CLAIMS RELATING TO POSSESSION OF A SHIP: *WILMINGTON TRUST COMPANY (TRUSTEE) V THE SHIP "HOUSTON"* [2016] FCA 1349

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In Wilmington Trust Company (Trustee) v The Ship "Houston" [2016] FCA 1349 the Federal Court of Australia considered the proper construction of s 4(2)(a)(i) of the Admiralty Act 1988 (Cth), which provides that claims 'relating to possession of a ship' are proprietary maritime claims, and therefore capable of supporting an action in rem against the vessel. Specifically, Siopsis J held that claims for delivery up of a ship and for damages for conversion and/or detinue fell within that definition. This note summarises the facts of the case and his Honour's reasoning, and critically analyses the link between each of those claims and possession of a vessel. Although a claim for damages for conversion does not at first sight concern possession in the same way as a claim in detinue, his Honour's conclusion is clearly correct in light of the authorities giving a broad interpretation to the words 'relating to'.

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I INTRODUCTION

In *Wilmington Trust Company (Trustee) v The Ship "Houston"* [2016] FCA 1349, the Federal Court of Australia (Siopsis J) held that claims for delivery up of a ship and for damages for conversion and/or detinue were properly characterised as claims 'relating to possession of a ship' within s 4(2)(a)(i) of the *Admiralty Act 1988* (Cth). Justice Siopsis reached this conclusion in respect of the claims in conversion and/or detinue on the basis that such claims seek to vindicate the plaintiff's right to possession. While claims in conversion and/or detinue are not claims *for* possession,[1]

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they clearly relate to possession. The effect of this is that such claims are 'proprietary maritime claims' and therefore are sufficient to found the court's jurisdiction to entertain an action *in rem* against the vessel.

II FACTS

By a bareboat charterparty[2] dated 29 September 2010 Woolmington Trust Company (the "first plaintiff"), chartered its US-registered vessel, *The Houston* ("Vessel") to Teras BBC Ocean Navigation Enterprise Houston LLC ("TBONE"). The charter allowed TBONE full use and control of the vessel, and required the payment of hire. It stipulated that TBONE was to redeliver the vessel at the expiration of the charterparty, and entitled the plaintiffs to withdraw the vessel from the service of TBONE and terminate the charter if TBONE failed to pay hire. In the event of such a termination the charter gave the plaintiffs the right to 'repossess the Vessel from [TBONE] at her current or next port of call, or at a port or place convenient to [it]'.[3]

On 2 December 2015 Teras BBC Houston (BVI) Ltd (the "second plaintiff"), acting on behalf of the first plaintiff, served a notice on TBONE stating that it was in default in the payment of hire, terminating the charter with immediate effect, and withdrawing the vessel from service. It stated that it required redelivery 'at the next immediate port of call'.[4] TBONE responded with an allegation that the first plaintiff had breached 'the covenant of good faith inherent'[5] in the charter by wrongfully arresting the vessel in Virginia. TBONE thereby gave notice to the first plaintiff of early redelivery of the vessel, and it nominated the date of 17 December 2015 as the date of redelivery at Port Hedland, Western Australia. The vessel was carrying locomotives which were to be discharged at that destination. TBONE also stated that all hire had been paid up to that date.

The first plaintiff later advised TBONE that it rejected those allegations, but the parties nevertheless engaged in correspondence relating to the means of effecting redelivery. On 15 December 2015 TBONE advised the first plaintiff that redelivery had been delayed to 28 December 2015 because of the plaintiffs' 'continued bad faith conduct'.[6] It also sought confirmation that the second plaintiff would not interfere by court action with the unloading of the vessel's cargo at Port Hedland. It maintained that redelivery was to occur because of the plaintiffs' breach. On 16 December 2015 a representative of the plaintiffs wrote to TBONE asserting the validity of the plaintiffs'

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[1] Although as is discussed below, a claim in detinue can include a claim for specific restitution of the chattel.
[2] The charterparty took the form of an amended BARECON 2001.
[3] [2016] FCA 1349 (29 November 2016) [11].
[4] Ibid [13].
[5] Ibid [14].
[6] Ibid [17].

right to terminate. The letter claimed the outstanding hire and alleged that TBONE had on various occasions ignored demands for the immediate redelivery of the Houston at various ports of call. The requested assurance was not given.

