

15.4 Draft Supreme Court Rules – April 2003

AMENDMENTS TO PART 83 –ADMIRALTY LIST – NSW SUPREME COURT RULES

Rule 6 - Solicitor's Undertakings

1. As alternatives to undertakings by solicitors for the purpose of the Admiralty Rules (Rules 41, 48, 49, 51, 52, 69 and Forms 12, 17, 18, 19 and 26) the Court will accept undertakings from law firms or indemnities from client/applicant and collateral security in the form of an irrevocable and unconditional bank guarantee payable on demand in favour of the Marshal to pay the fees and expenses to the amount of \$25,000, or a P & I Club letter of undertaking (from P & I Club member of the International Group) to similar effect or payment into Court of the said amount. The Marshal is empowered to require additional security from time to time, unless the Court otherwise orders.

Commentary

Rule 41 of the Admiralty Rules deems an undertaking to have been given and the consequences for a solicitor are addressed by Rule 75 of the Admiralty Rules. The undertakings by legal practitioners are a real cause of difficulty in both arresting and releasing a vessel or property. The legal practitioner should not be the subject of a personal obligation of this open ended kind which creates scope for conflict and is a powerful disincentive which discourages use of the jurisdiction.

Rule 7 - Marshal's Overdraft, Security and Indemnity Insurance

1. The Marshal shall, unless the Court otherwise orders, open and operate an overdraft account for the purpose of interim payment of the fees and expenses of the Marshal provided that the said overdraft does not exceed 25% of the Marshal's estimated value of the ship or other property.
2. The Marshal may form a preliminary estimate of the market value of the ship or other property from information provided by any party or any other source and without the need for any written appraisal of valuation.
3. The charges, costs, fees and interest incurred by the Marshal in opening and operating the said overdraft account are part of the expenses of the Marshal in relation to the arrest or, as the case may be, in relation to the sale of the ship or other property.
4. The Marshal may, unless the Court otherwise orders, obtain as soon as reasonably practical insurance cover in the name of the Marshal against default by the client giving the undertaking to the Court up to the amount of \$25,000 and against default under the supporting collateral security in the form of bank guarantee or P & I Club letter up to the amount \$25,000.
5. The insurance cover obtained by the Marshal may be for periods of three, six or 12 months as the Marshal deems fit and the costs and expenses incurred in obtaining the said insurance form part of the Marshal's fees and expenses in relation to the arrest or as the case may be in the relation to the sale of the ship or other property.

Commentary

The Marshal should be in a reasonably secure position with the benefit of the arrested property. To require constant demands for payment creates practical problems for the recipients despite the fact that a substantial asset may be arrested. In light of the priority of the Marshal's fees and expenses it is difficult to see why with substantial value property

additional security is necessary. In the ordinary case where the value of the ship or property arrested well exceeds any likely fees and expenses of the Marshal there is every reason to believe that the Marshal would be adequately protected if effectively \$25,000 in cash or security was provided in reserve to meet expenditure. The Marshal could then open and operate an overdraft account removing the need for regular demands under Rule 78 of the Admiralty Rules whilst still retaining a right to seek the same. The insurance cover which should be available in the market permits greater protection for the Marshal and is different to the concern addressed by Practice Note 84.

Rule 8 - Replacement and Limits of Undertakings

1. Where an undertaking has been given to the Court by the solicitor or law firm or an indemnity by the client/applicant or by the solicitor in relation to the fees and expenses of the Marshal and an application is successfully made by another party (for example for the release of the arrested ship or property) in which the client/applicant, solicitor or law firm is required to give an indemnity or undertaking in relation to the fees and expenses of the Marshal the existing undertaking or indemnity (and any collateral security) ceases to be a continuing future undertaking or indemnity and is limited to the fees and expenses incurred or estimated by the Marshal to have been incurred up to the date of the successful application. Further, upon payment of the fees and expenses of the Marshal incurred or estimated by the Marshal to have been incurred up to the date of the successful application, the pre-existing undertaking or indemnity (and any collateral security) by the client/applicant, solicitor or law firm to the Court is released.

