

## 8.1 Paper by Tamberlin J November 2001 on the role of the Marshal

### **THE ROLE OF THE ADMIRALTY MARSHAL\***

**Justice Brian Tamberlin – Federal Court of Australia**

#### **Introduction**

Essentially, the role of the Admiralty Marshal of the Federal Court of Australia is to take custody of a ship under arrest and to maintain the ship until such time as it is released by the Court or sold pursuant to an order of the Court. The Marshal is the custodian of a ship under arrest and acts on the direction of the Court. The Marshal practically assists the Court to solve the problems that arise in keeping a vessel under arrest until she is either released or sold. In judicial sales, the Marshal's role is to maximise the net proceeds of sale. In recent years, the Marshal has often adopted a pro-active approach to his or her role.

In Pritchards' *Digest of Admiralty and Maritime Law* (3<sup>rd</sup> ed, 1887), the office of Marshal is described as follows:

*"The Marshal is the executive officer of the court, and performs duties analogous to those of the sheriff at common law. He is charged with the execution of all process of the court, except writs and subpoenas... The Marshal was formerly remunerated by fees but by 3 & 4 Vict c 66, ss 5-18 (now repealed), a yearly salary was substituted for them, and he was prohibited from taking any fees for his own use. He attends the sittings of the court and carries the silver oar, as the emblem of the maritime jurisdiction of the court."*<sup>28</sup>

In his 1970 work *The Development of Admiralty Jurisdiction Practice Since 1800*, FL Wiswall Jr says:

*"In the nineteenth century, as today, the Marshal usually placed a member of his staff (known as a 'ship-keeper') aboard an arrested vessel... to prevent her from leaving the Court's jurisdiction and to protect her while in custody; care of a vessel in the custody of the Court has always been the Marshal's direct responsibility, and Lord Stowell once gave a decree against the Marshal personally when property was lost from an arrested vessel despite the Marshal's claim that his fees were not sufficient to provide a constant guard upon the ship in order to prevent waterfront predators from looting or tampering with her. The Marshal's lot was later 'improved' considerably: he became salaried in 1840 at five hundred pounds per annum – raised to seven hundred pounds by the end of Lushington's tenure as Judge; moreover, the ship-keepers and others of the Marshal's staff also became salaried, so that he was relieved of the burden of paying them out of his own fees; and as his duties included the appraisal and sale of vessels when decreed by the Court in actions in rem, he was permitted to continue*

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\* I am greatly indebted to my Associate, Lisa Emanuel, for her work in the preparation of this speech.

<sup>28</sup> Pritchards' *Digest of Admiralty and Maritime Law* (3<sup>rd</sup> ed, 1887), p 1472.

*charging a nominal broker's fee upon such sales according to established custom.*<sup>29</sup>

The decision of Lord Stowell referred to by Wiswall is that given in *The Hoop* [1801] 4 C Rob 145, where his Lordship said:

*“The credit of the Court is concerned in the safe-keeping of the property under its protection. If any such property is lost, it is at least the duty of the Marshal to be prepared to show that it was not lost by any default of his. If the fees of the Marshal’s office are not sufficient to enable him to provide means of security, it should be represented to those who have authority to increase them; but it is not a time to rely upon such a plea, when property under his keeping is alleged to have been already lost.”*<sup>30</sup>

His Lordship then decreed that the Marshal should pay the value of a long boat and cable lost while the ship was under his custody. This decision illustrates the extensive nature of the Marshal's responsibility in relation to an arrested vessel arising from custody.

It is worth noting that the above authorities draw attention both to the responsibility which attaches to the performance of the Marshal's duties as executive officer of the Court and the need for adequate funds to carry out those functions. In modern times there is provision in the legislation for the Master to obtain or recover funds from applicants or their solicitors in order to meet his expenses in relation to the arrest and sale of ships.<sup>31</sup>

### **The Role of the Marshal in the Arrest of a Vessel**

An action *in rem* is commenced by writ.<sup>32</sup> A warrant for arrest of the *res* may be issued by the Registrar at any time after the writ has been issued.<sup>33</sup> The warrant must be executed within six months of its issue.<sup>34</sup> The warrant can only be executed by the Marshal,<sup>35</sup> and is executed in the same way as the service of the initiating process.

### **Powers of the Marshal in Relation to Custody of an Arrested Vessel**

Upon arrest, the ship or other property is within the custody of the Marshal: r 47(1). Rule 47(2) obligates the Marshal, in the absence of an express court order to the contrary, to take all appropriate steps to retain safe custody of and preserve the property of the ship. It also empowers the Marshal to remove property from the ship to another place.

It is a contempt of court for any person to move the ship after notice that a warrant has been issued.<sup>36</sup> Any person interfering with property under arrest without the authority of the Court will be liable to an attachment.<sup>37</sup>

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<sup>29</sup> FL Wiswall Jr, *The Development of Admiralty Jurisdiction Practice Since 1800*, (1970), pp 47-48.

<sup>30</sup> *The Hoop* [1801] 4 C Rob 145 at 146.

<sup>31</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV “Turakina” (No 1)* (1998) 84 FCR 493 at 497-498.

<sup>32</sup> Rule 19 and Form 6.

<sup>33</sup> See r 40(1).

<sup>34</sup> Rule 42.

<sup>35</sup> Cf *The Solis* (1885) 10 PD 62. See Michael White (ed), *Australian Maritime Law* (2nd ed), The Federation Press, Sydney, 2000 at 51.

<sup>36</sup> *The Seraglio* [1885] 10 PD 120.