On 22 December 2015 TBONE's solicitors filed a caveat against arrest of the vessel, and undertook that if a proceeding to which the caveat applied were commenced against the vessel, it would enter an appearance and comply with any obligations as to the payment of bail.[7] This caveat was sent to the plaintiffs' solicitors, along with an email advising that the vessel's estimated time of arrival in Port Hedland was 26 December 2015 and that cargo discharge was likely to be completed on 30 December 2015. On 24 December 2015 the plaintiffs[8] commenced an action *in rem* against the defendant claiming, inter alia,[9] the following relief:

1. loss and damage arising from the detention and/or conversion of the vessel from on or about 2 December 2015; and
2. delivery up of the vessel forthwith.

The action *in rem* was brought in purported reliance on ss 16 and 18 of the *Admiralty Act 1988* (Cth).[10] TBONE entered an appearance as the bareboat charterer and disponent owner of the defendant vessel. By interlocutory application dated 11 January 2016, TBONE sought an order that the writ be set aside for want of jurisdiction, or that the proceeding be dismissed for that reason.

III DECISION

For the purposes of s 16, the court would only have jurisdiction to entertain the action *in rem*[11] if the claims were properly characterised as 'proprietary maritime claims', as defined in s 4(2) of the Act. That section relevantly provides:

> (2) A reference in this Act to a proprietary maritime claim is a reference to:
>
> (a) a claim relating to:
>
> (i) possession of a ship;

[7] In accordance with rule 9 of the *Admiralty Rules 1988* (Cth).
[8] Acting in its capacity as trustee for the Teras BBC Houston Trust, and Teras BBC Houston (BVI) Ltd.
[9] Other relief claimed, which is not of present importance, included unpaid hire, an indemnity, interest and costs.
[10] The *Admiralty Act 1988* (Cth) sets out exhaustively when actions may be commenced as proceedings *in rem* (s 14). One such instance is where the action is in a proceeding on a proprietary maritime claim concerning a ship or other property (s 16). Another is where the action is in a proceeding on a general maritime claim and a relevant person was the owner or charterer of, or in possession or control of, the ship when the cause of action arose, and the demise charterer when the proceedings are commenced (s 18).
[11] If the requirements of a provision allowing the plaintiffs to commence an action *in rem* could not be satisfied, the court would not have jurisdiction to hear and determine the action (s 10).

…

The plaintiffs submitted that each of the claims referred to were claims 'relating to possession of a ship' within the meaning of s 4(2)(a)(i). They relied on the decision of the High Court in *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* ("*Shin Kobe Maru*").[12] In that case, the High Court held that a claim by a plaintiff that, in accordance with the terms of a joint venture agreement with the defendant, ownership of a vessel be transferred to the joint venture company (or another joint venture company in which the plaintiff and defendant had an interest) was a proprietary maritime claim within s 4(2)(a) of the Act.[13]

In so holding, the High Court determined that the words 'relating to' in s 4(2)(a) were to be given a wide meaning, and therefore s 4(2)(a) embraced a claim by a party who asserted a third party's right to ownership in a vessel.[14] The High Court said:

> In their natural and ordinary meaning, the words "a claim...relating to...ownership" are wide enough to encompass a claim that a third party is or has been or is entitled to become the owner of the property in question. In this regard, the expression "a claim...relating to...ownership" may be contrasted with "a claim to ownership" or "a claim for ownership", which latter expressions would ordinarily indicate a claim as to one's own ownership, not that of another.[15]

Justice Siopsis held, referring to *Shin Kobe Maru*[16] and *Elbe Shipping SA v The Ship Global Peace*,[17] that under the Act, establishing jurisdiction does not depend upon any *factual* precondition, but on establishing that the particular claim has the *legal* character required by s 4(2)(a). In the latter case, Allsop J (as his Honour then was) said:

> In *The Shin Kobe Maru* the only "fact" that needed to be shown was the existence of a claim that bore "the legal character" of the kind referred to in s 4(2)(a)(i) and (ii) of the Act. The claim might fail for any number of reasons, but as a claim, that is as a body of assertions, it bore the legal character or answered the description of "a claim relating to possession of, or title to or ownership of a ship".[18]