Commentary

It is necessary to have the ability to replace those who give undertakings or indemnities and collateral security and to ensure that their exposure is finite and certain. Otherwise this can be a cause of real dispute in obtaining release or other orders concerning the property.

Rule 9 - Sale

1. Unless the Court otherwise orders the sale of a ship or other property by the Marshal will be by private tender, advertised for a period of three weeks in the UK *Lloyd's List*, *The Australian*, the *Lloyd's List DCN* in the form of the Invitation to Tender and Bill of Sale (in accordance with Form X) requiring payment of the purchase price within 3 weeks of acceptance of the tender.

Commentary

Sale needs to be as expeditious as reasonably practical and stream lining the procedure should accelerate the sale. Rules 69 – 70 of the Admiralty Rules do not adequately address the actual steps which gives rise to both delay and unnecessary additional costs. An appropriate precedent will need to be identified and annexed to the Rules.

Rule 10 - Priorities -Expeditious Payment of Proceeds Out of Court

1. Unless the Court otherwise orders where a ship or other property has been sold by the Marshal the proceeds of sale may be paid out of Court to the existing parties and caveators or a stakeholder thereof without any determination of priorities by the Court.

Commentary

Rule 73 provides a discretion to give notice of an intended determination but does not address the scope for an alternative payment out after sale so as to bring to an end the Court role. The determination of priorities should be able to be dispensed with when all parties including caveators or other in rem proceedings on foot against the same vessel present agree. To engage in further advertising diminishes the incentives for expeditious

resolution and may cause unnecessary delay and prejudice to those who have acted promptly.

Rule 11 - Abolition of Poundage

1. Unless the Court otherwise orders the Marshal shall not assert or claim any poundage in relation to the sale of the ship or property.

Commentary

Currently the Marshal charges fees on a commercial time basis and that together with poundage is taken out of what may be a wasting or diminishing of security for a claimant. To impose poundage on top of commercial fees is tantamount to double dipping and there is no logical reason why this extraction should be maintained.

Rule 12 - Marshal's Fees

1. Taxation of the Marshal's fees and expenses is dispensed with unless the Court otherwise orders. Further, any taxation of the Marshal's fees and expenses is to exclude only fees and expenses which have been incurred unreasonably and otherwise than in good faith by the Marshal.

Commentary

Rule 73 and 74 of the Admiralty Rules currently provide for taxation of fees and expenses of the Marshal. The right to taxation under the above Rules is not consistent in principle with right to payment untaxed found in Rule 53 of the Admiralty Rules albeit covering different fees and expenses. Taxation of Marshal's fees is unproductive and should not be encouraged unless there are clear failures that amount to both unreasonable expense and involve an absence of good faith. The consequence of amounts not being allowed upon taxation raises the question of who then pays. It cannot be that the Marshal should be exposed to unrecoverable liability except in an extreme case of failure beyond inadvertence or want of reasonableness.

Rule 13 - Repatriation of Crew/Master

1. The Marshal may in relation to any ship or property dispense with and repatriate any Master and crew, as soon as reasonably practical and the costs and expenses incurred form part of the Marshal's fees and expenses.

Commentary

There are often delays and dispute about repatriation that it would be better to leave in the hands of the Marshal. There is no reason why a vessel should remain for substantial periods under arrest with Master and crew, provided there is a satisfactory alternative available to the Marshal. Repatriation should also be streamlined to minimise delay.

Rule 14 - Aid to and by other Courts

1. The fees and expenses of the Marshal of any Court acting in aid of another Court shall form part of the fees and expenses of the Marshal.
2. The Marshal may take any step that he would otherwise have been able to take under these Rules or under the Admiralty Rules in aid of any other Court having jurisdiction under the *Admiralty Act* 1988 and may seek and obtain reimbursement of all fees and expenses incurred from the Marshal of that other Court.
3. All fees and expenses incurred by the Marshal in acting in aid of another Court having jurisdiction under this Act are recoverable in full without taxation.

Commentary

The *Admiralty Act* 1988 provides for assistance but does not spell out how that is to be implemented. The State Courts should have clear identified assistance regimes in place.

Rule 15-Duplicate Caveat Register (against arrest or against release)

1. A duplicate register or other online access to the Registry of the Federal Court in respect of caveats against arrest shall be provided and an affidavit as to search of the duplicate register or online access through the Supreme Courts shall be accepted unless the Court otherwise orders.

