PARTIES:	LAEMTHONG INTERNATIONAL LINES CO. LTD as the owners of the ship "LAEMTHONG PRIDE" as the surrogate for the vessel "NYANZA" Applicant AND: B.P.S. SHIPPING LTD Respondent
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Court of Appeal of the Northern Territory of Australia exercising jurisdiction in Admiralty
FILE NOS:	No. AP 27 of 1995
DELIVERED:	Darwin 3 November 1995
HEARING DATES:	26 and 30 October 1995
JUDGMENT OF:	ANGEL, MILDREN and THOMAS JJ

CATCHWORDS:

Shipping and navigation - Admiralty jurisdiction, law and practice - Appeal - Order to re-arrest vessel by single judge of supreme court - Jurisdiction disputed on factual basis - General maritime claim - Test applied incorrectly by applicant - Order to re-arrest - Security - Discretionary - Appeal dismissed

Ritz Hotel Ltd v Charles of the Ritz (1988) 15 NSWLR 158, distinguished

Deputy Commissioner of Taxation v Ahern (No 2) [1988] 2 Qd R 158, referred to

Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc (1994) 181 CLR 404 at 426-7, applied

Supreme Court Act s53

Supreme Court Rule rr43.03(2), 43.06

Admiralty Act 1988 (C'wlth) ss21, 10, 14, 17, 4(3)

admiralty Act 1988 (C'wlth) r39(2), 40, 52(1)

REPRESENTATION:

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP 27 of 1995

BETWEEN:

LAEMTHONG INTERNATIONAL LINES CO. LTD as the owners of the ship "**LAEMTHONG PRIDE**" as the surrogate for the vessel "**NYANZA**"

Applicant

AND:

B.P.S. SHIPPING LTD

Respondent

CORAM: ANGEL, MILDREN and THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 3 November 1995)

ANGEL J:

This is an application pursuant to s53 Supreme Court Act for leave to appeal from an order of Kearney J on 24 October 1995 for the re-arrest of the ship "Laemthong Pride" pursuant to s21 of the Admiralty Act 1988 (C'wlth).

Mildren J has explained the circumstances of the application and set out the relevant provisions of the Admiralty Act.

Upon consideration of the material before the learned primary Judge, I am of the opinion that no case has been made out to interfere with the order made, ie, that it has not been shown by the applicant that the order is wrong or that it has, or must have, been substantially affected by wrongful application of principle, or misunderstanding or erroneous assessment of the facts. Nor does it appear that any injustice results from the order.

I agree with Mildren J that there was evidence before the learned primary Judge establishing, on the balance of probabilities, first, that the ship "Laemthong Pride" was within the jurisdiction; secondly, that at the time the proceedings were commenced, the applicant was the owner of that ship; thirdly, that the applicant was a "relevant person" in relation of the respondent's claim; and fourthly, that the applicant was, at the time the alleged cause of action arose, the owner or charterer of, or in possession and control of, the ship "Nyanza".

The respondent's claim against the applicant, as is evident from the amended statement of claim, is a claim of the kind referred to in s4(3)(d) or (f) of the Admiralty Act 1988 (C'wlth).

It follows, applying *The Ship "Shin Kobe Maru"* (1994) 181 CLR 404 at 426-7, that Kearney J had jurisdiction to make the order he did. The attack upon jurisdiction fails. The applicant, significantly, I think, did not adduce any evidence

to rebut or contradict the respondent's evidence on the matters relevant to jurisdiction.

There being both jurisdiction and an asserted general maritime claim for demurrage, dead freight and damages for breach of an implied term of a charter party, it was not, in the circumstances, incumbent upon the respondent to adduce evidence to prove its claim before Kearney J. The applicant does not suggest, and did not suggest to the learned primary Judge, that the respondent's claim is vexatious, or lacks bona fides, or some how ought summarily to be dismissed, or is demurrable, or that there is some unanswerable defence, eg, payment or a set-off or some statutory time bar.

The applicant has yet to file and serve its defence to the respondent's claim.

It has not been shown that Kearney J erred in the exercise of his discretion in refusing to impose conditions with respect to the order he made.

I would grant leave to appeal and dismiss the appeal with costs.

MILDREN J:

This is an application for leave to appeal against an order made by Kearney J on 24 October 1995 granting an application by the respondent for the re-arrest of the "Laemthong Pride" pursuant to s21 of the Admiralty Act 1988 (Cth).

