

**BETWEEN**

**RUDI HARTONO & ORS**

Appellants

**AND**

**MINISTRY FOR PRIMARY INDUSTRIES**

**AND SAJO OYANG CORPORATION**

Respondents

Hearing: 14 November 2017

Coram: Elias CJ  
William Young J  
Glazebrook J  
O'Regan J  
Ellen France J

Appearances: K K Harding and C B Hirschfeld for the Appellants  
C J Lange and E J Couper for the Respondent  
Ministry for Primary Industries  
F M R Cooke QC, J Inns and E M Gattey for the  
Respondent Sajo Orang Corporation

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**CIVIL APPEAL**

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**MS HARDING:**

May it please Your Honours, counsel's name is Miss Harding. I appear with my learned friend Mr Hirschfeld for the appellants, and I would also like to introduce my assistant, Ms Joanna Ji, who has assisted us to prepare the electronic casebook and hyperlinking, and we are requesting her to be able to sit here with the electronic case book.

**ELIAS CJ:**

Yes, that's fine, no problem. Thank you, Ms Harding, Mr Hirschfield.

**MR LANGE:**

May it please the Court, Lange and Couper for the first respondent, and Mr Fletcher from the Ministry of Fisheries is also present.

**ELIAS CJ:**

Yes, thank you, Mr Lange, Mr Couper.

**MR COOKE QC**

May it please, the Court, Cooke with Ms Innes and Ms Gathey for the second respondent.

**ELIAS CJ:**

Thank you, Mr Cooke, Ms Innes, Ms Gathey.

Yes, Ms Harding.

**MS HARDING:**

May it please Your Honour, Your Honours, tēnā koutou.

I have prepared for this morning and I have given some hand-ups – I'm not expecting anyone to read it at the moment – but I have prepared my address, and I also prepared a one-page synopsis and a smaller summary that I would like to perhaps go over at the end, and I found a useful article which I have disclosed to my learned friends on the weekend which summarised some of

the cases we've all been referring to in our submissions in a way that I thought was helpful.

**ELIAS CJ:**

Ms Harding, the 20-page opening address, how does that differ from the submissions that have been filed?

**MS HARDING:**

It is what I want to say now and it –

**ELIAS CJ:**

Well, does it differ? Because I'm just wondering about your learned friends, whether they've had an opportunity to consider it?

**MS HARDING:**

It's what I'm going to be saying, I've just prepared...

**ELIAS CJ:**

Well, I think perhaps you should just address and we don't need necessarily to refer to that.

**MS HARDING:**

Yes.

**ELIAS CJ:**

But you've got a synopsis that you handed in have you, one-page synopsis?

**MS HARDING:**

Yes. It's my – I've had an opportunity to review the respondents' submissions and I'm going to make a change in emphasis on one part of section 256(4).

**ELIAS CJ:**

All right, you carry on, Ms Harding.

**MS HARDING:**

Thank you. So on behalf of the appellants I'd like to briefly set out the road map for my address this morning in which I wish to make five main points. The first is to explain the nexus between section 103 and section 256 which permits the appellants to be able to proceed with a claim over a sister ship. Secondly I wish to address section 256(4)(b)(v); originally I had addressed (i). Thirdly, I'd like to address the argument about the on and in argument and, fourthly, to address the five points raised in the Supreme Court leave to appeal judgment with the five questions. Then I wish to make a concluding submission which refers to relevant public policy matters with reference to the relevant case law with which I wish to make a legal point.

**ELIAS CJ:**

Well, all right. We have read your submissions so perhaps you only need to touch on matters that you want to emphasise and develop points that you're making.

**MS HARDING:**

Yes, I had prepared to do that, thank you, Your Honour.

So I'd just like to start with 10 minutes or so setting out the situation about the appellants, and what I say is the nexus, which connects section 103 of the Fisheries Act 1996 and section 256.

The appellants are a group of 26 Indonesian foreign fishermen who were recruited pursuant to an authority in principal issued by Immigration New Zealand. This authorised the second respondent to recruit fishers from overseas to work exclusively in New Zealand on their fleet of foreign fishing vessels collectively referred to as the Oyang vessels. The Oyang vessels were all registered to fish under section 103 of the Fisheries Act 1996, which I am referring to as "the Act". The appellants were all issued with New Zealand work permits. The material time period starts with Mr Wahyono who joined the foreign vessel *Oyang 70* on 13 December 2007. He was joined a few days later by Mr Hartono and they both left their employment on *Oyang 70* in

December 2009 prior to it sinking. The other 24 appellants work on *Oyang 77* which later became forfeited when their employment ended. In respect of the time period relating to them, Mr Akmedi was the first in time to commence employment on the 4<sup>th</sup> of May 2008 and the last man off *Oyang 77* was Mr Willy Fransiska whose last day of employment was 9 December 2011. I point that out because the material time period referred to by the first respondent isn't quite correct. So the dates of the material time period start from 13 December 2007 to 9 December 2011 which covers the employment of all 26.

The nexus linking the employment to the unpaid wages claim and their application under section 256 of the Fisheries Act seeking relief from the effects of forfeiture over *Oyang 75* is that pursuant to section 103(5)(a) of the Act the appellants were deemed to be the employees of the second respondent. Under section 103(5)(b) of the Act the second respondent was deemed to be their employer.

**ELIAS CJ:**

I'm sorry, I hadn't really appreciated the emphasis you're placing on section 103 in your written submissions.

**MS HARDING:**

Yes I'll refer to that.

**ELIAS CJ:**

Yes, all right. Which paragraph are you referring to?

**MS HARDING:**

103?

**ELIAS CJ:**

Yes.

**MS HARDING:**

Of the Fisheries Act?

**ELIAS CJ:**

No, in your written submissions.

**MS HARDING:**

I'm not reading my written submissions.

**ELIAS CJ:**

No I understand that and there's no need for you to read it so that's fine.

**MS HARDING:**

So I have prepared something to respond to my learned friend's submissions and address the issues. It's paragraph 3.4 sets out section 103(5)(a), it refers to it there. It also refers to it at paragraph 3.5.

**ELIAS CJ:**

Yes.

**MS HARDING:**

I've summarised it in a way that's going to link me to where we're going to go to deal with the issue of equitable rights.

**ELLEN FRANCE J:**

Sorry, section 103(5) has been amended, hasn't it, now so you're relying on it as it was prior to 2016?

**MS HARDING:**

Yes, thank you Your Honour, yes. All references to the Acts are related to the material time period when the employees were working. So section 103(5)(a) – can I carry on with that or would it be better if I went over the one page synopsis first to set out the plan?

**ELIAS CJ:**

Well I'm quite interested in how – because you're expanding on your references to section 103(5) to establish a nexus in rebuttal, is it, of the submissions that have been filed by the respondents?

**MS HARDING:**

Yes, the respondents talked about a lack of a nexus.

**ELIAS CJ:**

Yes.

**MS HARDING:**

But the nexus actually comes from the employment relationship and it comes from within the Fisheries Act itself. So I've revised my submission about equitable interests on reflection because I had made an argument in relation to section 256(b)(i) which sets out whether you have a legal or equitable interest and then the next subsection (2) security interest, but further down in the line is a (v) and that says, "Other interests known to the appellant," and I will be hanging my hat on that to bring this case together, and that links back to the employment relationship. Shall I carry on?

**ELIAS CJ:**

Yes.

**MS HARDING:**

The nexus linking the appellants' employment to their unpaid wages claim and their application under section 256 of the Fisheries is that pursuant to section 103(5)(a) that they were deemed to be employees, and under section 103(5)(b) the second respondent was deemed to be their employer as a matter of law.

**ELIAS CJ:**

But is there any issue at to their being employees?

**WILLIAM YOUNG J:**

I don't think there is, is there?

**MS HARDING:**

That's good, it brings the nexus together. It also set out the pay entitlements.

**ELIAS CJ:**

Well, the nexus argument really is grounded on the terms of section 256 isn't it, isn't that what you have to close on?

**MS HARDING:**

Yes, I appreciate all that. I believe I can –

**GLAZEBROOK J:**

If I understand your argument, you say the nexus comes from the fact that the second respondent is their employer and, as their employer, is obliged to pay the minimum wage, is that...

**MS HARDING:**

Yes, that's correct, and in the nub of the –

**GLAZEBROOK J:**

It's as simple as that, isn't it?

**WILLIAM YOUNG J:**

But is there any disagreement about this?

**ELIAS CJ:**

No.

**WILLIAM YOUNG J:**

I didn't think there was a dispute. I thought the whole dispute was whether they have an interest for the purposes of section 256(1) in the vessel.



