

**DONALD PICKERING & SONS ENTERPRISES LTD.
& ANOTHER**

A

v.

**KARIM'S LIMITED
THE SHIP BANIVUALIKU aka 'ZUBI'
THE SHIP SENIBIYAU**

B

[HIGH COURT, 1998 (Fatiaki J) 24th July]

Admiralty Jurisdiction

Admiralty- arrest of vessels- Admiralty Marshal's fees- whether mere custody incurs liability for payment – High Court (Admiralty Rules (Cap 13 – Subs.)

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The Admiralty Marshal sought payment for keeping possession of vessels which were arrested by Court Order. The High Court HELD: although the custody of the vessels had been with the Admiralty Marshal following their arrest they had at all times remained in the possession of third parties; accordingly no entitlement to possession fees had been incurred.

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Case cited:

Arantzazu Mendi [1939] A.C. 256

Interlocutory application in the High Court.

Mrs. M. Sharma for Admiralty Marshal

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M. Young for the Second Plaintiff

K. Buksh an interested party

Fatiaki J:

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On the 15th of May this court dismissed inter alia a claim by the Admiralty Marshal for the payment of fees under the High Court (Admiralty) (Admendment) Rules 1993. On that occasion I indicated that my reasons for doing so would be delivered on notice which I now do so.

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The background to the claim is as follows : On 23rd January 1996 two vessels, the "Banivualiku" aka "Zubi" and the "Senibiyau" ('the vessels') were arrested by the Admiralty Marshal pursuant to an application by the plaintiffs who alleged that they were owed monies for various works performed and materials supplied to the vessels upon the instructions verbal and written, of the above-named interested party Mr. Karim Buksh. The application was also supported by an undertaking by the plaintiffs solicitors:

"... to pay on demand the fees of the Marshal and all expenses incurred by him or on his behalf in respect of the arrest, or endeavours to arrest, the property and the care and custody of it

while under arrest.”

It is common ground that the “Zubi” was initially arrested by the Admiralty Marshal whilst it was berthed at the Fisheries jetty at Lami and the “Senibiyau” was arrested at the second plaintiff company’s boat shed at Walu Bay where it was raised on a slipway. Subsequently the “Zubi” was moved to a private wharf belonging to the Fiji Fish Company Ltd. also at Lami where it remains berthed to date.

A

By a notice dated 4th of March 1997 i.e. almost 13 months after the vessels were arrested, the first plaintiff company, which by then was in receivership, wholly discontinued its action. The second plaintiff company’s claim remained extant however.

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The action then went to sleep for another 14 months until the Admiralty Marshal by Notice of Motion filed on the 5th of May 1998 sought the discharge of the arrest warrants issued against the vessels, and claimed a fee of \$20 per day per vessel for the period 23.1.96 - 30.4.98. The total fee payable by the plaintiffs is \$33,200. Additionally, he claimed a further sum of \$25,057.06 being security costs incurred on behalf of the Admiralty Marshal. The application is supported by an affidavit of a Senior Court Officer of the High Court and an affidavit of the interested party who deposed that since the arrest of the “Zubi” he has provided and paid for the security costs on the said vessel.

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The application is vigorously opposed by the second plaintiff company which filed no less than five affidavits. In essence, the affidavits deny that the Admiralty Marshal incurred any costs or fees in maintaining possession of the vessels nor do the deponents accept that Mr. Karim Buksh provided any form of security for the vessels since their arrest.

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On the 15th of May 1998 after hearing all parties the arrest warrants were discharged by consent and the hotly contested claim for the cost of providing security for the vessels was ordered to be pursued by way of a writ action.

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The legal basis upon which the Admiralty Marshal seeks payment of his fees is said to arise from the High Court (Admiralty) (Amendment) Rules 1993. In this regard Order XVI r.1 of the High Court (Admiralty) Rules 1893 provides that :

“The fees contained in the Schedule shall be taken in the High Court in admiralty causes for the several matter mentioned herein.”

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and the relevant fees in the Schedule (as amended by the 1993 Amendment) provides for the following matters (so far as relevant for present purposes) :

"VI - IN THE MARSHAL'S OFFICE

	\$	¢
A	For executing any warrant or attachment.....	50.00
	For keeping possession of any ship, goods or any ship and goods (exclusive of any payments necessary for the safe custody thereof)	
B	for each day.....	20.00

Note - No fee shall be allowed to the Marshal for any custody and possession of property under arrest, if it consists of money in the bank, or of goods stored in a bonded warehouse, or if it is in the custody of a Customs Officer or other authorised person."

C Mrs. Sharma for the Admiralty Marshal submits that the plaintiff's liability to pay the Marshal's fees is clear as is the amount. The basis of that liability is the written undertaking given by the plaintiffs solicitors dated 23rd January 1996 (op.cit) and the mandatory requirement under the Rules that "the fees contained in the Schedule shall be taken in the High Court in admiralty causes".

D Mr. Young for the plaintiffs submits that the undertaking is limited to such fees as are properly and lawfully incurred by the Marshal in respect of the arrest of the vessel (which would have entailed travel expenses and an hours attendance at most) and also, for the care and custody of (the vessels) while under arrest (which on the undisputed evidence amounted to nil since the vessels were never at any time in the physical possession of the Marshal or his authorised officers albeit that it is accepted they were in his legal custody).

E More particularly, counsel submits that the wording of the Schedule is clear in that it speaks of keeping possession of any ship as distinct from having legal custody of it.

F This distinction counsel submits was clearly recognised in the leading case of the Arantzazu Mendi [1939] A.C. 256 where Lord Atkin in rejecting the Admiralty Marshal's claim that the arrest of the ship gave him possession of it, said at p.266 :

G "After the consent order the ship-keeper remained on board under a claim for the daily expenses while the ship is in the custody of the Marshal as expressed in the Supreme Court Fees Order 1930 ... Founding on this, the plaintiffs say that the ship was in the possession of the Marshal and could not therefore be in the possession of the Nationalist Government. This seems to me to be based upon a misapprehension of the position created by the arrest. The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but

custody. Any interference with his custody will be properly punished as a contempt of the Court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession.”

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With those observations I respectfully and entirely agree and, although our Rule does appear to differentiate between the Marshal's fee for keeping possession of a vessel and payments necessary for the safe custody thereof, the daily fee is, nevertheless, solely chargeable for keeping possession of the ship and not so long as the arrest warrant shall remain undischarged.

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In my considered opinion the addition of the active verb keeping to possession confirms and reinforces the distinction between actual physical possession and legal custody which may or may not carry with it a right to acquire physical possession. In my view the ordinary meaning to be given to the expression keeping possession is retaining physical control and a fee is a monetary payment for services rendered.

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I am fortified by the explanatory Note to the Schedule which expressly disallows the daily fee in respect of money or goods held or stored in a bank or bonded warehouse which, undoubtedly, would render such items outside the physical possession of the Admiralty Marshal.

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Needless to say I cannot accept that any fee is payable to the Admiralty Marshal where no service (other than executing an arrest warrant for which a separate fee is charged) has been rendered by him in respect of an arrested vessel.

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For the foregoing reasons the claim by the Admiralty Marshal for a daily fee for keeping possession of the vessels was disallowed.

(Application dismissed.)

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