The amended grounds of appeal, as set out in the proposed notice of appeal, are that his Honour erred:-

> "(a) in holding that he had jurisdiction to make an order re-arresting the ship pursuant to s21 of the Admiralty Act 1988 (Commonwealth);
>
> (b) in holding that the respondent had a strong argument that it had a general maritime claim pursuant to s4(3) of the Admiralty Act 1988 (Commonwealth);
>
> (c) in relying upon the material submitted by the respondent to conclude that the respondent had a strong argument that the respondent was the owner of the ship, that there was a charterparty in existence between the appellant and the respondent, as to the terms of the charterparty, that the appellant was obliged pursuant to an implied term of the charterparty to fumigate the cargo, that the appellant had breached this obligation, and this breach had caused the respondent the loss alleged;
>
> (d) in failing to place sufficient weight on the absence of an explanation as to why the material provided by the respondent on the hearing of the application to re-arrest had not been provided to the Court on the original application to arrest and the application to set aside that arrest;
>
> (dd) in finding that the respondent had established a claim in respect of demurrage and, further, dead-freight.
>
> (e) in failing to place sufficient weight on the fact that the respondent had failed to properly disclose to the Court at the previous hearing, inter

alia, the documents that evidenced the charterparty and the manner in which the quantum of its claim had been calculated.

4. His Honour erred in exercising his discretion in ordering the re-arrest of the "Laemthong Pride" without requiring the provision of security by the respondent."

The respondent ("BPS") commenced these proceedings against a company called Laemthong International Lines(S) Pte. Ltd as the owners of the ship "Laemthong Pride" as the surrogate for the vessel "Nyanza". The action was in rem. In paragraph 3 of the original statement of claim it was alleged that at all material times to date and at present the defendant Laemthong International Lines(S) Pte. Ltd, (hereinafter called the "Singapore Company") was and is the registered owner of the "Laemthong Pride". Pursuant to paragraph 4 of the statement of claim it was alleged that at all material times to date and at present B.P.S. was and is the registered owner of the ship "Nyanza".

By paragraph 5 of the statement of claim it was alleged that B.P.S. and the Singapore company entered into a charterparty agreement on 12 May 1995 whereby B.P.S. chartered "Nyanza" to carry a cargo of bagged rice from Bangkok to Nouakchott in Mauritania. It was pleaded by paragraph 6 that it was an implied term of the charterparty that the Singapore company as charterer of the "Nyanza" would undertake proper fumigation of the cargo. Paragraph 7 of the statement of claim pleaded that the Singapore company failed to comply with its obligations pursuant to the agreement in that the Singapore company failed to ensure proper fumigation resulting in infestation of the cargo by a species of beetle. By paragraph 8 of the statement of claim it was alleged that by reason of the Singapore company's failure to comply with its obligation pursuant to the agreement and the consequent infestation of the cargo the "Nyanza" was arrested at Nouakchott by the receivers' cargo insurers. B.P.S. alleged that by reason of the arrest it had

incurred loss and damage and it claimed damages in the sum of $1,833,285.00, interest and costs. B.P.S. applied for a warrant for the arrest of "Laemthong Pride" based on an affidavit sworn by the solicitor for B.P.S. on 16 October 1995. On that date the registrar issued an arrest warrant.

On 18 October the Singapore company appeared to the writ and applied to the Court for the release of the ship and the dismissal of the proceedings. The grounds for the application were that the proceedings had not been commenced on a general maritime claim; that the defendant was not the owner of the vessel at the time of the commencement of the proceedings; and that the proceedings were not able to be brought pursuant to s19 of the Admiralty Act. That application was supported by an affidavit sworn by the solicitor for the Singapore company. The purpose of that affidavit was to show that on or about 3 August 1995 the "Laemthong Pride" was sold to the applicant, a company incorporated in Thailand. Further affidavits were filed on both sides. The matter was heard before Kearney J on 18 and 19 October. Counsel appeared for Singapore company and also for the applicant. At that stage the applicant had not entered an appearance to the writ, and was not a party to the action. Counsel for the Singapore company and for the applicant immediately challenged the jurisdiction of the Court. The point of the challenge was a simple one, namely that B.P.S. had sued the wrong company. Counsel for the applicant and for Singapore company also submitted that the material relied upon for the arrest was absolutely bereft of substance.