**MS HARDING:**

Yes, well, I only have just started my opening.

**WILLIAM YOUNG J:**

Yes, but I mean it's quite a simple issue, but the background's quite complex, but it's not in dispute.

**MS HARDING:**

Yes, so...

**WILLIAM YOUNG J:**

I mean, we'll get lost in the thickets if you're not careful.

**MS HARDING:**

That's not my intention to do that.

Section 256...

**GLAZEBROOK J:**

And the other point is, don't we just assume for these purposes that they are owed money? We're not deciding whether they are or they aren't, we just assume they are.

**MS HARDING:**

Yes.

**GLAZEBROOK J:**

So we assume that they haven't been paid the minimum wage, they should have been paid the minimum wage and they're owed that money by the employer?

**MS HARDING:**

Yes.

**WILLIAM YOUNG J:**

And but for the forfeiture they would have statutory in rem claims in relation to their unpaid wages.

**MS HARDING:**

Yes.

**WILLIAM YOUNG J:**

So all of that sort of cuts away most of the stuff you've been talking about doesn't it?

**MS HARDING:**

Well, I was only in my introduction.

**WILLIAM YOUNG J:**

Sorry?

**ELIAS CJ:**

But you don't really need to introduce it if it's – you can cut to the chase really because we have read the submissions, Ms Harding.

**MS HARDING:**

Thank you, I appreciate that.

So we've re-evaluated our position in respect of what we had called "equitable rights". We had been pinning our hats on the fact that the appellants came to the Court with clean hands and sought equitable relief and a remedy to prevent a wrongdoer enjoying the fruits of a transgression by not paying the minimum wages and the Crown enjoying a windfall at the expense of migrant fishers being paid their minimum wages for which there's a public interest that they be paid. We've had a chance to reflect on that, so in relation to my previous argument I had referred to section 256(4)(b)(i), which starts with whether people have an equitable or legal interest. However, section 256(4), if we could look at that for a moment please, actually sets out a number of

things. So the first one was whether an interest is legal or equitable, subsection (i), subsection (ii), whether an interest is by way of security or otherwise, subsection (iii), if the interest is by way of security, what the security arrangement is, subsection (iv), whether the interest of any security is maintained on a register pursuant to statute, and (v), which is what I wish to emphasise, and I quote, “Any other interest in the property known to the applicant.” Looking at that, the reference to “other interests”, confirms there can be interest that are not proprietary interests in forfeit property, such as a vessel, for which applications can be brought under section 256(3), which includes unpaid wages.

**ELIAS CJ:**

Well, you are buying into the contentions of the respondents that an interest in “the vessel” has to be established before relief against forfeiture can be provided for unpaid wages, is that right?

**MS HARDING:**

I would not wish to make that concession at this point.

**ELIAS CJ:**

Well, your submissions seems to be being directed at establishing an interest and you're driven to “other”.

**MS HARDING:**

Yes, it seems that that's actually the path that makes sense because what Parliament has done is they have created a statutory other interest in what they've set up here.

**WILLIAM YOUNG J:**

Why are we talking – section 256(1) interest, the definition of interest and (b) is right on point, (b)(ii). If you have not got an interest under (b)(ii) –

**MS HARDING:**

Yes.

**WILLIAM YOUNG J:**

– then, I mean I think you're in trouble because that does seem to be right on point.

**MS HARDING:**

Yes, that is the interest that Parliament's created. They have created – there's three interests set out in section 256(1)(b). One, ownership, two, an interest the any fishing crew have in unpaid wages.

**WILLIAM YOUNG J:**

Yes, and that's your people.

**MS HARDING:**

Yes, so that leads us to the in and on argument which I just need time to get there if I could, and subsection (3) says, "The interests and costs incurred by a third party other than employer to provide for support and repatriation for foreign crew employed on the vessel." So Parliament has made a distinction between in wages and on the vessel.

**WILLIAM YOUNG J:**

And it's quite clear that (b)(ii) refers to statutory in rem claims against sister ships. I don't think there's any, I doubt if your friends would dispute that.

**MS HARDING:**

Good.

**WILLIAM YOUNG J:**

I mean that's true, isn't it?

**MR COOKE QC:**

Yes it certainly could cover those claims.

**WILLIAM YOUNG J:**

I'm sorry?

**MR COOKE QC:**

Yes it could do so.

**MS HARDING:**

Yes so –

**WILLIAM YOUNG J:**

Not that it does so here because proceedings hadn't been issued and that's the real point in the case.

**MR COOKE QC:**

Yes.

**MS HARDING:**

So my argument is that we did not need to commence in rem proceedings because the statute itself, section 256, provides for another interest, that other interest can be the unpaid wages in subsection (1)(b) (ii) and (iii).

**ELIAS CJ:**

Subsection (4) is simply a procedural provision really. It may be useful because it indicates the information that has to be put up but surely you just need to address the argument, well I would have thought that 1(b)(ii) means that the statute recognises an interest?

**MS HARDING:**

Yes, that's exactly what I'm trying to say. Thank you.

**GLAZEBROOK J:**

But do you need anything – I think what's being put to you is interest is defined as an interest a fishing crew may have in unpaid wages. Here they have an interest in unpaid wages, that's enough.

**MS HARDING:**

Yes.

**GLAZEBROOK J:**

It doesn't matter under that, it doesn't say you have to have issued an in rem claim and why should you have to.

**MS HARDING:**

That's my whole –

**GLAZEBROOK J:**

So the argument –

**MS HARDING:**

That's my whole argument, yes.

**WILLIAM YOUNG J:**

Well it might be better to just deal with that directly rather than approach it in a roundabout way which I think is what you are doing.

**MS HARDING:**

I had prepared...

**WILLIAM YOUNG J:**

It might get us through the rub.

**GLAZEBROOK J:**

Well the argument would be you just read the definition and the definition says they have an interest in unpaid wages. We're assuming for these purposes there are unpaid wages and there's your interest, that's the end of the case, that's the argument, isn't it?

**MS HARDING:**

So I could sit down now I suppose but, yes, that's my argument.

**ELIAS CJ:**

Well we could in fact, depending on what others think, we could in fact move to the respondents at this stage if that would – and if there isn't anything more that you want to develop.

**MS HARDING:**

The in and on argument is quite important.

**ELIAS CJ:**

Yes.

**MS HARDING:**

So I understand that Your Honours have picked that up as well, the difference in the wording, the in the wages versus on the ship.

**WILLIAM YOUNG J:**

Well I think that's apparent from our leave judgment that we'd picked that up.

**MS HARDING:**

Yes, yes, and that was also another argument addressed in the respondents' submissions. So there's quite a difference in the language that Parliament used which says to me that Parliament, if the restriction was going to be that you had to work on the vessel to claim the wages they would have said so because they clearly made a distinction between parties such as the Salvation Army. If they were going to provide support and repatriation costs for crew it was quite clear that if they were going to make a claim they'd have to have been paying for those support and repatriation costs for the people who worked on the ship.

**WILLIAM YOUNG J:**

Where in the Admiralty Act 1973 is there provision for the repatriation costs?

**MS HARDING:**

Well I looked at that and I don't believe that there is because, and that gets to my argument about other interests.

**WILLIAM YOUNG J:**

That it was, I mean I had a very quick look myself and I couldn't find it but it may be that there's a principle of admiralty law under which those two –

**MS HARDING:**

There is in the *The Madonna D'Idra* (1811) 1 Dods 37, 165 ER 1224 case in 1811 – so the Admiralty Act, if I just start there in subsection (4)(1), doesn't list anything for support and repatriation costs. The *Madonna* case –

**WILLIAM YOUNG J:**

I suppose they might be subrogated so the position, the Salvation Army looks after seamen and then repatriates them they might be subrogated to the rights of the seamen to sue and have a maritime lien but I'm not sure, but is that the law?

**MS HARDING:**

No, my review of the case law that wouldn't work, because there are other parties who voluntarily pay the people's support and repatriation costs and they weren't allowed to take over their position.

In the *Madonna* case in 1811 there were Greek ships with Greek sailors on it and they ended up in London.

**WILLIAM YOUNG J:**

Is that reported? Is that in your material?

**MS HARDING:**

Yes it's referred to in the footnotes. It's *Madonna* and the last name is D-I-D-R-A and that was referred to in the submissions hyperlinked at footnote 36 on page 7. It's a very famous case that sets out about maritime liens.



**WILLIAM YOUNG J:**

Sorry, footnote?

**GLAZEBROOK J:**

And what's the bottom line of it?