<sup>37</sup> *The Petrel* (1836) 3 Hogg 299 (166 ER 416).

The Marshal's custody and control of the vessel or property is solely for the purpose of performing his or her statutory duties and does not give him or her possession of or any proprietary interest in the property. This is clearly indicated in the historical outline of the role of the Marshal, which emphasises his or her duty to safe-keep property in custody. If an application is made by a party or other person with respect to the property or ship under arrest, it is necessary for the application to be served on the Marshal. Whether there is cargo on board an arrested ship or, if there is arrested cargo on board a ship, the cargo owner or the ship owner, respectively, can apply to have the cargo discharged from the ship: r 49. The application is made directly to the Marshal who can impose conditions on granting the application. Rule 49(2), which relates to cargo discharge applications, calls for an undertaking in writing satisfactory to the Marshal to pay on demand to the Marshal the fees and expenses of the Marshal in connection with the discharge.

There is an overriding supervisory power in the Court in all matters relating to the ship or its cargo and over any steps taken or proposed to be taken by the Marshal.<sup>38</sup> Rule 50 provides that "[t]he Court may, at any stage of the proceeding, make appropriate orders with respect to the preservation, management or control of a ship or other property that is under arrest in the proceeding".<sup>39</sup> The Marshal (or a party) may apply at any time to the Court for directions with respect to the ship or property: r 48. That application may be made either to the Court by whose process the ship was arrested or to the Court which subsequently may become seized of the matter. Provision is made for the transfer of property under arrest to another Court exercising Admiralty jurisdiction: r 47(4).

### **I. Expenses of the Marshal**

From the point of time that a warrant is issued and the assistance of the Marshal is invoked, he or she will incur expenses in relation to carrying out the arrest and retaining custody of the vessel.

In *Patrick Stevedores No 2 Pty Ltd v Ship MV "Turakina" (No 2)* (1998) 84 FCR 506, I summarised the structure of the Rules in relation to the protection of the Marshal with respect to arresting ships, keeping them in custody, releasing cargo, and arranging for sale.<sup>40</sup>

- Rule 39(1); Rule 41 and Form 12 require that on an application for arrest the applicant or its solicitor give an undertaking to the Court to pay to the Marshal, on demand, an amount equal to the amount of fees and expenses of the Marshal in relation to the arrest.
- Rule 49(2) relates to the cargo discharge applications, calls for an undertaking in writing satisfactory to the Marshal to pay on demand to the Marshal the fees and expenses of the Marshal in connection with the discharge.

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<sup>38</sup> White, *Australian Maritime Law* at 52-53.

<sup>39</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1)* (1998) 84 FCR 493 at 500-5001.

<sup>40</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV "Turakina" (No 2)* (1998) 84 FCR 506 at 508.

- Rule 51(1) and Form 18 empower the registrar to release the vessel from arrest in certain limited circumstances and require an undertaking to be given to pay the fees and expenses of the Marshal in complying with the application.
- Rule 52(1) empowers a party to the proceeding to apply to the Court in accordance with Form 19 for the release of a ship or other property that is under arrest in the proceeding. Rule 52(3) provides that “[o]n an application under subrule (1), the court may order the release from arrest of the ship or property on such terms as are just”. Form 19 contains the following undertaking: “I undertake to pay the fees and expenses of the Marshal in connection with the custody of the ship ... while under arrest.”
- Rule 53 empowers the Marshal to refuse release of a ship from arrest unless arrangements satisfactory to the Marshal have been made for payment of the fees and expenses of the Marshal in complying with the order.
- Rule 74 provides that fees and expenses of the Marshal in complying with an order of a Court are part of the expenses of the sale of the ship or other property.
- Rule 75 provides that any person who fails to comply with an undertaking given under the Rules is liable for committal.
- Rule 78 empowers the Marshal to make demands for interim payments on account of fees and expenses which any person is liable to pay to the Marshal under the Rules.

Rule 41 provides:

***“Liability for Marshal’s fees and expenses***

***41. An application for an arrest warrant constitutes an undertaking:***

- (a) if the application is made by the applicant personally – by the applicant; or  
(b) if the application is made by a solicitor on behalf of the applicant – by the solicitor;*

*to pay to the Marshal, on demand, an amount equal to the amount of the fees and expenses of the Marshal in relation to the arrest.”*

Before the arrest, the Marshal will usually ask the plaintiff, or the plaintiff’s solicitor, to provide at least AUS\$1,000 (but often up to AUS\$5000) on account of fees and expenses. The plaintiff or the solicitor is encouraged to deposit the funds pursuant to r 78(a). The Marshal is not entitled, however, to insist upon the deposit of the funds prior to the vessel being arrested. The Marshal may also make interim demands for payment on account of fees and expenses under r 78(b) and these may be made after the arrest has been carried out.<sup>41</sup>

There is *obiter* to the effect that the Act does not operate to impose a duty on the Marshal, which could be said to give rise to any enforceable claim by the plaintiff in the event of non-compliance.<sup>42</sup>

(i) The application of the Rules in relation to the expenses of the Marshal

<sup>41</sup> Whitehead, “The Role of the Admiralty Marshal of the Federal Court of Australia” at 4.