On 19 October when the matter resumed counsel for B.P.S. conceded that the action had been brought against the wrong company as owner and sought leave to amend the writ by adding the applicant as a defendant and as the owner of the ship "Laemthong Pride". An amended writ and an amended statement of claim was prepared in which it was asserted that prior to 13 August the Singapore company was the registered owner of the ship; that at all material times subsequent to 13 August

the applicant was the registered owner of the ship and that the charterparty was between the respondent and the applicant. The Singapore company remained as a second defendant to the action, although it is not clear why. After hearing submissions his Honour ordered that the arrest warrant of 16 October be discharged and that the "Laemthong Pride" be released forthwith. His Honour indicated that B.P.S. might make an application pursuant to s21 of the Act for the re-arrest of the ship if further supporting material became available to the respondent.

On 23 October an application was made by summons for the re-arrest of the vessel forthwith. Further affidavit material in support of that application was filed in Court. After hearing submissions on 23 October his Honour reserved his decision overnight. On 24 October his Honour ordered the re-arrest of the ship. His Honour gave no reasons for making that order in view of the urgency of the application. No complaint is made to this Court about the absence of reasons. However his Honour recorded first that he received all of the affidavit evidence upon which the parties relied, secondly that the additional material which had been placed before him in the form of two affidavits sworn 23 October, when read with earlier affidavit material constituted sufficient reason for the order to be made; and thirdly that the standard of proof which his Honour held applied was that the plaintiff had to satisfy the Court that on the material before the Court the plaintiff had a strong argument for the view that the Court had jurisdiction in rem in respect of the claims under s4(3) of the Act. His Honour's brief remarks indicated that his Honour regarded the remedy to order the re-arrest as discretionary, that he had considered whether the order should be subject to any conditions and that he had decided that no conditions should be imposed. He then invited the applicant to make an application for bail or for some other security to enable the ship to be released. I should record also that during the course of the application before his Honour on 23 October the respondent was given leave to amend the writ

further. The effect of that amendment was to plead two further breaches of the charterparty, namely the failure to pay demurrage chargeable at the rate of US$5,750 per day and dead-freight charges due on dead-freight of 5.03.21 metric tonnes. The total claim for the demurrage and dead-freight was US$222,301.52. However the total of all of the claims remained the same, namely A$1,833,285. The balance of the claim related to the alleged breach of contract relating to the failure to ensure proper fumigation of the cargo.

The Statutory Provisions

Jurisdiction is conferred on this Court in respect of proceedings which may be commenced as actions in rem by virtue of s10 of the Act.

Section 14 provides that proceedings shall not be commenced as an action in rem against a ship except as provided by the Act. Section 17 provides that a proceeding on a claim may be commenced as an action in rem against a ship where, "in relation to a general maritime claim concerning a ship or other property, a relevant person:

> (a) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship or property; and
>
> (b) is, when the proceeding is commenced, the owner of the ship or property."

Section 3 defines "relevant person", in relation to a maritime claim, to mean "a person who would be liable on the claim in a proceeding commenced as an action in personam". Section 19 provides as follows:

> "Right to proceed in rem against surrogate ship.
>
> 19. A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if:

(a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first-mentioned ship; and

(b) that the person is, when the proceeding is commenced, the owner of the second mentioned ship."

Section 4(3) defines "general maritime claim" to include claims, inter alia, for "a claim ... arising out of an act or an omission of ... the charterer of a ship ... being an act or an omission in the ... management of the ship, including an action or an omission in connection with ... the carriage of goods ... on the ship" (s4(3)(d)); and "a claim arising out of an agreement that relates to the carriage of goods or persons by a ship or to the use or hire of a ship whether by charterparty or otherwise." (s4(3)(f). It was not disputed that the claims made were "general maritime claims", i.e. that a claim for demurrage, a claim for dead-freight or a claim for damages for breach of the terms of the charterparty as pleaded, were "general maritime claims".

Section 5(1) provides that the Act applies in relation to all ships irrespective of the places of residence or domicile of their owners, and all maritime claims, wherever arising.