**MS HARDING:**

The bottom line with that one is they were destitute in London because a bottomry bondholder had taken action and they didn't have any money to get home and the King's proctor ended up paying their costs and then in the case the Crown sought to recover the money and the Judge ultimately decided that was sort of the part of wages because you had to subsist and then they recovered money that way otherwise the bottomry bondholder was going to get everything from the sale of the ship. But it's the only case out of the whole collection of everything that really dealt with that issue. It's a very short case, it's only a couple of pages. They had been –

**GLAZEBROOK J:**

So effectively similar to wages.

**MS HARDING:**

Well, no, I just said – the quote was he said that it was subsistence, was part of wages, because they had to eat pretty much. In that case the captain had defrauded the crew and somehow spent all the money for wages and didn't provide it to them or pay their union entitlements and other things he had to do under Greek law and he also took out this bottomry bond to another person and Lord Scott, who delivered the judgment there, said it was all a mystery trying to work out what happened in relation to everything because they all decided about Greek law in terms of wages and how to fund them and they thought it wasn't really right and just that the English Crown had to pick up the costs of sending the Greek fishermen – oh, they weren't fishermen, the Greek seafarers – back to Greece, but that's the only case that covered that issues. But there's definitely a distinction, going back to the Fisheries Act, between the on and in in the statutes.

So, well, that took us quite quick –

**GLAZEBROOK J:**

Where's the on and in, sorry? Is that just on the vessel in unpaid wages is that the...

**MS HARDING:**

The on and in argument is referring to the different words. The interests in –

**GLAZEBROOK J:**

Between (ii) and (iii) is that?

**MS HARDING:**

Yes, Your Honour. The interest in wages for the foreign fishing crew, which we say doesn't limit it to having to work on a specific vessel, because the nexus is the relationship to pay the wages and also this involved a fleet, and I would also like to point out section 28 of the Maritime Transport Act 1994 which states that the Crown should – sorry, I will just read that to you. “A member of the crew of a ship shall not by any agreement forfeit his or her lien on the ship, or be deprived of any remedy for the recovery of his or her wages,” that's the part that I wished to emphasise, “or abandon his or her right to wages in case of the loss of the ship, or abandon any right that he or she may have or obtain in the nature of salvage; and every stipulation in any agreement inconsistent with this subsection shall be void.” So in my nexus argument, which is the employment relationship, the requirement to pay the minimum wages that a fleet of vessels was involved here under the AIP to recruit the foreign crew, the work permits were issued. The work permits specified that they were allowed to work, well, they were allowed to work on the fleet of vessels exclusively for this particular employer and the Maritime Transport Act says they should not be deprived of a remedy.

I had been going to deal with the issue that if – I'm in Your Honours' hands what to do. I had prepared everything that I wanted to say but it seems that

Your Honours are quite focused and understanding what I wanted to say without me having to make a full speech. Should I carry on or do you think I should give you an opportunity to talk to the respondents about those issues?

**ELIAS CJ:**

No, I think that would be helpful, Ms Harding, we have read the material you've provided and we would like to hear from the respondents on what seems to be the critical issues, and then you can respond after that.

**MS HARDING:**

I had packed in for a bit of speech so I'll just briefly pack up.

**ELIAS CJ:**

Yes, that's all right, you unpack, and that takes a little while in this Court.

**MS HARDING:**

The other point that I wished to emphasise was about the public policy, which probably Your Honours already understand, and part of that also I wished to talk about is the consistent body of case law from the 1800s onwards. We disagree with the respondents' submission about consistency in admiralty amongst national and international countries. What is consistent, we say, is the particular protection of the law to address the power and balance from the employment relationship between seafarers and the need to protect them from themselves from abuse and to ensure the payment of wages, because commerce at sea can't take place without a trustee security for the payment of wages, which must ultimately be over a vessel, and of course the public policy is that that's important where an employer is unable or unwilling to pay the wages, and that goes back to, for example, a fleet, and a ship is lost. And also the problem here is that the remedy would be lost in relation to any kind of in rem claim over a sister ship should the crew not be able to proceed. The vessels are in Uruguay, they have been released on bond and they are fishing over there, and any claim over a sister ship would be in the Uruguay Court and any change of ownership would defeat being able to pursue a sister ship and it would have to be dealt with under the laws of Uruguay, would be very

confusing to get to the bottom of the wage claim, because the wage claim itself is calculated in quite complex ways, we have a foreign vessel with a foreign crew, so we have Korean ships with Indonesian people, New Zealand laws, even the calculations of wages are quite –

**ELIAS CJ:**

All of that's down the track though isn't it really, it's not for us now.

**MS HARDING:**

Yes. It would deprive them of a remedy, we say.

**ELIAS CJ:**

Yes.

**MS HARDING:**

Which is a fundamental flaw in the argument. The Court of Appeal also wasn't aware that those vessels weren't in New Zealand, because it didn't come up at the hearing about where those vessels were, and I have done a check in Uruguay, both of them.

**O'REGAN J:**

So if the appeal succeeds, what happens then in relation to the vessels?

**MS HARDING:**

If this appeal succeeds? I think it will be a long haul, Your Honours, to go through the process under the flow chart we prepared under section 256. And then if His Honour made a determination about that there were wages outstanding and how much wages were outstanding, then we would move on to seek orders, and we would be seeking an order under section 256(11)(c) for the vessels to be sold to create a fund to pay out the wages, and we would be asking for a direction that the Crown bring the ships back to New Zealand or make arrangements for them to be sold overseas.

**ELIAS CJ:**

Otherwise is it effectively, would your relief against forfeiture effectively be capped by the bond?

**MS HARDING:**

That would be a problem, yes, because the Crown owns these vessels so there must be a right for the Crown to instigate some proceedings to bring the vessels back, so they could bring some proceedings in Uruguay and bring them back. It would depend on the co-operation of the second respondents because technically the Crown owns those vessels now and they've had the privilege of using them and obviously making income from them from the fishing pending what it a very long Court case. If the appeal was not to succeed we would be seeking an order that the vessels be directed to come back to New Zealand, because the only way we could really facilitate in rem proceedings would be to do it here, but of course any change of ownership in the vessels defeats that problem anyway in relation to a sister ship claim. So it would be a very precarious position. But otherwise Your Honour is right, if the vessels were unable to be brought back, if they, say if they had another loss or something, then you'd be limited by the bond, which is really insufficient to pay so many people. But there are two vessels. Given that the process would be quite long to get to the issues relating to Court orders, it's probably appropriate that they're not in New Zealand collecting up Court charges and draining the cost of the ships, but as soon as we got close to it, they would really need to come back or be sold on international tender if that was allowed –

**WILLIAM YOUNG J:**

Won't you have to get relief from the Minister first?

**MS HARDING:**

No, His Honour, under subsection, section 256(7), His Honour has to consider a number of numbers, he can make an order under subsection (8) to relieve an interest in unpaid wages that's been found and established, under section 25(6)(b). Do Your Honours have the flow chart that we prepared?

I have that in my written submissions with the red tabs, and that is at appendix B, in a green tab, looks like that. I'd like to thank Ms Ji for helping me prepare this flow chart. It's the process. At the moment we're on the first box, the definitions, we haven't really made any progress on that, going up towards three years. If this appeal is allowed to proceed the next step would be in the High Court, because that proceedings have been removed there, subject to this appeal, we would deal with a section 256(3) leave application and then will present evidence about the unpaid wages, the calculations evidence, the defended trial –

**WILLIAM YOUNG J:**

Would you have to get a judgment from the Employment Relations Authority first.?

**MS HARDING:**

No. His Honour Justice Davidson would make these decisions in the High Court in this section 256 proceedings. With the previous cases decided in the High Court it was determined we did not need to go to the Employment Relations Authority or in rem to have a prior determinations of wages by another Court. His Honour would sit in the High Court and have hearings on multiple sections of section 256 so we basically have a Judge alone trial. We've already started preparing for that with all counsel in the High Court where the process we're being told to prepare memorandums about what things we can deal with, and what we can't agree with.

**WILLIAM YOUNG J:**

All right, so the Court is the High Court?