<sup>42</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1)* (1998) 84 FCR 493 at 505

The application of the Rules by the Court in determining questions relating to the expenses of the Marshal was discussed in *Patrick Stevedores No 2 Pty Ltd v Ship MV "Turakina" (No 2)* (1998) 84 FCR 506, as follows:

*"The starting point for determining this application is that the Marshal, acting as an officer of the Court and not as a party, is charged with the care and custody of the arrested vessel. He should therefore be fully indemnified for the costs incurred in discharging his duty and should not be required to incur fees and expenses without recourse to satisfactory reimbursement either before or after expenses are incurred..."*

*This approach is implemented in the Rules which give protection to the Marshal in respect of his fees and expenses. These Rules provide for a range of undertakings designed to protect the Marshal's financial position arising from the arrest. These undertakings are cast in different terms; they are required from different parties, and they come into operation at different stages of the arrest and custody period.*

*The differences in the scope of the various undertakings is apparent on their face. For example, the undertaking required on an arrest application covers all fees and expenses "in relation to the arrest". It is required from the applicant for arrest or the solicitor. The scope of this undertaking is extremely broad. In contrast, the undertaking required by an applicant for valuation or sale is much narrower in that it only refers to the fees and expenses of the Marshal "in complying with the order". If an application for sale is refused and no order is made then the latter undertaking does not operate because it is directed to the costs of complying with an order.*

*It is neither necessary nor appropriate, in my view, to approach the undertakings provided for in the Rules on the basis that they are mutually exclusive, or that they must be read down so as not to cover fees or expenses which may be encompassed by other undertakings and which might be given by different parties in respect of the same fees or expenses. It is not appropriate, for example, to read down the words "in relation to the arrest" in r 41 to necessarily exclude fees and expenses of the Marshal in connection with the custody of the ship, simply because the two undertakings are required in respect of different applications made at different stages of the arrest process.*

*The Rules do not attempt to establish a series of water-tight compartments with respect to undertakings. Merely because the Marshal may have the protection of two overlapping undertakings in respect of the same expenses from different parties does not mean that the language of those undertakings should be necessarily restricted. Obviously the Marshal may not claim double reimbursement in respect of the same fees or expenses. However, there is no reason why the language of the undertakings should not be given an ordinary or natural meaning. The working out of the relevant entitlements and obligations of the various parties providing the undertakings, as between themselves, is a matter for negotiation and resolution between those parties.<sup>43</sup>*

That case involved an application for an order releasing the ship owner's solicitors from their undertaking given in respect of an application for release of a vessel from arrest under r 52(1). The "Turakina" had been arrested on 19

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<sup>43</sup> Ibid at 509-510.

February 1998 and an application for release of the ship was made on 30 March 1998. The judgment of the Court refusing release was delivered on 11 May 1998. On 30 March 1998, an undertaking was given to the Court by the solicitors for the owner in the terms of Form 19 of the Rules:

*"I undertake to pay the fees and expenses of the Marshal in connection with the custody of the ship MV 'Turakina' while under arrest."*

The solicitor sought an order releasing him from the undertaking on the basis that it should not continue after the refusal of the Court to release the ship. I held that the fact that the application for release was unsuccessful did not mean that the solicitor for the owner should be released from the undertaking.

*"I do not accept the submission that the r 52 undertaking is conditional upon a release application being successful. Nor do I consider that it is somehow spent or exhausted if the application is refused. It may well be, for example, in a particular case, that the making of the application and the hearing of it will increase the period of custody and hence the consequential fees and expenses of the Marshal. In that situation there is room for the undertaking to operate to protect the position of the Marshal notwithstanding that the release of the ship has been refused."<sup>44</sup>*

I pointed out that it would have been simple, if that was what was intended, to frame the undertaking to make it clear that it only operated in circumstances where the ship was released.<sup>45</sup>

I applied a similarly broad interpretation of an undertaking given under the Rules in *Patrick Stevedoring No 2 Pty Ltd v The Ship "Turakina"* (1998) FCA 244:

*"The arrest of a trading vessel is an act which will normally entail serious and far reaching consequences to numerous persons and entities extending well beyond the parties in immediate dispute as to a specific claim or debt. For this reason r 41 is expressed in wide language. If the solicitor is not prepared to give the undertaking there may be no arrest."<sup>46</sup>*

In that case, I made orders requiring the plaintiff solicitors to provide funds in advance to the Marshal to pay the anticipated charges and expenses of the Marshal's engagement of two engineers. The solicitors for each of the plaintiffs in the proceedings had made undertakings under r 41.

McGuffie in *British Shipping Laws, Vol 1, Admiralty Practice* (1964) at [262] discussed the question of the expenses recoverable by the Marshal:

*"Various precautions involving expense may be taken by direction of the marshal to keep the vessel within the jurisdiction eg, placing a ship keeper on board, immobilisation of the main engines in a small vessel, provision of*

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<sup>44</sup> Ibid at 509-510.

<sup>45</sup> Ibid at 510.

<sup>46</sup> *Patrick Stevedoring No 2 Pty Ltd v The Ship "Turakina"* (1998) FCA 244 at 5.

*a skeleton crew if she is unmanned and port regulations call for a minimum number of men [sic] to be aboard, etc. These and similar steps in addition to stopping customs clearance and warning harbour authorities, are taken in the course of a normal arrest and if it should be reported that a defect on the vessel was causing or likely to cause serious deterioration to the value of the res then steps would be taken to investigate and possibly remedy the defect; when an arrest lasts more than a week or two it is usual for the marshal to take the necessary minimum steps ..."*

In *Bayside Air Conditioning Pty Limited v the Owners of the Ship "Cape Don"* (unreported, FCA, 15 May 1997), Cooper J stated that:

*"The role of the Marshal in these proceedings is that, subject to the supervision of the judges, he acts as an officer of the Court and not as a party to the proceedings and it is therefore appropriate that he should be fully indemnified for the cost incurred in discharging his duty."<sup>47</sup>*

In that case, the Marshal brought a notice of motion to enforce payment of his costs and expenses in maintaining the vessel under arrest. The plaintiff had paid approximately \$40,000 to the Marshal on account of costs and expenses associated with the arrest of the vessel, its upkeep and maintenance. The Marshal had demanded payment presumably under r 78 and there had been default.