The Objection to Jurisdiction

The applicant's submission was that Kearney J did not have jurisdiction to make the order under s21(1) of the Act as the respondent had not shown a "strong argument" as to the existence of a general maritime claim within the meaning of s4(3) of the Act. In support of this argument counsel for the applicant relied upon a number of authorities including Empire Shipping Company Inc v Owners of The Ship "Shin Kobe Maru" (1991) 32 FCR 78 (Gummow J); 1992 (38) FCR 227 (Full Court); (1994) 181 CLR 404 at 426-7 (High Court); Port of Geelong

Authority v "The Bass Reefer" (1992) 37 FCR 374; Devine Shipping Pty Ltd v The Owners of the Ship "B.P. Melbourne", Supreme Court of Tasmania, 26 July 1994 per Zeeman J (unreported).

I do not consider that the test has been correctly stated by the applicant. In Owners of The Ship "Shin Kobe Maru" v Empire Shipping Company Inc (1994) 181 CLR 404 at 426-7, the High Court in a joint judgment of all Justices, said:

> "Where jurisdiction depends on particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. And, of course, they must be established on the balance of probabilities in the light of all the evidence advanced in the proceedings held to determine whether there is jurisdiction.
>
> In this case, Empire asserts jurisdiction on two bases. So far as jurisdiction is asserted by reason of s4(2)(a), it does not depend on any factual precondition but, rather, on the claim having the legal character required by that paragraph, namely, "a claim relating to ... possession of [or] ... title to, or ownership, of a ship." The position is somewhat different with s4(2)(b) in that ownership is a question of mixed fact and law and there may well be cases where facts must be established before a claim can be characterized, in terms of that paragraph, as "a claim between co-owners". However the issue in this case, so far as s4(2)(b) is concerned, seems not to be whether Empire has established facts proving co-ownership, but whether the facts give rise to a relationship which is recognized in law as co-ownership. These issues were not fully developed in argument and, as earlier indicated, it is not necessary to determine whether s4(2)(b) applies in this case. That being so, it is convenient to consider this aspect of Y.S.L.'s argument solely by reference to s4(2)(a).
>
> The question whether Empire's claim bears the legal character of a proprietary maritime claim as defined in s4(2)(a) of the Act does not depend on findings of fact and, thus, cannot involve any consideration of the balance of probabilities. That being so, there is no basis for the application of the principle in The Aventicum [[1978] 1 Lloyds Rep 184] in relation to Empire's claim that there is jurisdiction by reason of s4(2)(a)."

The power to arrest

The right to arrest the res in an admiralty action in rem goes hand in hand with a right to proceed in rem: Meeson, "The Practice and Procedure of the Admiralty Court", at p15. Arrest is the means of obtaining security for the satisfaction of any judgment obtained in the action. The power of arrest is conferred by s22(3) of the Act. An application to arrest a vessel is made pursuant to rr 39 and 40 of the Admiralty Rules (Cth). Rule 39(2) requires that the application be supported by an affidavit of the applicant or of a solicitor or agent of the applicant in accordance with Form 13. The supporting affidavit requires only short particulars of the claim to be set out (Form 13). Rule 40(1) provides that "subject to this rule, the Registrar may issue an arrest warrant". The wording of r40 is quite different from the wording of either the English rules discussed in "The Varna" [1993] 2 Lloyd's Rep 253 at 256-7. The wording of r40 suggests that the application for the warrant is an application for a discretionary remedy which it lay in the power of the registrar to grant or to refuse. See also r4(2). An application for release from arrest may be made to the Court in accordance with r52(1). That rule requires the application to be made in accordance with Form 19 which requires the applicant to set out the grounds upon which the application is made. There is no specific requirement in that rule for a supporting affidavit.

It seems to me that an application under r52 might be made on jurisdictional grounds, or on any other ground. Alternatively the applicant could apply to have the plaintiff's claim struck out as an abuse of the process of the Court or as not constituting a viable cause of action, or as being demurrable for some other reason in which case the writ in rem could be set aside and with it would go the warrant of arrest. Whichever procedure is adopted, if there is a challenge to jurisdiction it is to be determined in accordance with the principles enunciated by the High Court in "Shin Kobe Maru".

In other cases the relevant principles to be applied are those which apply to summary judgment applications or strike out applications in the ordinary jurisdiction of the Court.

So far as re-arrest is concerned s21 provides as follows:

> "Re-arrest
>
> 21. (1) A ship or other property arrested in a proceeding on a maritime claim may not be re-arrested in a proceeding in relation to the claim unless the court so orders, whether because default has been made in the performance of a guarantee or undertaking given to procure the release of the ship or property from the earlier arrest or for some other sufficient reason.
>
> (2) An order under subsection (1) may be made subject to such conditions as are just."

