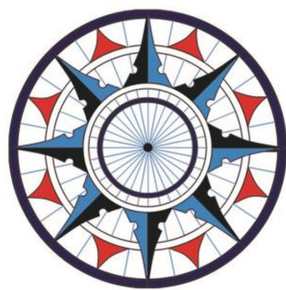


Delaware North Marine Experience Pty Ltd v The Ship "Eye-Spy" [2017] FCA 708

McKerracher J - Federal Court of Australia

23 June 2017

- **"As is – where is" is not necessarily inclusive of latent defects.**
- **Arresting parties must fully evaluate the security demanded on arrest of a vessel.**
- **As always – parties must understand the full effect of their contractual clauses.**

Facts

Delaware North Marine Experience Pty Ltd ("the Plaintiff") entered into a "Barecon 89" Standard Bareboat charter for a period of 14 days beginning 6 February 2015. The vessel suffered a failure of her starboard stern tube assembly (SSTA) on 7 February 2015 and was unable to be sailed.

Proceedings *in rem* were brought against *Eye Spy* and as such, TKL Holding Pty Ltd, as the owner, and Moreton Bay Whale Watching Tours Pty Ltd as the disponent owner in possession of the vessel at the time of the charter. TKL Holding Pty Ltd and Moreton Bay Whale Watching Tours Pty Ltd are collectively referred to as "the Defendants".

The Plaintiffs are claiming breach of contract on the grounds that the vessel was not seaworthy at the time of charter. The unseaworthiness resulted in the loss of use of the vessel they were chartering and required that they charter a replacement vessel.

The Defendants maintained that they were not liable and refused to pay damages. That resulted in an application by the Plaintiff to have the vessel arrested. Arrest was executed on 26 November 2015 and the security on arrest of the vessel was set at $366,000. The Defendants cross claimed that the arrest was unjustified and that the security was excessive.

As is - where is

The SSTA failed due to inadequate cooling water supply and the cause of the loss of water supply is the nature of the first dispute. The Defendants argued that this failure was the result of the chartering crew turning off the relevant water supply valve, and in the alternative, that accepting the vessel on an "as is, where is" basis meant that

the Plaintiff was responsible for the repair. These arguments are related to Clause 2 of the charter agreement, the pertinent parts of which read as follows;

> "The Owner shall before and at the time of delivery exercise due diligence to make the Vessel **seaworthy**…
> … the Owners shall be responsible for repairs or renewals occasioned by independently verified **latent defects** in the vessel…
> … upon delivery of the vessel, the sub charterer accepts the vessel in its **"as is – where is"** condition."
> (emphasis added)

McKerracher J determined on the facts that the Defendants were liable for the failure of the SSTA. This was considered to be a breach of Clause 2 as the Defendants had not exercised their due diligence to make the vessel seaworthy.

The Defendants argued, in the alternative, that the plaintiff was responsible for the repair of the SSTA on the basis that the vessel was accepted "as is - where is". The Defendants argued that "as is - where is" is inclusive of latent defects, the plaintiff and the court took a different position.

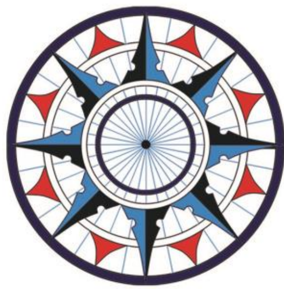
According to Clause 2 of the contract, the owner of the vessel, the Defendant, shall be responsible for repairs occasioned by independently verified latent defects. McKerracher J stated "if it is necessary to substantially pull something apart to discover the defect it is, by definition, latent".

This decision was determined on the basis that "as is – where is" does not include latent defects. However, the construction of Clause 2 was instrumental in the determination and another charter with different terms may place the responsibility for latent defects differently.

Excessive Security

The defendants originally cross-claimed that the arrest of the vessel was both unjustified and that the security demanded on arrest was excessive. The first claim was abandoned, and the excessive security claim went on to be the most interesting legal issue of this case.

The plaintiff demanded $316,000 for the release of the arrested vessel, with the addition of $50,000 in legal costs and $10,000 interest. On the day the vessel was arrested the defendants paid the total of $366,000 to the Court and the vessel was ordered to be released. The defendant then made application to the Court for $100,000 of the security to be returned on the grounds that it was excessive. The Court ordered as such, and later additionally ordered that the balance, $266,000, be transferred into an interest-bearing account.



Section 34(1)(a)(i) of the *Admiralty Act 1988* provides that where a party unreasonably and without good cause demands excessive security in relation to the proceeding, the party is liable in damages where the loss or damage has been suffered as a direct result.

The Court orders the security required for release of an arrested vessel. Hence, perhaps it is the Court who was unreasonable? The Court makes the order for security on the suggestion and guidance of the plaintiff. The plaintiff relied on the letter of demand that set out the sum of $316,000 but did not substantiate this figure with invoices for the costs raised as a result of the breach i.e. the charter of a new vessel. The claim was actually only to the sum of

McKerracher J observed that the plaintiff, and the lawyers involved, had 6 to 7 months from the time of the incident to the time of arrest to collate the invoices and costs incurred. Had the invoices been evaluated it would have been realised that the security sought was excessive. As a result, McKerracher J decided that it was unreasonable for the plaintiff to demand $315,000 on a claim that was reduced to $40,336.30 at trial.

The loss incurred by the defendants as a result of the excessive security is only the interest that would have accrued had the money for security been in an account of the defendants, earning interest. As such it was only a minor penalty of $1,200 awarded for the cross-claim.

Despite only being a minor monetary penalty, this case warns applicants to arrest to do their calculations and make a reasonably request of security for the arrest.

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