In *Bayside Air Conditioning Pty Limited v the Owners of the Ship "Cape Don"* (unreported, FCA, 15 August 1997, Cooper J), the Marshal applied for directions as to the course to be followed having regard to repudiation by the plaintiff of a contract to purchase the ship. There was also an application by solicitors to withdraw as solicitors for the plaintiff and to be relieved of their undertaking to pay the Marshal's fees and expenses in relation to arrest under r 41. Cooper J pointed out that the Marshal is entitled under r 78 to make one or more demands for interim payment and that the solicitor's undertaking is enforceable by committal pursuant to r 75. While the firm of solicitors that gave the undertaking did not seek to resile from its obligations, it sought to stop the open-ended nature of its undertaking in circumstances where the client exposed the solicitors to liability on the undertaking and took no steps to pay the Marshal's costs and expenses or to advance the proceedings. Notwithstanding the arguments, his Honour held the solicitors to their undertaking, although the solicitors were given leave to withdraw. His Honour found the solicitors liable for the costs and expenses of the Marshal until four days after the hearing but released them thereafter from the undertaking. He considered that the Marshal should forthwith identify the costs and expenses attributable to the valuation and sale of the ship to the plaintiff, including the costs and expenses incurred as a consequence of the plaintiff's default on the sale and make demand under the undertaking contained in its application for valuation and sale pending trial. The ship was to be released from arrest four days after the hearing in the absence of an undertaking by alternative solicitors to pay upon demand the Marshal's costs and expenses.

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<sup>47</sup> *Bayside Air Conditioning Pty Limited v the Owners of the Ship "Cape Don"* (unreported, FCA, 15 May 1997) at 4.

(ii) Wages and repatriation of crew members

The repatriation of crew members may be able to be recovered as an expense of the Marshal in relation to the arrest. In *Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1)* (1998) 84 FCR 493, an undertaking had been given by the applicant for arrest to pay the Marshal's fees and expenses in relation to arrest. The master and crew of the arrested vessel sought a direction that the wages and the costs of the repatriation of the crew to New Zealand be paid as part of the Marshal's costs of arrest. The issue was whether the wages of the master and crew and the cost of their repatriation could properly be described as "fees or expenses of the Marshal in relation to the arrest" within r 41. It was submitted by the applicants that the appointment of the master as ship's keeper, in furtherance of the Marshal's obligation to keep the ship in safe custody and preserve it, meant that the wages of the crew were properly expenses in relation to arrest.

- Repatriation of crew members

In that case, I considered that the costs of the repatriation of the Master and crew could be described as an expense of the Marshal in relation to the arrest. I said:

*"[I]f the Marshal reasonably considers it is appropriate to repatriate the crew and the crew are willing to return to their home port then such an expense can properly be described in the present circumstances as "an expense of the Marshal in relation to the arrest" and can therefore either be the subject of a demand under r 78 in anticipation of the expense being incurred, or can be recovered from the proceeds of sale, after the moneys have been paid."*<sup>48</sup>

In regard to the application of r 41 generally, I considered that "[t]he words 'in relation to' are words of the wide scope ... The connection required by that language may be made out where there is a rational and discernible link between the arrest and the need for repatriation of the foreign crew".<sup>49</sup>

The plaintiff submitted that because the repatriation of the crew could be described as a cost of complying with an anticipated order for sale, it should not be treated as a cost of the arrest. In rejecting this argument, I said:

*"In my view this approach is too restrictive and seeks to rely on a dichotomy, which does not in reality exist. In practice there may be many circumstances where it may be appropriate for a Marshal to arrange for repatriation of the crew prior to any application being made for sale. For example, in order to minimise daily running costs of the vessel, which would otherwise be unnecessarily incurred by permitting a full complement of seamen to remain on board when it was neither appropriate nor necessary. In such a case, if the crew members were discharged or were*

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<sup>48</sup> *Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1)* (1998) 84 FCR 493 at 503.

<sup>49</sup> *Ibid.*

*willing to leave the vessel, and wished to be repatriated, then it may well be appropriate for the Marshal to incur the costs of repatriation and seek, in advance if necessary, from the plaintiff the funds to achieve the repatriation. There is no universal formula because each set of circumstances may be different.*

*The need for repatriation of the crew arises as a consequence of the arrest of a vessel with a foreign crew on board, on the application of a plaintiff. There is an evident and real connection between the arrest and the need to pay repatriation expenses ... Repatriation expenses, in my view, in the present circumstances, are an appropriate expense of the Marshal in relation to the arrest because it is in the interest of all parties concerned to minimise the payment of daily expenses pending a determination of the dispute and where appropriate the sale of the vessels. In order to minimise costs it is clearly desirable that vessels, the subject of this proceeding, should be de-manned and layed up as soon as practicable...*

*Where the crew are willing to return to their home port and accept repatriation, it is within the discretion and power of the Marshal to arrange for repatriation and make demand on the undertaking given on arrest by the applicant's solicitor to pay the expenses of the Marshal in advance if necessary.*

*In the present case, I consider that there is a rational and substantial link between the costs of repatriation and the performance by the Marshal of his functions, such as to justify the treatment of repatriation as an expense of the Marshal in relation to the arrest.”<sup>50</sup>*