It is clear that an application for re-arrest is a discretionary remedy. The Australian Law Reform Commission's Report No. 33 observes (para 211), that at common law the mere release of a ship from arrest did not itself prevent re-arrest. If bail had been given to the value of the claim or of the ship, however, the basic rule was that the ship was wholly released from the action and the res may not be re-arrested on that cause of action.

The Commission considered whether it would be better to set out the circumstances under which the right to re-arrest can be exercised in the Act. It was decided that it would be better to leave the court with a discretion whether to permit re-arrest (and to confer the power to impose conditions on the right to arrest) whilst specifying the most important of the grounds on which re-arrest is likely to be permitted.

The way the matter was argued in the Court below and before us accepted that the power to re-arrest under s21 of the act was discretionary. The argument proceeded upon the basis that the discretion ought not be exercised where that Court lacked

jurisdiction. Further it appears to have been common ground in the Court below that the Court ought not to exercise is discretion unless the plaintiff satisfies the Court that on the material before it the plaintiff had a "strong argument" for the view that the Court had jurisdiction in rem. His Honour was referred to the High Court's decision in "Shin Kobe Maru", supra.

The principles upon which leave to appeal will be granted.

As this is an appeal from a discretionary judgment the applicant must show that some error has been made in the exercise of the discretion: see generally the well known statement of principle in House v R (1936) 55 CLR 599 at 504-5. In Victoria it appears that where the appeal is from an interlocutory order in a matter of practice and procedure it is necessary to establish that the correctness of the primary judge's decision is attended with sufficient doubt and also that injustice would be a consequence of refusing to hear the appeal. The Victorian approach was discussed by this Court in Nationwide News Pty Ltd v Bradshaw (1986) 41 NTR 1. The majority view of the Court was that there was no two-fold test: see O'Leary CJ at pps 7-8 and Nader J at pps 13-14. Asche J (as he was then) followed the Victorian practice: see p19.

In the present case it is apparent that his Honour applied the wrong test in relation to the standard of proof required for deciding whether the Court had jurisdiction. I would therefore grant leave to appeal.

Has the respondent proved that the Court has jurisdiction?

The applicant submitted that in order to establish jurisdiction the respondent must prove:

(a) The existence of the alleged charterparty;
(b) That the respondent is the registered owner of the "Nyanza";
(c) The implication into the charterparty of the implied term alleged in paragraph 8 of the amended statement of claim and;
(d) The breach of the implied term.

The respondent on the other hand submitted that it had a duty to establish

(a) That the vessel was within the jurisdiction
(b) That the vessel was owned by the applicant
(c) There existed a charterparty agreement between the applicant and the respondent
(d) That the respondent was entitled to pursue the vessel as a surrogate ship and
(e) That there was a claim either in terms of s4(3)(d) or s4(3)(f) under the Act.

I do not accept the applicant's contentions. In my opinion the jurisdictional facts which the respondent was required to establish were:

(1) That the ship was in the jurisdiction of the Court at the time of the application for rearrest (see s22(2) and (3)).

(2) That the applicant was a "relevant person" in relation to the claim and was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship "Nyanza".

(3) That at the time when the original proceedings commenced the applicant was the owner of the "Laemthong Pride".

(4) That the claim was a claim of the kind referred to in s4(3)(d) or (e).

None of the other matters urged upon us by the applicant are jurisdictional facts. It is not necessary for the respondent to be the owner of the "Nyanza". It is sufficient, for the respondent to this bring action, if the respondent is a party to the charterparty, although that is not a jurisdictional fact either.

There is no dispute that the ship "Laemthong Pride" was within the jurisdiction of the Court at the relevant time or times. There is no dispute that the action is an action in rem and that the nature of the claim was a general maritime claim concerning the vessel "Nyanza".

It was not in dispute that at the time when the proceeding was commenced the applicant was the owner of "Laemthong Pride".

Counsel for the applicant submitted, in effect, that the evidence did not establish that the applicant was a "relevant person" in relation to the claim and that the applicant was, when the cause of action arose, the charterer of the "Nyanza". The principle argument that was advanced before this Court was that the only evidence of the existence of the charterparty was inadmissible.

