UK DEFENCE CLUB

Soundings

UK – Ship Arrest. Should an arresting party be required to provide a cross-undertaking in damages in order to arrest a ship under English law?

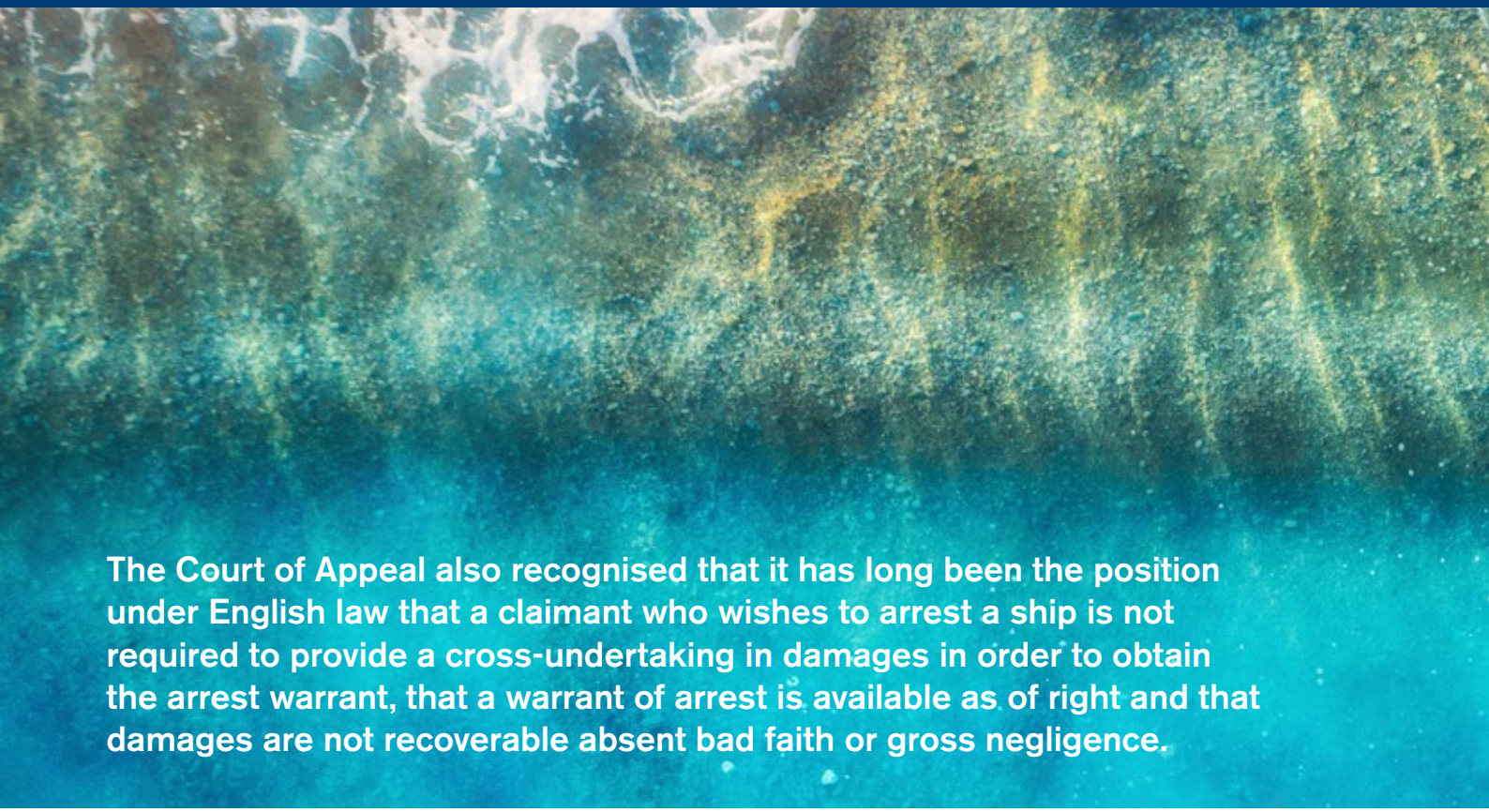
This question was recently considered by the Court of Appeal, and thus saw the English Courts examining the above question for the first time in over 20 years in the case of the ALKYON - Stallion Eight Shipping Co S.A. v Natwest Markets Plc. (formerly The Royal Bank of Scotland Plc.) [2018] EWCA Civ 2760.

Background

In January, 2015, the claimant bank provided a secured loan to Stallion Eight Shipping Co. S.A. ("owners"). The loan was provided to assist in the financing required to purchase the ALKYON. In March, 2018 the bank obtained a valuation of the ship and demanded additional security. The owners have taken issue with this, which dispute is proceeding in the English High Court. The ship is currently under arrest in the UK.