- Wages of the Master and crew

In relation to the post arrest wages of the Master and crew, I found that they were not fees and expenses of the Marshal in relation to the arrest within the meaning of r 41(b). The Marshal has a broad discretion under the Act and the Rules in the way in which he or she exercises his or her functions and performs his or her duties. However, when the Marshal executes a warrant for arrest he or she does not thereby assume the employer's responsibility for past or continuing wages due to the Master and crew. The reason for this is, in part, outlined in the recent decision of *Bayside Air Conditioning Pty Ltd v Owners of Ship "Cape Don"* (unreported, FCA, 15 May 1997) by Cooper J, as follows:

*“As the Marshal... acts as an officer of the court and not as a party to proceedings the Marshal should be fully indemnified for the costs he has incurred in discharging his duty.”*

However, in some circumstances, the Marshal would be liable for the wages and other entitlements of the Master and/or the crew of an arrested vessel. In *Patrick Stevedores No 2 Pty Ltd v Ship MV Turakina (No 1)* (1998) 84 FCR 493, I said:

*“[F]or example, where some or all crew members have left the ship leaving her with an insufficient or inadequate complement of crew, it may be*

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<sup>50</sup> Ibid at 504.

*appropriate or essential for the Marshal to engage a crew in order to carry out his duties to preserve the ship and keep her in safe custody pending release or sale. This may occur by the Marshal specifically engaging numbers of the existing crew or contracting with outside contractors. In fact, in the case of each vessel under arrest, in this matter, it was necessary for the Marshal to engage four substitute engineers to replace two engineers, who had left each vessel. This was done pursuant to a direction of the Court that it was appropriate in the circumstances to engage those engineers. There can be no doubt that an express engagement in such circumstances will generally be an expense of the Marshal in relation to the arrest.*<sup>51</sup>

It was submitted by the Master and crew that by appointing the Master as the ship's keeper in the case of each vessel under arrest in this matter, the Marshal "fairly contemplated" that there would be an active and continuing program of maintenance and preservation carried out on the arrested vessel under the supervision of the Master. Such work, it was argued, was necessary and appropriate to preserve and maintain the ships whilst in the custody of the Marshal. It was then submitted that because the work was being carried out by the Master and crew to the knowledge of the Marshal, since it was directed to assist the Marshal in the performance of his duties, then the fees and expenses of paying their wages could be properly incurred by the Marshal and, therefore, could be properly characterised as an expense in relation to the arrest.<sup>52</sup>

These submissions had several difficulties. First, the Master and crew, with the exception of recently engaged engineers, did not have any employment relationship with the Marshal. In this regard, I stated that:

*"The position of the Master and crew in this application is to be contrasted with the position of the new contract engineers, who were specifically engaged by the Marshal pursuant to a Court direction to replace those engineers, who left the vessels. This direction was given in the light of evidence that it was appropriate, in the circumstances, for the Marshal to engage the two substitute engineers on each vessel in order to preserve and maintain the ship and keep it in safe custody pending release or sale*  
...<sup>53</sup>

I considered that the payment of the crews' wages and other entitlements after the arrest was, "generally speaking, not the responsibility of the Marshal". An exception to this general rule is if the Marshal considered it appropriate or necessary to enter into an agreement to engage such crew, as in the case of the contract engineers in that matter. What is necessary or appropriate with respect to the number and nature of the crew to be engaged by the Marshal in any particular case will largely depend on the nature and quantity of the cargo.

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<sup>51</sup> Ibid at 498-499.

<sup>52</sup> Ibid at 502.

<sup>53</sup> Ibid at 502.

*"The number and nature of the crew to be engaged by the Marshal will vary from time to time depending on the status of particular vessels, such as, for example, whether they are layed-up .... The appropriate crew number may also depend on whether it was necessary to move the vessel in order to effect discharge of cargo or to berth at a suitable location which may vary from time to time as a result of exigencies at the port of arrest."*<sup>54</sup>

I concluded that, in the absence of any engagement between the Marshal, the Master and the crew, it could not be said that the wages of the crew members were the fees or expenses of the Marshal in relation to the arrest. Whether or not post-arrest wages of the Master and crew can properly be described as expenses of the Marshal in relation to the arrest "will depend, for example, on any specific agreements or arrangements entered into between the Marshal and the Master and crew".<sup>55</sup> In this case, while work had been done on the vessel by the Master and crew since her arrest, "such work [could not] ... in a realistic sense be said to have been carried out for the benefit of the Marshal...".<sup>56</sup>

As noted above, one instance in which the Court found post-arrest wages to be expenses of the Marshal in relation to the arrest occurred in the same matter. In *Patrick Stevedoring No 2 Pty Ltd v The Ship "Turakina"* (13 March 1998, FCA, Tamberlin J), applications were brought by the Marshal seeking to obtain funds to replace two engineers on each of the two arrested vessels, MV "Turakina" and MV "Rangitata". The applications were based on the undertakings proffered by the solicitors for each of the plaintiffs in the proceedings, see specifically rr 41, 75 and 78 and Form 12. On the available evidence, the current engineers proposed to leave the vessel and I did not accept the proposition of the plaintiffs that the requirement of two engineers could not reasonably be justified. The Marshal's case was that in order to ensure safe custody and preserve the ship in accordance with r 47(2), it was appropriate and necessary for engineers to be retained to replace the departing engineers. In finding in favour of the Marshal and holding that the solicitors must adhere to their undertaking and pay the Marshal's costs of replacing the engineers, I stated the following:

*"In my view, the expenses of the Marshal in taking steps to preserve the vessel clearly extend to ensuring that staffing is maintained at a prudent level. This is the case on the evidence ...*

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*The practical reality is that the Marshal does not have funds available to obtain advice and engage the necessary engineers to preserve and keep the vessel in safe custody. The funds must come from somewhere. The*

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<sup>54</sup> Ibid at 502-503.