TBONE, having entered an appearance for the defendant vessel, submitted that neither of the plaintiffs' claims could properly be characterised as proprietary maritime claims. TBONE advanced a number of submissions which depended upon acceptance of its version of the facts, or were otherwise contentious. Justice Siopsis

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[12] (1994) 181 CLR 404.
[13] Ibid 427.
[14] Ibid 418-9.
[15] Ibid 418.
[16] Ibid 426-7.
[17] (2006) 154 FCR 439, 458 [70] (Allsop J).
[18] Ibid.

found that these submissions comprised various ways in which the plaintiffs' claims might fail. They went to the merits of the claims and not the legal characterisation of those claims. Accordingly, the submissions were not relevant to determining whether the court had jurisdiction under s 16 of the Act.

The correct inquiry was whether the plaintiffs' claims could properly be characterised as 'claims relating to possession of a ship'. In answering that question in the affirmative, his Honour said:

> This is because the claim for delivery up of the "Houston" is a claim for the delivery up of possession of the "Houston" and is, therefore, a claim for possession of a ship, and so, clearly, falls within the ambit of cl 4(2)(a) of the *Admiralty Act*.
>
> Further, the body of assertions comprising the claims for damages for the torts of conversion and/or detinue comprises the plaintiffs' assertion of TBONE's interference in the first plaintiff's right to possession of the "Houston" after 2 December 2015. The claim is founded upon an assertion that TBONE by its conduct after 2 December 2015, and whilst the "Houston" was in its actual possession, denied the first plaintiff's right to possession. In my view, that claim is to be characterised as being a claim "relating to possession" of a ship, as it seeks to vindicate the first plaintiff's asserted right to possession of the "Houston", consequent upon its notice of 2 December 2015, in which it claimed to terminate the charterparty.

The requirements of s 16 were therefore met and the court had jurisdiction to entertain the action *in rem*. His Honour's conclusion with respect to s 16 meant he did not have to consider whether the court had jurisdiction pursuant to s 18.[19] The application was dismissed.

IV COMMENT

This decision establishes that the following three types of claims are to be characterised as claims 'relating to possession of a ship':

1. claims for delivery up of a vessel;
2. claims in detinue; and
3. claims for damages in conversion.

The first two of these propositions are relatively uncontroversial. It is the third which, at first glance, appears more contentious.

A *Claim for Delivery up of the Vessel*

[19] The plaintiffs had relied on s 4(3)(f) and (w) in this respect.

It is undoubtedly the case that a claim for delivery up of a vessel is a 'claim relating to possession of a ship'. By its claim, the plaintiff asserts that it is entitled to possession and seeks the court's assistance in acquiring it. This aspect of his Honour's decision is clearly correct.

B *Claim in Detinue*

It is also easy to understand why a claim in detinue should be categorised as relating to possession. Detinue is an ancient action, traceable to the twelfth century.[20] It is essentially a proprietary action, and is the only common law action which allows the plaintiff to seek specific restitution of the chattel concerned.[21] It is not available as of right, however; the court has a discretion to make such an order where the chattel has some special value or interest.[22] The proprietary nature of the action, and the possibility of regaining possession of the chattel itself, demonstrates why it is apt to be characterised as a claim relating to possession.[23]

It is worth noting that TBONE did not actually seek specific restitution of the vessel in its claim in detinue. Rather, it sought damages for the detention of the Vessel, making the claim akin to one in conversion. Whether such a claim should be characterised as one 'relating to possession of a ship' is discussed below.

C *Claim for Damages in Conversion*

The classification of claims for damages in conversion as relating to possession is more problematic. Like detinue, this tort protects the plaintiff's possession, or immediate right to possession, of the chattel.[24] However, it differs in that a successful action in conversion can only result in an award of damages, and not specific restitution of the chattel.[25] It is thus clear that an action in conversion, whether successful or unsuccessful, can never change possession of the chattel itself. On that

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[20] R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 101; Frederic Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1936) 48.