**MS HARDING:**

Yes, at Christchurch. That is because – we originally filed in the District Court because the proceedings had started in the District Court at Christchurch, when the vessels were forfeited after the hearings for the criminal proceedings. Then there were appeals to the High Court, first by the second respondents, and then by the appellants. Both of those appeals were heard

on the same day and Justice Davidson in that decision of the 18<sup>th</sup> of December 2015 concluded that there didn't need to be a prior determination in the Employment Relations Authority, the Employment Court or in the Admiralty Court High Court jurisdiction and that he would make those decisions in a hearing under section 256(6)(b). This was its own little process, its own trial, and then he would determine if there were wages outstanding, the amount of any wages outstanding. Then we would move on to look at factors under section 256(6), which is where he makes his determinations. He then has to go on and consider a number of factors under section 256(7)(a) to (k). Then he moves on to consider section 256(8), which means if he was going to order, for example, redemption, there had to be no manifest injustice, and he can make an order in respect of the appellants to satisfy the interest in unpaid wages, and then we would ask for what type or orders we wanted, which is, there's a range of orders that can be asked for under subsection (11), and we would want the one under subsection (11)(c), which would create a fund from the ship, otherwise we'd be limited to bond money. Does that help?

**WILLIAM YOUNG J:**

It does, thank you.

**MS HARDING:**

In my submission, it's a really good streamlined process for dealing with all the issues in a one-stop shop and it's quite logical how Parliament put it together, which you can see in the flowchart, it flows through quite nicely. Thank you Your Honours.

**ELIAS CJ:**

Thank you Ms Harding. Yes, Mr Lange.

**MR LANGE:**

May it please the Court. As set out in the written submissions the Ministry does not oppose the appellants being able to bring a claim from relief providing it fits within the statutory scheme, and in the Ministry's submission,

section 256 permits a person claiming an interest in forfeit property to apply for relief and, as is apparent from all the material that has been filed, there is no dispute that an interest exists where there is a maritime lien from the ship on which a person has worked, but the focus here is on the sister ship claims.

So turning to the five questions posed in the leave judgment, the Ministry's position is and has always been the *Oyang 75* and *77* are forfeit property. The appellants are fishing crew and they have a claim for unpaid wages. The fourth issue posed in the leave judgment was what in rem rights the appellants had. Leaving aside the maritime lien situation, it's the Ministry's submission that they had the ability or right to bring a sister ship claim in effect. So it's a statutory claim and again there doesn't appear any disputers to that.

So we then turn to the fifth question posed.

**ELIAS CJ:**

Are you going to develop that from the fifth question because I have a prior question about the definition and whether the definition doesn't itself constitute the interest in the forfeited property?

**MR LANGE:**

I'm probably going to develop that in the fifth question because it's whether that ability to commence a sister ship in rem claim what interest does it create.

**ELIAS CJ:**

But isn't it possible to see these two things as quite distinct, the relief against forfeiture provisions and the in rem – and they come together because there is the ability to seek relief against forfeiture if you do have an in rem interest or claim. But this is a specific definition which seems to me to constitute recognition that there is an interest in a forfeited vessel for the purposes of relief against forfeiture if there are unpaid wages. Why can't you read section 256(1)(b)(ii) like that?



**MR LANGE:**

Well, we can deal with that later, but deal with the point now. When we have a look at what the purpose was when the amendment was made it was to reflect the admiralty principles, it wasn't intended to expand them, and the issue that arises here is the ability to proceed in rem on a sister ship claim, it doesn't of itself create an interest in the vessel, and if we go through the various authorities –

**ELIAS CJ:**

Well I understand that but it's...

**MR LANGE:**

– the interest is on attachment.

**ELIAS CJ:**

I'm still hung up on the statutory language.

**WILLIAM YOUNG J:**

I mean, the whole idea, once the vessel is forfeited all interests are cancelled, aren't they?

**MR LANGE:**

Yes.

**WILLIAM YOUNG J:**

So a maritime lien claim no longer exists?

**MR LANGE:**

No.

**WILLIAM YOUNG J:**

And even indeed if procedures had been issued the maritime lien claim is gone and the same would be with the statutory in rem claim.

**MR LANGE:**

Yes.

**WILLIAM YOUNG J:**

So in that sense both the maritime lien claims and the statutory in rem claims are affected in exactly the same way by the, well, there's a wrinkle to that because the statutory in rem claim may just be suspended but leave that aside for a moment, both are effectively inoperative once forfeiture occurs.

**MR LANGE:**

Yes.

**WILLIAM YOUNG J:**

So the definition of interests is a sort of a notional definition, a definition of what might be available but for the forfeiture.

**MR LANGE:**

Sorry?

**WILLIAM YOUNG J:**

Well just, if we didn't have section 256(1), the definition of –

**MR LANGE:**

(b)(ii), yes.

**WILLIAM YOUNG J:**

– “interest” then as at the time of – once the vessel was forfeited, there are no interests in it other than those of the Crown.

**MR LANGE:**

Correct. It's taken free of all encumbrances.

**WILLIAM YOUNG J:**

All adverse interests are cancelled, or at the very least suspended.

**MR LANGE:**

So we need to have a look at what interests did the appellants have at the time of forfeiture.

**ELIAS CJ:**

Why isn't it created by the forfeiture.

**WILLIAM YOUNG J:**

Yes, is it, it's not really an abuse of language to say that a right to have a vessel seized, and a right to resort to the vessel for the satisfaction of a claim is an interest in that vessel. It may be an easily defeasible interest, defeasible by the sale of the vessel before proceedings are issued, but I would have thought that, as that of ordinary English, it's an interest.

**MR LANGE:**

So the term "interest" includes an interest in respect of?

**WILLIAM YOUNG J:**

Yes, and that's consistent with the language. There's nothing in the – it would be easy to have put in the definition of "interest" providing statutory in rem – in the case of a statutory in rem claim, proceedings have been issued, I mean that would have been a very easy thing to do and then you would have been, you know, sort of home and hosed.

**MR LANGE:**

And the issue that arises here is that Parliament hasn't used that in respect of extended definition of interest in connect with or in respect of.

**GLAZEBROOK J:**

It just defines interest though.

**ELIAS CJ:**

Yes.

**MR LANGE:**

But if, for example, we take the –

**GLAZEBROOK J:**

Well if it didn't define – I mean why did it define "interest" if it just meant a pre-existing interest, it wouldn't need to have defined "interest". Isn't the fact it has defined "interest" means it's expanding the definition of "interest" or at least creating one, recreating one which has been suspended at the most or has disappeared because of the forfeiture.

**MR LANGE:**

But in other areas the legislature has provided an extended definition of "interest" and referred to "legal or equitable interest" or –

**ELIAS CJ:**

But you need that, and then you need – because you need to protect those in rem interests but isn't this entire of itself the interest that is defined in "wages"?

**MR LANGE:**

But in other areas it's provided that extended definition where the interest not only includes the legal and equitable but any right, power in connection with the property. The example for that is in the criminal proceeds area where there is that extended definition –

**GLAZEBROOK J:**

But why do you need an extended definition when it says, "Interest means an interest in unpaid wages." Why would you, how would you extend that? It doesn't say in unpaid wages in respect of the particular forfeited ship. It just says an interest in, "An interest means an interest in unpaid wages."

**MR LANGE:**

Yes, but the Act goes on –

**GLAZEBROOK J:**

So it's not a legal or equitable interest, or any sort of interest, it just says, "An interest in unpaid wages."

**MR LANGE:**

But an interest in unpaid wages does not create an interest in the vessel.

**GLAZEBROOK J:**

But interest is defined as meaning that, whether it creates – where does it say an interest has to be an interest in the vessel, if interest means that.

**WILLIAM YOUNG J:**

Well, it probably has to have some connection with a vessel but...

**GLAZEBROOK J:**

Well it would have to have some connection with a vessel...

**ELIAS CJ:**

But it arises on the forfeiture of the vessel. Doesn't – there is no application for relief against forfeiture except in connection with the forfeiture.

**MR LANGE:**

Yes, but the manner in which section 256 has been drafted, in my submission, requires there to be an interest in the forfeit property.

**WILLIAM YOUNG J:**

Isn't it implicit that it's the interest in the vessel over which a claim could but for the forfeiture have been made? Can I just ask you a related question? Say the plaintiffs in this case had issued proceedings in the Employment Relationship Authority and obtained a judgment and just when it's about to be paid the vessels were forfeited. You'd say they're out of luck because they –

**MR LANGE:**

So they haven't commenced, so it's purely in the civil jurisdiction not in the admiralty?

**WILLIAM YOUNG J:**

Assumed they had issued proceedings in the Employment Relations Authority but had not, had as it were, taken their steer from the statute and had not issued an in rem claim against the vessels until they, because they thought that there was a genuine dispute about wages and they'd be paid. They obtain a judgment and then the vessels are forfeited, you'd say they are just out of luck, in fact, you would say that.

**MR LANGE:**

As the legislation is currently framed, yes, and it may well be legislation that is in need of amendment.