<sup>55</sup> Ibid at 505.

<sup>56</sup> Ibid at 503. The costs order made by his Honour in this matter, which provided that all of the Master and crews' legal costs of the application be paid from the fund representing the proceeds of the sale of the "Turakina" and the "Rangitata", was upheld on appeal by Full Federal Court in *Bremer Landesbank Kreditanstalt Oldenburg v The Ship 'Turakina'* (1999) 161 ALR 587. Beaumont, Moore and Merkel JJ held that in determining whether the Master and crew should pay the costs of the issue upon which they failed, the Judge was entitled to have regard to the reasonableness of bringing the claim on which they failed in the same proceedings as the claim on which they succeeded.

*Marshal has to enter into commitments to ensure that his duty is performed. The plaintiff's solicitor has given an undertaking to this Court as required by the Rules. That undertaking must be adhered to. The Marshall needs to be put in funds to meet the commitment into which he is presently about to engage to carry out his statutory duties. In those circumstances monies must be paid in advance to cover those commitments.*

*... It is important to bear in mind in the present case that the undertaking is cast in broad terms in order to protect the Marshal, who is required to assume custody and preserve the vessel and the property. No doubt parties giving such a broad undertaking to pay on demand must be taken to be aware of its importance particularly in the case of an undertaking by a solicitor. The Marshal is given direct and immediate recourse by the undertaking to the obligations assumed by the solicitor in order to meet the costs incurred or likely to be incurred in maintaining the arrest procured at the behest of the plaintiffs.<sup>57</sup>*

Leave to appeal from the above decision was refused in *Waitemata Stevedoring Services Ltd v The Ship MV "Rangitata"* (unreported, FCA, 22 April 1998, Lindgren J). In that case, Lindgren J stated:

*"Admiralty Rule 78(b) clearly empowers the Marshal to make one or more demands for interim payments on account of fees or expenses yet to be incurred, and is not confined to enabling the making of demands for interim payments on account of fees or expenses already incurred. This follows from the terms, nature and purpose of paragraph (b) itself and also from the expression "as a deposit" in paragraph (a) of the rule. Second, Admiralty Rule 78 makes it clear that the Marshal is not confined to relying on the undertaking expressed in the form of application for arrest or the undertaking created directly by Admiralty Rule 41.*

*It may be said that the form of order sought by the Marshal in this case was not that envisaged by Admiralty Rule 48, and that the kind of direction contemplated by that Rule is, in the circumstances of the present case, a direction to the effect that the Marshal was justified in making a demand under Admiralty Rule 78 for the sum of \$20,000. It may be said that Admiralty Rule 48 contemplates a direction to the Marshal rather than, as in par 2 of the Marshal's application, an order against the plaintiff's solicitor. But the fact that any deficiency of form could quite easily be overcome by the making of a demand under Admiralty Rule 78 (b) in view of the construction which I take of that provision, demonstrates that no injustice has arisen. The amount in question has in fact been paid to the Marshal and it would be futility to allow an appeal, the result of which would be only to invite the Marshal to achieve the position in which he is placed at present by following a different procedure.<sup>58</sup>*

(iii) Repairs to the ship

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<sup>57</sup> *Patrick Stevedoring No 2 Pty Ltd v The Ship "Turakina"* (13 March 1998, FCA, Tamberlin J) at 6-7.

<sup>58</sup> *Waitemata Stevedoring Services Ltd v The Ship MV "Rangitata"* (unreported, FCA, 22 April 1998, Lindgren J) at 3-5.

In *Dick v The Vessel "Percy & Jean"* [2000] TASSC 140, the Marshal applied for directions as to the preservation of a ship under arrest and alternately sought remuneration for renovating the ship for sale. The Court in that case considered whether the ship should be slipped now and/or in six months time and whether other recommended work should be carried out. Blow J made no direction to slip the ship but did direct the Marshal to implement other recommendations. The plaintiff at trial was ordered to pay the Marshal \$1,800 for repairs.

In considering the application of r 47(2) in the circumstances, Blow J stated:

*"It seems that very little has been said in reported cases as to the principles a court should apply when called upon to decide what steps are appropriate for a ship's preservation. It seems self-evident that, to an appropriate extent, steps should be taken to preserve any arrested ship so that the plaintiff will have some means of enforcing his [or her] judgment if he or she is successful in the action, and so that the owners will not suffer unduly if they are successful and their vessel is returned to them. Another obvious factor is that 'a stitch in time saves nine'. It would generally not be appropriate to spend so much money on a ship that it is placed in better condition than it was at the time of arrest, unless such expenditure is warranted for the purpose of selling it. Further, I think it would be inappropriate and unreasonable to require the Marshal to preserve an arrested vessel in exactly the same condition that it was in when arrested. Some degree of deterioration is, for practical purposes, unavoidable. I gather from the evidence before me that, when a ship is laid up for reasons unconnected with litigation, the steps taken for its preservation will vary according to the intended length of the lay-up. It must follow that the likely duration of an arrest is a factor to be taken into account in determining what steps are appropriate for a ship's preservation. Generally speaking, the authorities that I have been referred to add nothing to these self-evident propositions. However, it may be of some significance that Tamberlin J in Patrick Stevedoring (No 2) Pty Ltd v The Ship "Turakina" [1998] 244 FCA, cited with approval a passage from McGuffie's British Shipping Laws, Vol 1, Admiralty practice (1964) para 262... [see above] Obviously when a ship is under arrest for years, the steps appropriate for its preservation are likely to be much more than minimal."<sup>59</sup>*