A subsidiary issue arose, however, namely whether the arrest should be set aside if the bank failed to provide a cross-undertaking in damages, as is the standard practice when granting interlocutory relief, such as a freezing order.

continued overleaf



The Court of Appeal also recognised that it has long been the position under English law that a claimant who wishes to arrest a ship is not required to provide a cross-undertaking in damages in order to obtain the arrest warrant, that a warrant of arrest is available as of right and that damages are not recoverable absent bad faith or gross negligence.

A number of prominent legal commentators, notably Sir Bernard Eder, have argued that there is an imbalance in the law which should be revised so that the position should be the same for ship arrests as it is for freezing orders.

The matter was subject to the Admiralty jurisdiction of the High Court in accordance with the Senior Courts Act 1981. The statute provides that "an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises". The owners applied to the High Court for the release of the ship from arrest.

In the first instance judgment, which was reported in detail in the August, 2018 Soundings, Mr Justice Teare found against the owners. The judge concluded:

"The court is unable to accede to the application that the vessel be released in the event that the Bank fails to provide a cross-undertaking in damages. To exercise the court's discretion to release in that way would (i) run counter to the principle that a claimant in rem may arrest as of right, (ii) be inconsistent with the court's long-standing practice that such a cross-undertaking is not required, and (iii) be contrary to the decision of the Court of Appeal in Bazias 3 and Bazias 4 and to the dicta of Lord Clarke in Willers v Joyce which I, as a first instance judge, must respect. Finally, any change in Admiralty law and practice, given that the present position has prevailed for so long, is not a matter for the Court to change overnight (even assuming that it could do so) but for Parliament or the Rules Committee to consider after proper consultation."

However, the judge noted that this is an area of law that has not been considered by the higher courts for more than twenty years and is a matter of general importance and interest. The judge gave permission to the owners to appeal to the Court of Appeal.

The Court of Appeal hearing took place on 6th November, 2018 before Sir Terence Etherton, Lord Justice Gross and Lord Justice Flaux. In a judgment handed down on 11th December, 2018 the Court of Appeal also found against the owners.

The Court of Appeal recognised that the courts have a discretion to release a ship from arrest, but that discretion must be "exercised in a principled manner". The Court of Appeal also stated:

"…a Court at any level would think long and hard before departing from the usual practice with regard to the release of a vessel from a maritime arrest – but that is not the same thing as being precluded from doing so."

The Court of Appeal also recognised that it has long been the position under English law that a claimant who wishes to arrest a ship is not required to provide a cross-undertaking in damages in order to obtain the arrest warrant, that a warrant of arrest is available as of right

and that damages are not recoverable absent bad faith or gross negligence.

The Court of Appeal also held that, once a ship has been arrested, the standard practice of the Admiralty Court is that it will not be released unless security has been provided or an abuse of process is established.

The Court of Appeal judgment sets out an extensive discussion on the differences between an admiralty arrest and a freezing order and refers to Mr Justice Teare's judgment in the High Court. Mr Justice Teare concluded that an admiralty arrest and a freezing order are not of the same character because "…the arresting party is entitled to the issue of a warrant of arrest as of right and is not dependant upon a court order to that effect" as is the case with a freezing order.

The Court of Appeal concluded that the owners' case would undermine very long-standing domestic law as to effect a maritime arrest as of right, the limitation upon the recovery of damages for wrongful arrests save in cases of bad faith or gross negligence, and the usual practice of requiring security as the price for releasing a ship from arrest.

The Court of Appeal considered that there are "formidable considerations" in support of the current position being maintained including:

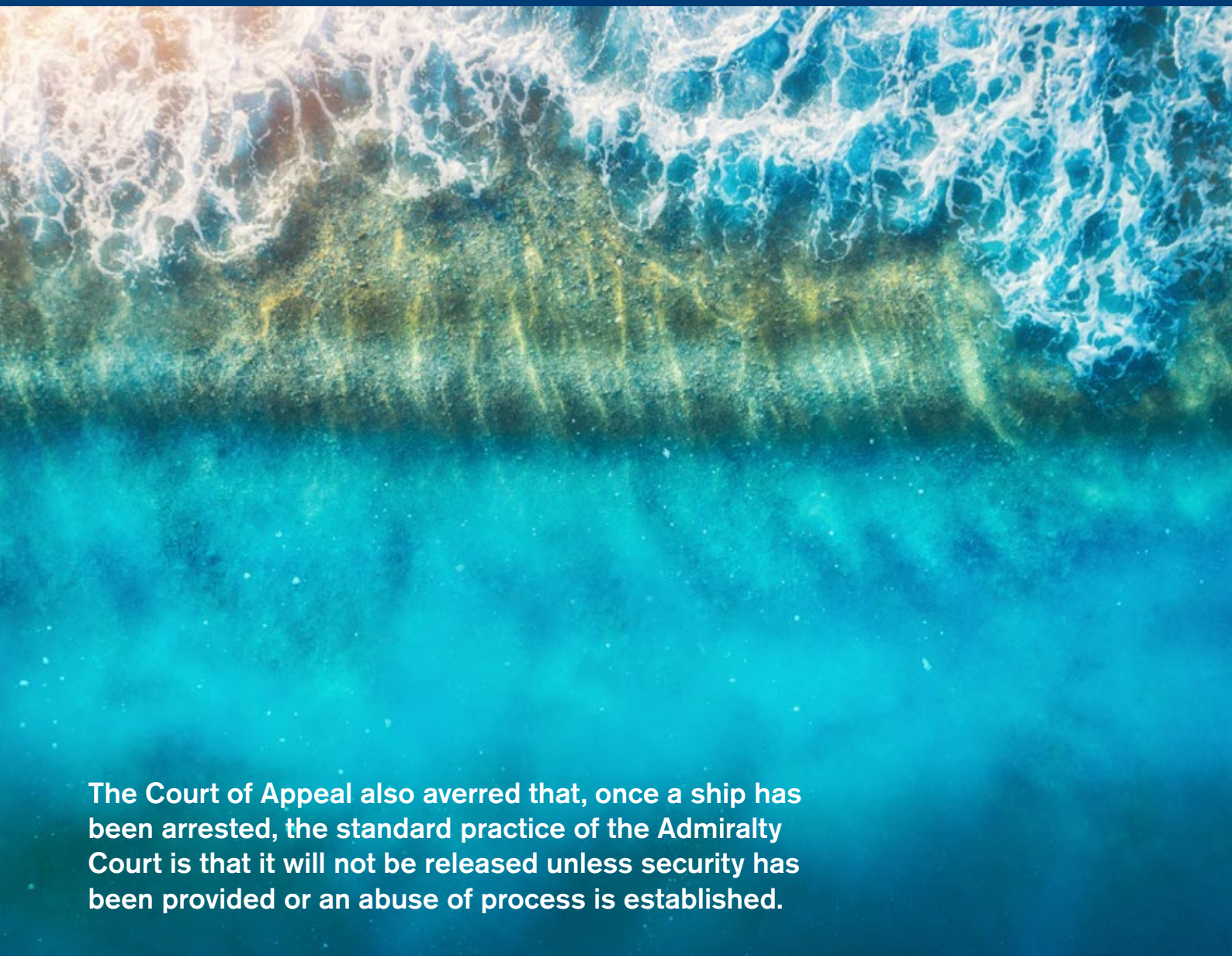
(i) The Court believed that there was a clear need for caution before restricting or hindering access to seeking an arrest warrant.

(ii) If the owners' appeal succeeded in this case, it was overwhelmingly likely that the requirement for a cross-undertaking would become routine. This would act as a deterrent to the use of an arrest even in meritorious cases. Furthermore, if the provision of a cross-undertaking in damages were to become routine, this would have an adverse effect on the ability of unpaid crew or suppliers of necessaries to arrest a ship.

(iii) Maintaining the present position would continue to produce the desired outcome of the threat of an arrest in many cases, that being the provision of security. The court also noted that relatively few arrests are necessary, with P&I Clubs and hull underwriters regularly posting security upon receipt of a threat of an imminent arrest.

(iv) The court considered that the similarity between maritime arrests and freezing orders is neither exact nor compelling enough to require a cross-undertaking in the context of maritime arrests.

(v) There has been no industry-wide pressure for a departure from the existing position and the debate amongst legal commentators does not disclose a consensus.



The Court of Appeal also averred that, once a ship has been arrested, the standard practice of the Admiralty Court is that it will not be released unless security has been provided or an abuse of process is established.

(vi) The maritime industry and the statutory rules have existing arrangements under which P&I Clubs and hull underwriters regularly give undertakings to avoid an arrest or to release a ship from arrest. These arrangements should not be lightly disturbed.

The Court of Appeal observed that a case for change would be strengthened if there was significant support from the maritime community, beyond the views of certain legal commentators. However, the court concluded that the case against changing the settled law and practice was overwhelming.

Conclusion

The reasoning behind the decisions of both the High Court and the Court of Appeal confirms the law as it presently stands. that cross undertakings in damages are unlikely to be required in the case of an arrest.

If Members have any queries relating to this Soundings, please contact the Managers.

The UK Defence Club
Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web: ukdefence.com