Commentary

The Register is maintained by the Federal Court under Rule 14 of the Admiralty Rules. The Form 13 affidavit required under Rule 40 and upon release application Forms 18 and 19 require search of the Register. There is no reason why a duplicate or some direct access should not be available so as to avoid the need for search in the Registry of the Federal Court of Australia.

Rule 16 - Affidavit to support Arrest

1. An affidavit to support an application for arrest warrant should identify sufficient facts (whether or not hearsay) to disclose a serious question to be tried and should specify, if known, a description of the ship or property, and its condition, location, nature and state of loading, number of crew and any special risks likely to affect the arrest or preservation of the property during the arrest .

Commentary

The affidavit under Rule 39 (2) of the Admiralty Rules is generally bare of facts to identify either that there is a good arguable cause of action or as to the particular circumstances surrounding the vessel. The disclosure of a serious question will minimise the risk of vexatious proceedings and ensure that the process is unlikely to be abused. The disclosure about the circumstances surrounding the vessel will assist in the Marshal and parties understanding relevant risks for the purpose of protecting their interests.

Rule 17 - Determination of Applications

1. Applications concerning arrest, release or in relation to a ship or property under arrest may be returnable before the Admiralty List Judge or the relevant Duty Judge for urgent Admiralty List applications.

Commentary

The advantages of a judge considering applications in admiralty are considerable. The Rule 40 of the Admiralty Rules actually provides power for the arrest to be implemented by almost a rubber stamp exercise by lodgement of the necessary documents and Rule 51 of the Admiralty Rules currently permits release to be dealt with by the Registrar even though in practice it is often dealt with by the Court under Rule 52. The proposed new rule ensures that the drastic remedies available through arrest and the like are not abused. It may well be that institution of a regular listing on the first Tuesday each month would also assist the parties and practitioners in an efficient conduct of the Admiralty List. There will still be urgent circumstances that necessitate immediate relief from the Court and it is of utility if the process for urgent applications is clear.

Rule 18 - Request for Information

1. The Marshal shall as far as reasonably practicable inform any party or caveator upon request in writing of the status of the arrest, the fees and expenses incurred, anticipated future fees and expenses and as to the timing and amount of anticipated further demands. The fees and expenses incurred by the Marshal in responding to such request form part of the fees and expenses in relation to the arrest of the ship or other property.

Commentary

There is a need to ensure that the lines of communication with the Marshal are understood and certain. Given the serious consequences of the undertaking as to fees and expenses

and the right to immediate interim demands under Rule 78 of the Admiralty Rules there is a need for parties to be aware of the current state of outgoings. The information may also facilitate prompt resolution and may assist in obtaining release.

Rule 19 - Costs/Taxation

1. Unless the Court otherwise orders costs to be paid to any person in relation to proceedings brought under the *Admiralty Act 1988* shall in the absence of agreement be assessed and the amount of the claim for debt, damages or other money is on taxation irrelevant.

Commentary

The complexity of most admiralty proceedings and the nature of the process available warrant no monetary limit on claims such as generally found in Part 52 and the new rule would prevent application by analogy.

Rule 20 - Bail Bonds

1. A partnership or corporation carrying on business within the jurisdiction may act as a surety.
2. Where both sureties are corporations they must be unrelated.
3. Unless the Court otherwise orders each surety in support of a bail bond shall file an affidavit as to their current assets and liabilities as well as all known contingent liabilities, proceedings on foot, whether the subject of any earlier insolvency/bankruptcy, and whether the subject of service of any demand under the *Corporations Act 2001* or *Bankruptcy Act 1966* and the surety shall expressly undertake to the Court to file a further affidavit up dating the same within seven (7) days if any material adverse change in circumstances occurs.

Commentary

Rule 54 provides for Bail Bonds and form 20 provides limited information about the financial position of the proposed surety. The new rule would ensure that appropriate information is provided as to assets and diminish the risk of the surety being a person of straw. There is no reason why a corporation within the jurisdiction cannot be a surety. Two sureties are required and if both are corporations they should be unrelated.