His Honour recognised the different interests of the parties:

*"It was of course the plaintiff who applied for the arrest warrant in this case. With this case nearing trial, it is to the advantage of the defendants to maximise the expenditure on the vessel. In the event that they are successful at trial, they will gain the benefit of any such expenditure, at the expense of the plaintiff. If the plaintiff's case is a strong one, he might be encouraged to settle on terms favourable to the defendants if taking the case to trial will necessitate substantial expenditure, particularly if his prospects of successfully enforcing a judgment otherwise than by sale of*

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<sup>59</sup> *Dick v The Vessel "Percy & Jean"* [2000] TASSC 140 at [4].

*the vessel are not strong. Against that background, it is perhaps not surprising that the defendants are urging me to make directions which would involve substantial expenditure on the vessel, whilst the plaintiff contends that much less expenditure is appropriate.*<sup>60</sup>

In deciding whether or not to make certain directions in regard to particular repairs, his Honour considered whether failure to make a particular direction constituted a “threat to the ship’s preservation” or a “serious problem”,<sup>61</sup> and whether a particular direction was “necessary or appropriate for the preservation of the vessel”.<sup>62</sup> If it was not, no direction was made.

(iv) Insurance premiums

The issue in *Den Norske Bank (Luxembourg) SA v “Martha II”* [2000] FCA 241 was whether insurance premiums paid by the Marshal in relation to an arrested vessel were recoverable out of the proceeds of sale of the vessel as a cost and expense of the Marshal. In that case, the Marshal had incurred insurance for hull machinery, protection and indemnity in the Marshal’s name. The plaintiff had taken out its own insurance.

The plaintiff contended that “as a matter of interpretation”, hull machinery, protection and indemnity insurance was not a type of cost or expense which the Marshal was entitled to incur in carrying out the functions assigned by r 47 or under the Act. Although not having to decide the matter, I did not consider this submission to be persuasive.<sup>63</sup>

The plaintiff also pointed to a Practice Note dated 10 May 1996, made by the Chief Justice of the Federal Court, which notified the public that it was not the practice of the Marshal during the period of arrest to hold commercial insurance for the benefit of persons who had an interest in the arrested property, including cargo. The Practice Note also stated that the Marshal would obtain indemnity insurance while the vessel was in the possession of the Marshal, and that the cost of that insurance would be an expense incurred by the Marshal, payable by the party issuing the writ for arrest. I found that the Practice Note did not assist the plaintiff because it was made after the Marshal took out the insurance policy. Prior to 10 May 1996, it seemed that it was the practice of the Marshal to take out commercial insurance. The purpose of the Practice Note was to put practitioners and other bodies on notice that the Court, henceforth, would not take out hull and machinery insurance and to suggest that they should consider making their own arrangements.<sup>64</sup>

I considered past practice as a guide to determining whether the Marshal’s actions in taking out insurance were appropriate.

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<sup>60</sup> Ibid at [5].

<sup>61</sup> Ibid at [12].

<sup>62</sup> Ibid at [16].

<sup>63</sup> *Den Norske Bank (Luxembourg) SA v “Martha II”* [2000] FCA 241 at 7.

<sup>64</sup> Ibid at 8.

*“... [T]he Notes do indicate that there had previously been a practice whereby commercial insurance was taken out by the Marshal. This is relevant to a consideration of the appropriateness of the Marshal's actions, which occurred prior to the issue of the Practice Note. In the Admiralty jurisdiction especially longstanding practice of the Court is of considerable importance. This is more so than in many other jurisdictions because the substantive law has tended to develop having regard to court and shipping practice.”<sup>65</sup>*

I further stated:

*“As I read r 47(1) the conferral of custody of the ship on the Marshal empowers the Marshal to incur all expenses appropriate and incidental to that custody. While subr (2) mandates certain action on the part of the Marshal it does not delimit the more general power to retain custody over the ship. In the course of exercising that custody in this case it was open, in my view, for the Marshal to form the opinion that it was appropriate to take out the insurance. What is necessary or appropriate for the performance of the Marshal's duties is in the first instance a matter for the exercise of discretion and judgment on the part of the Marshal. Given the functions and powers of the Marshal conferred by the Act and Rules the Court will not lightly set aside a decision by the Marshal to adopt a particular course of action such as insurance. Practice Note No 12 does not affect this position. It is not directed to a question of power or jurisdiction but is simply intended to be a notification of the further practice of the Marshal. I do not accept the contention that the insurance was not ‘appropriate’ to ‘retain safe custody’ or ‘to preserve the ship’.*

*It was submitted by the plaintiff that while the insurance was designed to preserve the value of the vessel for the possible benefit of the plaintiff, it does not ‘preserve’ the vessel itself in any way as, for example, painting or other maintenance may preserve the vessel. In my view, such a distinction is too narrow. The question as to what is appropriate should be approached on a broader basis. The broad scheme of the legislation is that the vessel or any fund which stands in its place, whether arising from sale or as a condition of release, is available to provide security for a properly based claim by a plaintiff. The insurance effected by the Marshal in this case was in order to preserve the security. Suppose, for example, that the vessel had been partly destroyed by fire. The insurance moneys resulting from a claim could have been used to repair or reinstate the vessel. It cannot be said to be inappropriate for the retention of safe custody of the vessel. On the contrary it is in every sense an appropriate measure to take, as indicated by the longstanding practice in the United Kingdom and Australia which led to the making of the various Practice Notes.”<sup>66</sup>*

In that case, I held that the Marshal was entitled to recover the full expense of the insurance. Delay was a factor in this ruling – the plaintiff had been on notice of the insurance for over three and a half years before it filed its original notice of motion challenging the Marshal's decision to take out the insurance.<sup>67</sup> The plaintiff did not avail itself of its power under r 48(1) to apply to the Court for directions with respect to the ship or property at any time.<sup>68</sup>

### **Powers of the Marshal in Relation to Sale of an Arrested Vessel**

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid at 9-10.