**WILLIAM YOUNG J:**

Well, might it not be just in need of a sensible construction? You see you can apply the wording to capture these claims, you don't have to read anything in. You have to perhaps treat it as implicit that the claim relates to a vessel in common ownership but beyond that nothing has to be done, it's as easy as pie.

**MR LANGE:**

The Court would have to interpret interest in as including an interest in connection with the vessel, in my submission.

**WILLIAM YOUNG J:**

But you'd have to do that anyway, wouldn't you?

**ELIAS CJ:**

In any event, it's all got to be determined by a Judge so what's the harm in it? Orders have to be made.

**MR LANGE:**

Yes.

**ELIAS CJ:**

It's only an application.

**MR LANGE:**

Yes, I agree.

**ELIAS CJ:**

Precipitated by the forfeiture. If the legislation says that the relief against forfeiture can be provided for any unpaid wages any fishing crew may have where's the real risk of an odd outcome?

**MR LANGE:**

Perhaps not so much in the wages claim but this would also equally apply to New Zealand vessels.

**WILLIAM YOUNG J:**

Sorry?

**MR LANGE:**

To New Zealand vessels. So if you had a sister ship claim, say Stark Ship Brokers wherever they are were owed money and it was a statutory claim on a New Zealand vessel this would also apply to that situation?

**ELIAS CJ:**

Why?

**MR LANGE:**

Pardon?

**WILLIAM YOUNG J:**

What would be wrong with that?

**ELIAS CJ:**

Yes, because they are treated equivalently. Foreign vessels, foreign owned New Zealand vessels or – oh, I see, foreign operated fish...

**MR LANGE:**

No, if you're dealing with a New Zealand vessel as opposed to a foreign vessel.

**ELIAS CJ:**

Oh, I see, a New Zealand vessel.

**MR LANGE:**

So it was a New Zealand under (c).

**ELIAS CJ:**

Well, it won't come under 256(1)(b) then, will it?

**MR LANGE:**

No, it would come under (c), but if the interest...

**ELIAS CJ:**

But then that's a different interest, it's a legal or equitable interest that existed at the time of the forfeiture. So your argument is really trying to make it equivalent even though the legislation is different.

**MR LANGE:**

If at the end of the day there was forfeiture and there was a potential claim it always remains open for the Crown to make ex gratia payments to people.

**WILLIAM YOUNG J:**

But that's not an ideal system, I mean particularly when there's presumably a big dispute as to whether there is any money owing at all or, if so, how much. How's that to be determined on the ex gratia basis?

**MR LANGE:**

It doesn't necessarily mean that the people in the position of the appellants in this case would be left out of pocket, they clearly do have a claim in respect of the *Oyang 77*.



**WILLIAM YOUNG J:**

Yes.

**MR LANGE:**

And the only issue arises is for the two crew members who worked on the *Oyang 70* who have to rely on the sister ship claim as do the others who rely on the –

**WILLIAM YOUNG J:**

*Oyang 75.*

**MR LANGE:**

*Oyang 75.*

**WILLIAM YOUNG J:**

Can I just ask you about item (b)(iii) of the definition? What's the status and the law of admiralty, say the Salvation Army support a destitute seaman and then repatriate them, what claim would the Salvation Army – was it by subrogation?

**MR LANGE:**

Repatriation costs were always considered as a subset of the wages claims, and one of the cases referred to by my friend –

**WILLIAM YOUNG J:**

Yes, but what would give the Salvation Army the right to claim it, subrogation, or assignment?

**MR LANGE:**

I haven't thought through the basis for that, but certainly repatriation costs were always a subset of wages.

**WILLIAM YOUNG J:**

I understand that. So that's what the seamen can recover. But (iii) assumes that a third party who assists the man has a claim. Now is that by – I mean, if

they don't have a claim for maritime lien, if the third party doesn't have a claim for maritime lien, that rather undermines your argument.

**MR LANGE:**

So does a third party...

**WILLIAM YOUNG J:**

Salvation Army pays the seamen, pays their airfares, and then goes to the Minister or the forfeiture Court and says, "We want reimbursement."

**MR LANGE:**

Yes.

**WILLIAM YOUNG J:**

Now if the Salvation Army had – so leaving aside forfeiture – the Salvation Army had said, "Oh, great, the *Oyang 75*'s in Court, let's arrest it, what claim would they have had against the *Oyang 75*? Would it be a direct claim as a third party or would it be a subrogated claim in the shoes of the seamen, or would they have no claim at all because they're just fishers?"

**MR LANGE:**

They do have a claim, because it forms part of the maritime lien, but...

**WILLIAM YOUNG J:**

Sorry?

**MR LANGE:**

Probably have – it forms part of the maritime lien, the repatriation costs.

**WILLIAM YOUNG J:**

Yes, I know, but the maritime lien is one that's available to the seamen. Is it available to someone who supports the seamen, that's the question.

**MR LANGE:**

I would have to have a look. I think the answer is yes.

**WILLIAM YOUNG J:**

Yes. It could be by subrogation.

**MR LANGE:**

Yes. And certainly in the decision of the *Westport (No4)* [1968] 2 Lloyd's Rep 559 (Admir) which my friend Mr Cooke refers to, I think there it was the subsistence and repatriation costs may have been paid by the master of the vessel, so that's a slightly different scenario because he would have a lien anyway. But I'd have to look into that further to give an answer on it.

**ELIAS CJ:**

Well, it may be of some significance, because if there is no entitlement to a lien or interest in rem in respect of repatriation costs it does look as if 256(1)(b) is uncoupled from other property interests.

**GLAZEBROOK J:**

The parliamentary material did suggest that but it may have been just saying that it happened with lack of forfeit property so I'm not entirely sure. But the parliamentary in the material did say, "Otherwise these won't be paid at all," and that was the trigger for the amendment. But they may have just been saying, "Because of the forfeiture," I don't know the answer to that.

**WILLIAM YOUNG J:**

Well, there are actually three alternatives. The third parties may just be out of luck, they may have a right by subrogation to the position of the seamen, they may take an assignment of the seamen's rights.

**MR LANGE:**

Unlikely to be the third, because generally a maritime lien is not assignable.

**WILLIAM YOUNG J:**

Sorry?

**MR LANGE:**

Not assignable, a true maritime lien, is my understanding.

**WILLIAM YOUNG J:**

Right.

**MR LANGE:**

I would have thought it was more likely to be via a subrogation-type process.

**WILLIAM YOUNG J:**

Okay.

**MR LANGE:**

The other issue I raise in my submissions is that the amendment was meant to reflect the provisions under the admiralty legislation and not improve them. And of course one of the limitations in the admiralty jurisdiction is you can bring the claim against the offending ship, the sister ship, but not both.

**WILLIAM YOUNG J:**

Well, that must have gone mustn't it?

**MR LANGE:**

Well...

**WILLIAM YOUNG J:**

How could that work under the forfeiture regime? I mean, I'm conscious of the point you're making. I'm actually rather doubtful about the validity of the distinction anyway, because it's not that obvious as a matter of merit.

**MR LANGE:**

But again –

**ELIAS CJ:**

We've got Lord Denning saying it was a "dirty compromise".

**MR LANGE:**

At the International Convention, yes.

**ELIAS CJ:**

Yes, but there's not much on it really, is there, because the Court of Appeal decision simply adopts Lord Denning.

**MR LANGE:**

Yes, so he went back and had a look at the international, no, was it 1952 international conference or convention on the matter, and referred to that issue where some European countries allowed multiple ships, England didn't and this was the compromise but it still does appear to be the law on this point.

**WILLIAM YOUNG J:**

Is there anything in the parliamentary material to suggest that the distinction between lien claims in relation to the ship worked on and statutory in rem claims was taken on board by the Select Committee?

**MR LANGE:**

The comments are brief, is the problem.

**WILLIAM YOUNG J:**

I thought they had the virtue of succinctness.

**MR LANGE:**

And I refer to at paragraph 62 of my submissions, it was simply that we believed the existing legal mechanisms under the minimum wage legislation and the Admiralty Act provide adequate means to allow foreign fishing crews to address wages disputes.

**ELIAS CJ:**

But that's so if you're thinking about whether you arrest a ship or something like that, those sort of remedies are those sort of disputes but once you've got

a forfeited ship and a regime of relief against forfeiture I don't see why those considerations matter at all including the consideration that you, you can understand why you might ask people to choose between which ship they're seeking an in rem remedy against if you're going to be tying up the fishing fleet by arresting them all until you're paid, but it seems another thing where you actually have a forfeiture so all of this is being determined within that context.