The affidavit contemplated by r39(2) of the Admiralty Rules in support of an application for an arrest may be sworn by the applicant or by a solicitor or agent of the applicant. Neither r39 nor the form to which it refers specifically provides that the affidavit may be sworn on information and belief. Rule 90.03 of the Northern Territory Supreme Court Rules provides that chapters I and II of the Supreme Court

Rules with the necessary changes, and to the extent that they are not inconsistent with the Admiralty Rules, apply to and in relation to all matters to which those rules apply. Rule 43.03(2) of the Supreme Court Rules provides that on an interlocutory application an affidavit may contain a statement of fact based on information and belief if the grounds are set out. It was common ground that this rule applied in the circumstances of this case. The applicants submitted that the only evidence that the applicant was the charterer of the "Nyanza" at the time when the cause of action arose was inadmissible because the affidavit purported to give secondary evidence of the contents of that document.

The case for the respondent was that the charterparty was evidenced by a recapitulation contained in a telex from Seatown Shipbroking Pte. Ltd (which the respondent says was the agent for the applicant) to C F Sharp Chartering and Shipbrokering (S) Pte. Ltd, the respondent's agent, sent on an unspecified date on or about 15 May 1995. The respondent alleged that this telex contained the specific terms of the charterparty agreement and adopted (subject to some variations) the general terms of a prior charterparty of a ship "M V Agate". The evidence was that the original telex was held by the respondent's agents. The affidavit of Miss Creedon sworn 23 October 1995 (AB169) states, upon information and belief, that the terms of the telex were also to be found in another document, annexure "A" to the same deponent's affidavit of 23 November 1995 appearing at AB pps 109 to 110. The terms of the document at AB 109-110 refer to a charterparty of the "M V Agate" "logically amended and with the following alterations". Miss Creedon swears upon information and belief that exhibit "B" to her earlier affidavit (AB pps 58 to 65) sets out the terms of the "M V Agate" charterparty including the alterations referred to in the recapitulation. Miss Creedon's affidavit is sworn on information that she has received from Mr John Ericson, a shipping broker resident in Singapore in the employ of C F Sharp Chartering and Shipbrokering (S) Pte. Ltd, the Singapore

agent for the respondent who negotiated the charterparty with the applicant's agent and who had the carriage of the matter.

The original document is still in Singapore and in the hands of the respondent's agents. It is an established exception to the best evidence rule that secondary evidence is admissible to prove the contents of a document which is in the possession of a person not a party who is beyond the jurisdiction of the court: see Cross on Evidence paragraph 39055; Gillies Law of Evidence in Australia 2nd ed., p 578. Consequently, secondary evidence is admissible to prove the contents of the charterparty. As Cross observes, para 39035, as a general rule, there are no degrees of secondary evidence, and oral evidence may be adduced without accounting for any copies that may be in existence. Consequently, even if the respondent had been able to persuade its agent in Singapore to fax to its solicitors in Darwin a copy of the original telex or telexes, (and other documents needed to be read with those telexes), those faxes, if annexed to an affidavit, would in themselves have been secondary evidence.

Rule 43.06 of the Supreme Court Rules provides that a document to be used in conjunction with an affidavit shall be either annexed to or made an exhibit to the affidavit. Rule 43.06(3) permits the relevant portion of a document to be included in the body of an affidavit, but the document must be produced when the affidavit is used. Otherwise r43.06 does not abrogate the best evidence rule. In practice, original documents are rarely annexed to, or exhibited to, affidavits, and photocopies, (often photocopies of photocopies or of faxed copies) are used without objection, and the original is not produced.

The provisions of s48 of the Commonwealth Evidence Act 1955 makes a true photocopy of certain documents admissible in proceedings to which that Act applies. However that Act does not apply to these proceedings. There are no statutory provisions in the Northern Territory which abrogate the common

law rules. The time has come when consideration should be given to amending the Rules of Court to provide more flexibility for the use of secondary evidence of documents, particularly in interlocutory proceedings.