<sup>67</sup> Ibid at 6.

<sup>68</sup> Ibid at 7.

On the application of a party the Court may, under the Rules, order that a ship or other property under arrest be valued or sold, with or without evaluation: r 69(1).<sup>69</sup> An application under r 69(1) constitutes an undertaking by the applicant to pay, on demand, to the Marshal an amount equal to the fees and expenses of the valuation and/or sale: r 69(4). If the ship or property is deteriorating, an order for sale may be made without an application having been made: r 69(5).<sup>70</sup> It is necessary for the property the subject of an order for valuation and sale to be under arrest.<sup>71</sup> An order for sale may be made *pendente lite* (before judgment) on the ground, amongst others, that the value of the vessel is deteriorating. The Marshal has the conduct of the sale, which is to be by public auction, unless the Court otherwise directs: r 70. This includes the appraisal, sale, removal of property from the ship and the discharge of cargo.<sup>72</sup> The Marshal is required to make a return after the sale and pay into Court the gross proceeds of sale and bring into the Registry the account of sale, with vouchers in support for taxation by the taxing officer: r 71. The Registrar taxes the fees and expenses of the Marshal in connection with the valuation and sale: r 72.<sup>73</sup> Sale under the auspices of the Court confers an absolute title free of all encumbrances on the purchaser.<sup>74</sup> This principle was considered by Justice Ryan in *Readhead v Admiralty Marshal, Western Australia District Registry* (1998) 87 FCR 229.

The prescribed form 26 application for valuation or sale contains the following undertaking:

*"4. I undertake to pay on demand to the Marshal an amount equal to the fees and expenses involved."*

Except for his costs of arresting and obtaining an order for judicial sale, a plaintiff in admiralty proceedings does not necessarily receive payment of a judgment in his favour out of the proceeds of sale, nor does he obtain specific security allocated for his claim. The net sale proceeds create a pool of funds that are available for all creditors with *in rem* claims against the vessel. All *in rem* creditors includes those whom may not be parties to the admiralty proceedings at the time the order for sale is made.

In regard to the Marshal's costs, Cooper J said in *Bayside Air Conditioning Pty Limited v The Owners of the Ship "Cape Don"* (unreported, FCA, 15 May 1997):

*"As to the position of the Marshal's costs, I think the appropriate order is that those costs be the Marshal's costs of sale and be paid out of the proceeds of sale. As the Marshal in these proceedings acts as an officer of*

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<sup>69</sup> See *The Shell Mex 3* [1970] 2 Lloyd's Rep 403; *The West Port (No 1)* [1965] 1 Lloyd's Rep 547.

<sup>70</sup> See *Bayside Air Conditioning Pty Ltd v The Owners of The Ship Cape Don* (unreported, FCA, 15 May 1997, Cooper J). There were five decisions in all concerning the arrest of the "Cape Don" and the release of the solicitors of this undertaking.

<sup>71</sup> *The Lady Rachilla* [1967] 1 Lloyd's Rep 591.

<sup>72</sup> As to the Marshal effecting repairs to a ship before sale: *The West Port (No 2)* [1965] 1 Lloyd's Rep 549.

<sup>73</sup> White, *Australian Maritime Law* at 58.

<sup>74</sup> *The Gouandris* [1927] P 182; see also *Redhead v Admiralty Marshal* (1998) 157 ALR 660, where the court held the sale overrode a claim to detention and possible forfeiture for breach of the *Fisheries Management Act 1991* (Cth).

*the Court and not as a party to the proceedings the Marshal should be fully indemnified for the costs he has incurred in discharging his duty. Accordingly, the Court orders the costs of the Marshal of and incidental to today's application be paid on a solicitor and own client basis."*

It is apparent from the foregoing that his Honour considered that the solicitor and own client basis provided a complete indemnity to the Marshal in respect of costs.<sup>75</sup>

*Patrick Stevedores No 2 Pty Ltd v Ship "Turakina"* (1999) 167 ALR 143 involved applications by two claimant banks seeking release of part of the funds held by the Marshal from the sale of the two ships in which a number of entities claimed interest. The issue in that case was whether the Court should order release of part of the funds before priorities among the claimants had been determined. The Marshal sought to retain a portion of the funds to meet the contingency of having to tax the bill of costs for all his fees and expenses. The Marshal relied in part on Item 12 of the schedule to the Federal Court Rules.

In that matter, I ordered the release of part of the funds on the basis that it was inappropriate to order the retention of a portion of the funds to meet the contingency of the Marshal having to tax all his fees and expenses. However, I did think it appropriate to order the retention of a portion of the funds to meet the contingency of the Marshal having to tax the bill of costs of his legal costs and expenses.

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<sup>75</sup> *Patrick Stevedores No 2 Pty Ltd v The Proceeds of the Sale of MV "Skulptor Konenkov"* [2000] FCA 1710 at 3, per Tamberlin J.