**MR LANGE:**

And equally I would have to accept it would be open for the appellants to divide their claim so some could bring a claim against the 75 and others against the 77 so the infringement of more than one vessel wouldn't be –

**ELIAS CJ:**

I can't see the policy of not allowing – I can see the policy of not having all your ships being arrested in the maritime jurisdiction but if you're simply looking at what are you going to do within, the actual forfeiture that has occurred, I can't see why you need to get them to elect, "I'll have this arrested ship but not that arrested ship."

**MR LANGE:**

Well the point you're raising is the mischief doesn't arise in that situation.

**ELIAS CJ:**

No.

**WILLIAM YOUNG J:**

Just looking, I mean when I was just looking through Mr Cooke's submissions to try and pick up your reference he said that the Admiralty Act proceeds on the assumption that statutory in rem claims are only going to be enforced by the High Court, by proceedings in the High Court and it does, I do wonder about the point I mentioned to you before, the reference to the Employment Relations Authority because that really might be taken by people in respect of the plaintiffs here or the applicants here as an indication that if they've got a

dispute, go to the Employment Relations Authority, whatever award is made will be recognised in forfeiture proceedings.

**MR LANGE:**

I think the reality of the situation is people in the position of the appellants have the ability to look at alternative means to resolve their dispute. They can ask the Employment Relations Authority to resolve it and they can quantify it and the matter, if they quantify it that can be taken into account by the relief Court or they can ask the relief Court to quantify their claim from paid wages.

**WILLIAM YOUNG J:**

Well it held on the *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) case and I don't think anyone challenged it, that the terms of the Admiralty Act were a carve-out which reserved the High Court jurisdiction over wages claims from the exclusive jurisdiction of the employment institutions. So there must be concurrent jurisdiction of the High Court and the employment institutions.

**MR LANGE:**

And equally it would be possible for an in personam claim to be brought which could be either in the District Court or High Court.

**WILLIAM YOUNG J:**

But I don't think that the Employment Relations Authority could arrest a ship, could it?

**MR LANGE:**

No. No, but it's – the Court is determining the claim for unpaid wages.

**WILLIAM YOUNG J:**

Yes, but I'm just sort of envisaging what happens if you just go along, take the statute at its face, issue proceedings in the Employment Relations Authority. On your theory of the statute you also have to issue a sort of holding proceedings in the High Court and have the ship arrested?

**MR LANGE:**

If you wish to enforce it against the ship, yes. And you'd always have to, save only if forfeiture occurs, institute proceedings in the –

**ELIAS CJ:**

Isn't the reference to the Employment Relations Authority or any Court simply an indication that there'll have to be some sort determination of the quantum of wages of owing, it's no more than that really isn't it?

**MR LANGE:**

I agree.

**ELIAS CJ:**

And it's all open and it can be done within the forfeiture application I would have thought too.

**MR LANGE:**

Yes, I agree.

**WILLIAM YOUNG J:**

Oh, yes. What I'm suggesting is that it's perhaps a pointer away from a requirement for the proceedings to be in the High Court, which is what the statutory in rem argument presupposes.

**ELIAS CJ:**

Yes.

**MR LANGE:**

Certainly my view is the wages claim can be determined by any Court which has jurisdiction to determine wages.

**WILLIAM YOUNG J:**

Yes.



**MR LANGE:**

Which could be the Employment Court, it could be the High Court, it could be the District Court.

**ELIAS CJ:**

So on that view, if the view were taken that this is all within a forfeiture context, there really is no real need for the proceedings to have been transferred into the High Court.

**MR LANGE:**

No, but it was done out of practicality in the Court of Appeal. Some issues arose...

**ELIAS CJ:**

Yes.

**MR LANGE:**

I was going to argue against it we just want the matter, well, the Ministry just want the matter heard, and it's now in train there with various management directions taking place, so, in my view –

**ELIAS CJ:**

Oh, no, I wasn't suggesting it be unwound, I was just curious as to whether there really was any need, except that it was somehow thought that the two, that the admiralty jurisdiction was invoked or connected.

**WILLIAM YOUNG J:**

It was also because of the amount, the size of the claims. Some of the claims were over 200,000.

**ELIAS CJ:**

Yes, that's right, they had to, yes.

**MR LANGE:**

And that's an argument for another day, we probably don't need to get into it now, but on one view section 256 confers authority on the District Court or the High Court and when it comes to wages reinforces that they can be determined by the ERA.

Unless there is anything further you wish to hear from counsel on, those are the submissions on behalf of the –

**ELIAS CJ:**

Thank you, Mr Lange.

**MR COOKE QC:**

So that's a one page overview of the submissions I intend to make and I apprehend from the exchange between the Court and my learned friends that we're really coming down to quite a narrow issue.

**ELIAS CJ:**

Well, and also that the issue is concerned with your very first sentence.

**MR COOKE QC:**

I appreciate that so I'm glad I've managed to write the first sentence at least it's framing the issue.

**ELIAS CJ:**

You've cut to the chase.

**MR COOKE QC:**

Yes. I do want to say though, and I will come back to this later, but I think this is one of those cases where there is a natural or orthodox interpretation of the provisions that we've got but it's one of those cases where the Court is concerned about the background circumstances and here the plight of the seafarers in question and in light of those circumstances, are sticking where there is another possible interpretation on the provisions.

**GLAZEBROOK J:**

Well, actually what I'm looking at is the natural English interpretation of that provision which says nothing whatsoever about proprietary interest. It defines an interest as being (b)(ii).

**MR COOKE QC:**

I understand the point, and I will be seeking to persuade Your Honours that there actually is the more natural interpretation that does involve a proprietary interest and I will come to that in a moment, but it may also be helpful for me to address the background and I will do that later in the submissions, because there has been parliamentary remove in this area it's a much more effective means to address the circumstances that are said to concern foreign crews on foreign vessels rather than more obliquely through a slightly artificial, I will submit, interpretation of the relief against forfeiture provisions.

But can I obviously go to the chase, cut to the chase about what this section actually means, and I would invite Your Honours to go to the section in terms of what it means because obviously we have to look at the text of the enactment in light of its purpose and what Your Honours are putting and have put to my learned friends is that the change to the definition of interest does mean that any unpaid wages is deemed to be an interest that is within the relief against forfeiture regime.

The first important thing about interpreting this provision, that before that change to the definition of interests in respect of foreign vessels the only interest that could qualify for the relief against forfeiture provisions was the ownership interest. No other interests in the property could be considered and that is presumably on the basis that these were foreign vessels and that the owner would deal with the relief against forfeiture and then the owner would have to deal with the other claims that are made against the vessel. That was seen as different from New Zealand vessels where the New Zealand parties could come to the Court and say, "Well I've got this property and the forfeiture has dealt with that, it won't interfere with that."

But in my submission, and I will come expressly to the wording, all that Parliament did when it changed that definition was agree that wages interests could be addressed as well as ownership interests in the relief against forfeiture provisions. What they did not intend to do by bringing wages interests within the regime, to say that when anyone had a wages interest they had an interest in the property. It was still a requirement to go to the law to find out whether the claim for unpaid wages led to an interest in the property and critical to that submission of course is the idea that you still have to demonstrate an interest in the property. And you can see that by working out what is it that is the operative provision in section 256 and the operative provision is 256(3). So that's any person claiming an interest, and we know it's the defined term, includes an ownership interest or a wages interest, "Any person claiming an interest in any forfeit property may within 35 working days after the date of the forfeiture or such further time as the Court may allow apply to the Court for relief from the effect of forfeiture on that interest."

So that deals with the suggestion made earlier that the interest is created by forfeiture. You have to have an interest in the –

**WILLIAM YOUNG J:**

Well, say you've got an interest and it's defeated by forfeiture, it would be thought to follow that it's an interest in the vessel that's forfeited because on your argument you'd accept that these people have an interest because they're within the definition. You deny that it is an interest in the *Oyang 75*, but park that argument for a moment. It's an interest which is adversely affected by the forfeiture so what –

**MR COOKE QC:**

I wouldn't quite put it that way round. I say the section defines what interests can be considered under 256(3), an ownership interest or a wages interest can qualify.

**WILLIAM YOUNG J:**

Yes.

**MR COOKE QC:**

But you've still got to have, that interest has got to lead to an interest in the forfeit property.

**WILLIAM YOUNG J:**

Yes, I understand that argument but they are literally within the definition of the wages interest.

**MR COOKE QC:**

They are within the definition of interest.

**WILLIAM YOUNG J:**

Okay, it is an interest which is adversely affected by the forfeiture.