In Ritz Hotel Ltd v Charles of the Ritz (1988) 15 NSWLR 158 McLelland J held that secondary evidence of the contents of the document could not be adduced by affidavit in the absence of an appropriate explanation for the absence of the document. It is not clear that that was a case dealing with an interlocutory application to which the equivalent of r43.03(2) applied. In Deputy Commissioner of Taxation v Ahern (No.2) [1988] 2 Qd R 158 the Full Court of the Supreme Court of Queensland considered the equivalent rule in that State. The deponent of an affidavit stated the beliefs that he had reached concerning the activities of Mr Ahern and the transactions in which he and a host of other entities had been involved in consequence of a long investigation which included perusal of a considerable quantity of documentary material. Thomas J, with whom the other members of the Court agreed, observed at p 163:-

> "Such evidence could be received only if properly receivable under O.41 r.3. This involves two requirements - first that the source material itself be admissible, and second that the source be identified (Savings and Investment Bank Ltd v Gasco Investments (Netherlands) B.V.), (supra) at 282G and 385F respectively) [[1984] 1 All ER 296 at 305]. As to the first requirement, in the absence of disclosure of the source as it is impossible in the presence case to tell the extent to which any given fact is established by the source of material - or the extent to which it has been built into a fact by an inference drawn by Mr Cowper. As to the second, although Mr Cowper made broad reference to documents and sources, this was not in the circumstances a sufficient disclosure of the sources of his information and the grounds of his belief. It may be doubted whether it was a disclosure of sources at all. A broad reference to "documents I have seen" or "documents in my possession" or "enquiries I have made" cannot suffice. The object of disclosure is to provide some specified source which can, if necessary, be followed up by the adversary or the court. In a case such as the present a broad reference may suffice such as to bundle of documents so long as they are somehow identified and can be produced

> if necessary, or there is a proper explanation for their absence."

In this case the relevant affidavits did identify the source of the deponent's information and belief and it would appear that the source material itself was admissible. In addition it was obvious why the original documents were not able to be produced, particularly as the proceedings were brought on urgently, as they inevitably must be.

In any event, oral evidence is admissible to prove the existences of the relationship between the two parties constituted by the charterparty. This includes evidence as to the existence of the charterparty, the parties to it, and the vessel to which it related, although not of its terms: see Cross, para 39010; Mallinson v Scottish Australian Investment Co Ltd (1920) 28 CLR 66 at 75.

Finally, even if the evidence was inadmissible, I do not consider that the applicant should now be permitted to raise this issue. Although it is clear from the transcript of proceedings in the court below that counsel for the applicant objected to the admissibility of the evidence concerning the existence of the charterparty, the basis of the objection which he took at the time was not founded on the best evidence rule. The objection seems to have been that there was no evidence of any acceptance of an offer. A subsidiary objection was taken concerning the existence of some confusion in the evidence about whether some of other documents formed part of the contract or not.

I do not think that the applicant should now be permitted to raise in this Court an objection to the admissibility of the evidence relating to the charterparty and the evidence led before the Court below as to its terms. I do not think that the objection taken before us was clearly stated in the Court below. Further the proposed grounds of appeal set out in the proposed notice of appeal do not clearly raise this issue.

In these circumstances I think there was sufficient evidence before the Court below to establish that the applicant was the charterer of the "Nyanza" at the relevant time and would have been liable to an action in personam and so is a "relevant person" within the meaning of the Act.

So far as jurisdiction is concerned it is clear that by reference to the pleadings the claims were general maritime claims arising out of an agreement that relates to the carriage of goods by a ship whether by charterparty or otherwise within the meaning of s4(3)(f). It is therefore unnecessary to consider whether they were also general maritime claims by reference to some other head of claim referred to in s4(3) of the Act. In my opinion questions of the implication of an implied term of the charterparty or matters going to proof of breach of the implied term are not jurisdictional facts.

The applicant produced no evidence to the Court to rebut any of the relevant jurisdictional facts. I therefore conclude that the respondent had established on the balance of probabilities that the Court had jurisdiction.

The exercise of discretion in granting the order

In my opinion it is relevant to the exercise of the discretion to order the re-arrest of the ship to consider whether the applicant has established that the alleged implied term does not exist. In my opinion if the applicant is able to show that the Court would summarily dismiss the respondent's action in rem, that would be a proper basis for the refusal of the Court to exercise its discretion. I cannot think of any other proper basis relevant to the circumstances of this case. It was not suggested for example that the proceedings were vexatious or that there had been material non-disclosure. The applicant did complain about the lack of explanation as to why the documents identified as constituting the charterparty had

changed during the course of the proceedings. Whilst no specific explanation was given, an explanation may be inferred. Initially the evidence relating to the charterparty was supplied by the respondent's London solicitor. When the respondent's agent, who negotiated the contract was contacted, he identified the terms of the contract and the documents relating thereto. Whilst the documentation is in some respects different, the terms of the critical provisions are not. The affidavits were required to be prepared in great haste from information supplied by persons in overseas countries. I do not think those circumstances ought to have borne very heavily in the exercise of his Honour's discretion.