[21] *Kettle v Bromsall* (1738) Willes 118; *Bellinger v Autoland Pty Ltd* [1962] VR 514, 519 (Herring CJ). See also D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 108. The Court's power to grant specific restitution was first introduced by the *Common Law Procedure Act 1854* (UK). It is now to be found in s 80 of the *Civil Proceedings Act 2011* (Qld) and its equivalents. There was a time at which delivery *in specie* was available as of right, but before 1854 it could not be insisted upon: *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, 307.

[22] *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, 307. For guidance as to how this discretion is exercised see Andrew Tettenborn, 'Intentional Interference with Chattels' in Carolyn Sappideen and Prue Vines (eds), *Fleming's Law of Torts* (Thomson Reuters, 10th ed, 2011) 63, 85-6.

[23] This issue could not arise in England, where detinue has been abolished: *Torts (Interference with Goods) Act 1977* (UK) s 2.

[24] See generally, Cynthia Hawes, 'Tortious Interference with Goods: Title to Sue' (2011) 17(2) *Canterbury Law Review* 331.

[25] Balkin and Davis, above n 20, 62 fn 11.

basis, it might be argued that a claim for damages in conversion is not one relating to possession.

Support for this argument can be found in the jurisprudence relating to claims for damages arising out of a breach of contract for the sale of a vessel. Such a claim is not a 'claim relating to possession of a ship', as ownership is not being claimed.[26] It lacks the necessary proprietary connection. In *Paul Allison & APAI Pty Ltd v The Ship Greshanne*,[27] the Supreme Court of Tasmania (Zeeman J) considered the question of whether 'an action for an agreed price payable on the sale of a ship, in circumstances where unqualified title and possession have passed to the purchaser' could properly be categorised as a 'claim relating to possession of a ship'. His Honour answered that question in the negative:

> Without reference of authority, it seems plain to me that a mere action for the price in the circumstances of the present case does not fall within those parts of the definition. The proposition that it does is novel and not remotely supported by any authority which I have been able to locate … The second plaintiff's claim does not relate to the possession of the ship. The applicant is in possession of it and neither plaintiff seeks, by the action, to disturb that possession.[28]

By analogy, it might be argued that in an action for conversion the plaintiff is not seeking to disturb the possession of the defendant, but merely to claim damages for the infringement of his or her right to possession. As such, it should not be classified as a claim relating to possession.

Against this, however, is the fact that the section speaks not of 'claims *for* possession', but of 'claims *relating to* possession'. The High Court in *Shin Kobe Maru* has given an expansive interpretation to the words 'relating to'. The same point was made about the words 'in relation to' by Lord Keith in *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co*:

> It is necessary to attribute due significance to the circumstance that the words of the relevant paragraphs [are] "in relation to" not "for" … The meaning must be wider than would be conveyed by the particle "for".[29]

By giving the same expansive interpretation to the words 'relating to' in s 4(2)(a), it becomes clear that the conclusion reached by Siopsis J is correct. A claim

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[26] James Turner QC and Sarah Derrington, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2016) 47-8.
[27] (1996) 6 Tas R 137.
[28] Ibid 140. It is worth noting that Zeeman J subsequently justified his conclusion by reference to *Empire Shipping Company Inc v Owners of the Ship "Shin Kobe Maru"* (1991) 32 FCR 78, confirmed on appeal in *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1992) 38 FCR 227.
[29] [1985] AC 255, 270-1.

for damages in conversion is correctly characterised as a 'claim relating to possession' because it operates to vindicate the plaintiff's asserted right to possession.

V CONCLUSION

Wilmington Trust Company (Trustee) v The Ship "Houston", as far as the authors are aware, is the only case to directly consider whether claims for damages in conversion and/or detinue are to be characterised as claims relating to possession of a ship.[30] The effect of Siopsis J's conclusion that such claims bear the legal characterisation of a claim relating to the possession of a ship is that the *in rem* jurisdiction of the court is available under s 16 of the Act. His Honour's approach, which focuses on the fact that such claims seek to vindicate the plaintiff's asserted right to possession, is clearly correct when viewed in light of the authorities giving a broad interpretation to the words 'relating to'.

[30] The English equivalent of ss 4(2)(a)(i) and 16 is in similar terms, and is to be found in ss 20(2) and 21(2) of the *Senior Courts Act 1981* (UK). This decision is therefore likely to be equally applicable in the United Kingdom.