, however, is that there is a serious question-mark as to Raukura Moana Fisheries Ltd's ability to meet any liability on its undertaking as to damages. There are also some indications of game playing behaviour associated with the possibility that Raukura Moana Fisheries Ltd will go into liquidation.

[140] In those circumstances, a modified version of the *Mareva* injunction can only remain in place if accompanied by appropriate security from Raukura Moana Fisheries Ltd covering any likely loss which might be recoverable against it by the ship owners in the event that Raukura Moana Fisheries Ltd is called upon to meet its undertaking.

[141] In the circumstances I propose to hear the parties as to the terms of any continued *Mareva* injunction and those terms will have to include appropriate security from Raukura Moana Fisheries Ltd as just mentioned.

Disposal of applications

[142] As to the disposal of the applications:-

1. I decline the applications seeking return of all or part of the security.

2. I order the immediate release of the vessels.

3. I decline to discharge the *Mareva* injunction. I am prepared to make any necessary amendments to it which may be suggested by counsel to make it crystal clear that it does not involve a detention of the vessels. Further, it must be made conditional upon security being provided by Raukura Moana Fisheries Ltd in accordance with the indications given in paragraph [140] of this judgment.

4. I adjourn for further consideration the issue whether the ship owners are entitled to a stay of proceedings.

5. I reserve all issues as to costs. Broadly, I am of the view that Raukura Moana Fisheries Ltd is entitled to costs associated with the first hearing and the ship owners are entitled to costs in relation to the second hearing. I do not regard Raukura Moana Fisheries Ltd as being culpable in any sense relevant to costs in respect of the breach of the undertakings given the narrow argument espoused by Mr Tetley at the hearing on 7 March. I have taken into account the remarks attributed to Raukura Moana Fisheries Ltd's solicitors and associated issues of non-compliance in my conclusion that the ship owners are entitled to costs in relation to the second hearing (at which Raukura Moana Fisheries Ltd has been partly successful). I am presently minded to deal with issues of costs on the basis that the two entitlements are broadly equivalent to each other and no further order is necessary.

6. I direct that the case is to be called before me by way of telephone conference at 8.45 am on Friday 30 March. On this occasion I will endeavour, with the assistance of additional argument then to be presented and any further evidence the parties may care to lay before me, to resolve the outstanding issues as to whether the ship owners are entitled to a stay of proceedings, the form the *Mareva* injunction is to take and costs (should either of the parties wish to challenge my tentative view).

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