**MR COOKE QC:**

But that's not what –

**WILLIAM YOUNG J:**

Yes, I know, I know, but just a step at a time, you accept that too?

**MR COOKE QC:**

I accept that it is adversely affected in the sense that the seafarers here can no longer bring their proceedings in rem.

**WILLIAM YOUNG J:**

So doesn't it sort of follow that it's an interest in the ship that has been forfeited?

**MR COOKE QC:**

No.

**WILLIAM YOUNG J:**

Can I ask you a related question? Is it wrong, and I'm sure you will say of course it's wrong, but is it wrong to regard a right to bring a statutory in rem

claim against a ship as an interest in the ship which is defeasible upon sale before commencement of proceedings?

**MR COOKE QC:**

It is wrong, and the Court said it was wrong in *Kareltrust v Wallace and Cooper Engineering (Lyttelton) Ltd* [2000] 1 NZLR 401.

**WILLIAM YOUNG J:**

In what case?

**MR COOKE QC:**

*Kareltrust*, because *Kareltrust* was a case that was similar except it was about engineers rather than seafarers. So what happened in *Kareltrust* – and I am conscious that Your Honour was the trial Judge...

**WILLIAM YOUNG J:**

I was reasonably aware of *Kareltrust*, we read it.

**MR COOKE QC:**

So what happened in *Kareltrust* is that the vessel was caught offending. It was seized. Engineers then did work on the vessel but they didn't bring their in rem proceedings and then the vessel was forfeit and the Court of Appeal said in *Kareltrust*, "Well you didn't bring proceedings in rem. You don't have any sort of right until you actually bring proceedings."

**WILLIAM YOUNG J:**

Yes I understand that but they don't actually – what they're saying was that because – the contention upheld was that Karelrybflot had transferred its interests in the vessel of *Kareltrust* with intent to defraud creditors.

**MR COOKE QC:**

That was a subsequent – yes.

**WILLIAM YOUNG J:**

Yes, and the view that the Court of Appeal didn't interfere with, didn't get to probably.

**MR COOKE QC:**

Yes, well, it got to it.

**WILLIAM YOUNG J:**

But said that it didn't matter because the statute is fraught, it only made the transaction voidable, and it was too late to, the proceedings were issued too late.

**MR COOKE QC:**

So that's why they couldn't bring in rem proceedings later when the vessel was returned because there was a transfer in ownership.

**WILLIAM YOUNG J:**

Yes and the transfer was only voidable and it hadn't been avoided before the proceedings had been issued.

**MR COOKE QC:**

But the Court of Appeal also said, "And you haven't brought proceedings before it was forfeit either and because you haven't brought –

**WILLIAM YOUNG J:**

Didn't they accept, am I wrong, didn't they accept that a statutory in rem claim would rearise once a vessel was released from forfeiture?

**MR COOKE QC:**

Yes it did say that that ability to bring that claim would revive once the vessel was returned.

**WILLIAM YOUNG J:**

I've always wondered actually, what would have happened if Wallace and Cooper had then issued further proceedings?

**MR COOKE QC:**

The problem was in that case the transfer and ownership had occurred.

**WILLIAM YOUNG J:**

Yes, let's say they avoided it.

**MR COOKE QC:**

Right.

**WILLIAM YOUNG J:**

And then issued proceedings again, it's not really addressed in the judgment. But anyway they are very narrow points and in the end not a very meritorious outcome that the fraudster got away with it.

**MR COOKE QC:**

Well, this is why I started my submission by saying actually that what's really troubling the Court here is the underlying concern about the plight of the seamen and I do want to come back to that. But can I just, I'd like to go to that decision because it reiterates the point about you don't have an interest, a statutory in rem, a right to bring proceedings in rem does not give you a right in the property. Before I go there can I just –

**WILLIAM YOUNG J:**

So is there any Judge who actually squares up to that issue?

**MR COOKE QC:**

Yes. Let's go to *Kareltrust* because it says it.

**WILLIAM YOUNG J:**

Okay.

**MR COOKE QC:**

And that's in the first respondent's bundle of authorities and behind tab 2. Just to reiterate what the facts are, what happened here was it's a, this is this, this Russian foreign vessel, it's the same one that's the subject of the select



committee inquiry later. What happens is the vessel is seized by the Ministry. Wallace and Cooper Engineering undertake works on the vessel but they don't bring any in rem proceedings to convert that right into an interest in rem in the vessels before the convictions and the vessels are forfeit and on page 413 at about line 38 we start, "No right in rem attached however to the vessels." "No right in rem attached however to the vessels in which supplies are made by Wallace and Cooper or to any other ship in Karelrybflot's fleet until a proceeding was actually brought and then only against the ships which were named as defendants in the in rem proceedings."

**WILLIAM YOUNG J:**

So what page is that?

**GLAZEBROOK J:**

It's the end of paragraph 62 on page 413.

**MR COOKE QC:**

Yes, sorry. End of paragraph 62, page 413.

**WILLIAM YOUNG J:**

Yes.

**MR COOKE QC:**

So I've just read the last lines of paragraph 62 at about line 39 saying, "No right in rem arose from the work only when you bring the proceedings." 63, "The ability to proceed in rem thus piggybacks on the proceedings in personam. It is a remedial procedure or enforcement right as does not arise until invoked and therefore when the forfeiture happened there was no proprietary interest to be extinguished by it, not even an inchoate right such as exists immediately when circumstances have occurred giving rise to a seaman's maritime lien." And then there's the reference to *The Heinrich Bjorn* (1885) 10 PD 44 describing the difference between a maritime lien where the right in the vessel arises when you do the work on the vessel, and these statutory rights to seek enforcement against property. And then after, and it

refers to the very different nature of those two different rights. And then 64, “The statutory proceedings in this case, and thus the respondents’ rights against Karelrybflot’s,” I don’t know how you pronounce that, “vessels named in those proceedings did not exist when the ships were forfeited and redeemed. The rights could never therefore have been extinguished by forfeiture.” So that’s the point I mean, that is what this Court has described as the nature of what are called the “statutory in rem rights”, the rights to bring proceedings to get rights in property.

So then you go back to the provisions of 256 and you see what the Court is referring to. So when I was in 256(3), “Any person claiming an interest in any forfeit property may apply to the Court for relief from the effect of forfeiture on that interest.” And what is the effect of forfeiture? It’s the fact that the Crown takes title absolutely and without any encumbrances, and that’s from section 255(e)(i), that’s behind tab 3 of the appellant’s interests, bundle of authorities.

And then you can go further within this provision to see that that must have been what is involved by looking at subsection (4), “Every application under (3) shall contain sufficient information to identify the interest and the property in which it is claimed and shall include a full description of the forfeit property in which the interest is claimed,” and then (b), “Full details of the interest or interest claimed, including whether the interest is legal or equitable,” I think Your Honour Justice Glazebrook put to my learned friend Ms Harding that it didn’t have to be a legal or equitable interest, this makes –

**ELIAS CJ:**

Well, there could be a legal interest pursuant to 256(1)(b)(ii).

**MR COOKE QC:**

All that is doing is describing what interests qualify, it’s not actually saying, doesn’t say, “Because there’s a claim for wages that means you meet the requirements of the section.” Because 256(1)(b)(ii) doesn’t even identify an employer, an employee, a vessel, it just describes “wages”. It could be wages in any vessel...

**WILLIAM YOUNG J:**

Can't you just construe it as a claim for wages which would support a claim against their vessel but for the forfeiture?

**MR COOKE QC:**

But that just avoids the wording of the provision.

**WILLIAM YOUNG J:**

No, but...

**GLAZEBROOK J:**

Well, where does it avoid the wording? That's what I'm having trouble with.

**MR COOKE QC:**

You've got to have an interest in the –

**GLAZEBROOK J:**

But I don't see where you get that from, that's my problem. Because the interest is the interest as defined, in unpaid wages.

**MR COOKE QC:**

You've still got to get within subsection (3) the effect of forfeiture on that interest. So there's got to be an interest –

**GLAZEBROOK J:**

Well, it gets rid of your ability to claim in rem.

**MR COOKE QC:**

I agree that after forfeiture you no longer will be able to bring proceedings, but the section is directed to the effect of forfeiture and interest that already exists, not on ones that might be brought. And that's why you have to give full details of what the interest is and whether it's legal or equitable.

**WILLIAM YOUNG J:**

Can you point to – sorry, I asked this question I think of Mr Lange. Can you point to anything in the parliamentary material to suggest that the difference between the maritime lien claims and statutory in rem claim for wages was appreciated by the legislature?