The respondent put its claim for the existence of the implied term on two bases:

(1) A term to be implied based on an alleged custom or usage in the particular market in which the parties agents were contracting and

(2) On the basis of an implied term necessary to give business efficacy to the contract.

As to the former, the applicant led no evidence, and was content to criticise certain evidence led by the respondent on that topic. It may be accepted that the evidence so far offered, even if admissible, is deficient, insofar as the affidavit evidence as to trade usage does not give raise to an implied term of the kind pleaded in paragraph 8 of the statement of claim.

The term to be implied in order to give business efficacy to the contract, however, is another matter. According to the charterparty the law of the contract is the law of England. I think it is safe to assume that the law of England and Australia as to the implication of terms is the same having regard to the Privy Council's decision in BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers

of Shire of Hastings (1978) 52 ALJR 20 at 26 (applied by the High Court of Australia in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 at 347. Having regard to the materials available to the Court below I do not think it is so plainly unarguable that the respondent's claim for the existence of the implied term could not succeed, that the court's discretion should be interfered with. Similarly, I do not consider that the material before the Court below established that it was plainly unarguable that the respondent had not breached the implied term, if it existed.

Insofar as the respondent's claim for demurrage rests upon the provisions of clause 20 of the charter I am not satisfied that the applicant has established this claim is bound to fail in the light of the evidence concerning the contract provisions requiring a "full and complete cargo of bagged rice". Similarly, I would not consider the evidence establishes that the respondent's claim for dead-freight charges is clearly not maintainable.

Finally the applicant submitted that his Honour erred in failing to require the respondent, in the exercise of his discretion, to provide security for the applicant's likely losses during the period of arrest. The applicant likened the situation to that of a foreign plaintiff seeking injunctive relief. It was submitted that the deficiencies and other short-comings in the respondent's material supported the applicant's concern of the lack of merits in the respondent's claim and the possibility therefore that the applicant may be left with a judgment under s34 of the Act which could not conveniently be enforced.

Counsel for the applicant was not able to refer us to any authority where, as a condition for the granting of an order for the re-arrest of a ship, the court required security to be given. Indeed there is no practice that I have been able to ascertain requiring plaintiffs in an action in rem to give

security when the arrest of a ship is sought, merely because the plaintiff is a foreign company with no assets in the jurisdiction. It would appear from the Australian Law Reform Commission's Report No. 33, that there is no such practice: see para 197. It should be pointed out that s34 allows damages for unjustified arrest where a party "unreasonably and without good cause" obtains an arrest of a ship. As the Australian Law Reform Commission's Report No. 33 at paragraph 302 explains, s34 applies only to arrests which are made unreasonably as well as without good cause so as to avoid the possibility of a penalty when the arrest appeared reasonable at the time but turned out to be unjustified. In other words, even if the respondent ultimately fails in its action in rem that does not automatically entitle the applicant to damages. Further, there are two other considerations which point towards the correctness of the decision of Kearney J not to impose conditions. The first is the ability of the applicant to mitigate his loss by arranging for the vessel to be released on bail. It was suggested to us that the applicant may not be able to afford the costs associated with a bail bond and that on the evidence before us it did not have the support of its P & I Club. Be that as it may, the evidence would seem to suggest that the applicant has two ships and that there is nothing to show it does not have the means or ability to provide the security which no doubt will be required if a bail bond is to be entered into. Finally there is evidence that the respondent's action is being brought by its P & I Insurers exercising their rights of subrogations under a policy granted to the respondent and it would seem unlikely in the extreme that the insurers would not be able to meet the respondent's costs or any damages awarded against the respondent under s34 of the Act. I do not therefore think that it has been demonstrated that his Honour erred in failing to attach conditions to the re-arrest of the vessel.

Conclusions

Accordingly I would grant leave to appeal, but dismiss the appeal with costs.

THOMAS J:

I have read the draft Reasons for Judgment of Mildren J. I agree with his reasons and with his decision. I would grant the application for leave to appeal and dismiss the appeal.