**MR COOKE QC:**

No, I can't, and I don't believe they would have been contemplating those subtleties. And it was in that case they were dealing with seafarers who would have had a true maritime lien.

**ELIAS CJ:**

Just remind me of the sequence of the amendments though. Because the definition in (1)(b)(ii) is 2002 isn't it?

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

But the balance of provisions, so subsection (3) and (4), are the earlier...

**MR COOKE QC:**

They were always there.

**ELIAS CJ:**

Yes, they were always there.

**MR COOKE QC:**

So that was there and the only problem –

**ELIAS CJ:**

Well, why did you need, on your argument why did you need 256(1)(b)(ii) if...

**MR COOKE QC:**

The section before it was amended only identified one interest qualifying under the machinery and that was an ownership interest.

**ELIAS CJ:**

Yes, that's right.

**MR COOKE QC:**

So what happened is you've got the *Udovenko* vessel situation and in that situation is brought to Parliament and Parliament said, "Actually our Acts just allows only one type of interest to qualify and that's ownership interests, we need to be able to deal with situations where you've got repatriation and wages claims so let's bring that ability," but that's all they were doing. They weren't trying to say when that Admiralty Act procedures didn't give you an interest in the property you got one by the definition of interest. It just said, "Now those types of interest qualify for consideration in the 256."

**ELIAS CJ:**

Well it might be quite important for your argument based on, in particular, subsection (3) that the interest in repatriation is not –

**MR COOKE QC:**

If you want to look for hints you can see that their change in 256(b)(iii) only relate to repatriation costs on the vessel.

**WILLIAM YOUNG J:**

Yes.

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

So they were not contemplating extending the common law statutory regime to assist the vessels.

**ELIAS CJ:**

But there is a query as to whether there is a common law statutory in rem procedure. It's a bit odd referring to it –

**WILLIAM YOUNG J:**

For third parties.

**ELIAS CJ:**

For third parties.

**MR COOKE QC:**

And the only thing I can help the Court with that is my footnote in written submissions, footnote number 33 on page 19 of our written submissions, which identify that repatriation costs are within the maritime lien.

**WILLIAM YOUNG J:**

Yes, we all agree on that.

**MR COOKE QC:**

I don't know what the answer to Your Honour Justice Young's question is about when someone else meets the costs, and I'm not sure if there are any cases.

**WILLIAM YOUNG J:**

Well the case the Ms Harding cited, the *The Madonna D'Idra*, sort of deals with it but in a way that's not helpful because the claim seems to have been brought on behalf of the seaman by the Crown.

**MR COOKE QC:**

Right.

**WILLIAM YOUNG J:**

Presumably on the basis that they advance the money and would recoup themselves from the award.

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

So that the ship basically, there's basically a complete breakdown of relations between the master of the crew in London, the crew are all Greek speaking, the Government feeds them and then sends them back to Greece. They have, in the meantime, issued proceedings in the common law Courts for wages and they have joined in the proceedings in the Court of Admiralty, effectively the Crown took over their case.

**MR COOKE QC:**

Right.

**WILLIAM YOUNG J:**

So one way or another they might be able to enforce it but I'm not aware of cases that say a third party has a maritime lien.

**MR COOKE QC:**

Yes, and I suggested on the written submissions that might arise from subrogation but I think –

**WILLIAM YOUNG J:**

Why would you need it if it's subrogation because you wouldn't need a – if their rights are by subrogation then it's unnecessary. They would just stand in the shoes of the seaman so it's enough to create the rights of a seaman.

**MR COOKE QC:**

Right, but remember what I say is happening here, what Parliament is doing and what the select committee intended it to was just ensure that there were other types of interest that could qualify for the rest of the machinery.

**WILLIAM YOUNG J:**

Well, they're looking at the *Udovenko* case and they're saying that the seamen in the situation, there has to be a remedy that deals with the position of seaman and those who assist them.

**MR COOKE QC:**

And so it's adding – your wages claim is a legitimate interest be it dealt with, and also your repatriation costs are only for the vessel.

**WILLIAM YOUNG J:**

Yes.

**MR COOKE QC:**

So it's hard to say that –

**ELIAS CJ:**

But it's still an expansion. If you're tying everything to pre-existing property interests under subsection (3) it doesn't fit the repatriation.

**MR COOKE QC:**

I think there's an ambiguity about whether the pre-existing law – certainly pre-existing law allowed repatriation costs to cover the maritime lien. There is the uncertainty about whether third parties who have met it came within the maritime lien and I accept it is arguable because of that uncertainty that Parliament was extending things here but only in respect of those repatriation costs, not in respect of sister vessels.

**ELIAS CJ:**

It undermines the strength of your argument based on subsection (3) because you have to have an extension for (4)(b)(iii), and why not a similar extension for (b)(ii)?



**MR COOKE QC:**

I don't think it's clear-cut that the law before this amendment prohibited third parties claiming under the maritime lien, so I don't think there's the dislocation that Your Honour is putting to me. But even if this was right, it's difficult to see from that argument that there was an intention by Parliament to enable sister ship claims to be qualified, because why would they have put –

**ELIAS CJ:**

What's the policy against it?

**MR COOKE QC:**

– why would they only have put on the vessel?

**ELIAS CJ:**

But what's the policy against sister ship claims under (b)(ii)?

**GLAZEBROOK J:**

Because there isn't, you say, if they have already made an in rem claim.

**MR COOKE QC:**

They get it.

**GLAZEBROOK J:**

But what's the policy behind saying that that is such an important issue here?

**MR COOKE QC:**

I mean...

**GLAZEBROOK J:**

In terms of a forfeiture?

**MR COOKE QC:**

You can argue about the policy of maritime liens and statutory liens, they are incredibly well established by case law and you can argue about whether it's fair in all cases.

**GLAZEBROOK J:**

But why when Parliament was doing this would it have – if somebody had said to it, “You realise that you don't have an interest in property unless you've actually made an in rem claim...”

**MR COOKE QC:**

An in rem claim.

**GLAZEBROOK J:**

“Oh,” they'd say, “Well absolutely we clearly have to make sure that that's the only time that we can extend this to unpaid wages.”

**MR COOKE QC:**

And my answer to that would be that when the select committee confronted the situation that arose out of this Russian vessel, it decided against significant reform in this area and to just make an adjustment that was co-existing with existing common law statutory law about liens.

**GLAZEBROOK J:**

But you say it didn't actually have in front of it, or there's nothing to indicate that it had in front of it something that said, “Well that's only if they have made an in rem claim that this will apply.”

**MR COOKE QC:**

No, and I wouldn't have thought that they would have considered all the possible implications of admiralty law in that respect. They were dealing with a much more simple question. They were dealing with a situation with this Russian crew and should there be an adjustment to the existing statute, and they said, “Yes, look, the existing admiralty law should be sufficient to deal with those cases. We're not going to do a more profound reform than that.”

And if I could just take Your Honours to the select committee report on that and that's in the appellant's bundle, tab 8.

**O'REGAN J:**

Sorry, which bundle?

**MR COOKE QC:**

The appellant's bundle of authorities.

**WILLIAM YOUNG J:**

I've been looking at Tetley. It's actually a very debatable issue whether a maritime lien can be assigned. There's certainly authority that it can't be assigned.

**MR COOKE QC:**

Right.

**WILLIAM YOUNG J:**

So that a third party who pays a seaman's wages is not subrogated to the maritime lien, a case called *The Petone* [1917] P 198.

**MR COOKE QC:**

It doesn't surprise me that there was a debate about it. The exact metes and bounds of admiralty law might have been uncertain.

And I was going to the select committee report behind tab 8, and what you see from that is a decision, and it's really on sort of the top. If you use the numbers at the top, page 5 of the select committee report or page 32 of the bottom right-hand numbers, under the heading, "Proposed course of action," a rejection of the more widespread proposals to have bonds in place that would ensure that people always paid, and at the end of that first paragraph. "We believe the existing legal mechanisms under the minimum wage legislation and Admiralty Act provide adequate means to allow foreign fishing requests to address wage disputes," and it goes on in that spirit. Just bringing across the existing field of admiralty law would be sufficient to deal with that. And again over the page, they don't think this will guarantee solution in all cases. If you look at the middle paragraph on the next page, page –

**ELIAS CJ:**

Sorry, can you just tell me again where I can find it? I've lost it.

**MR COOKE QC:**

So I'm in behind tab 8 on page 5 of that report, using the top right-hand numbers, now going over to page 6.

**ELIAS CJ:**

Yes, thank you.

**MR COOKE QC:**

In the middle of that page, "We consider it appropriate that the Court should have the opportunity to consider wages in support of repatriation costs when disposing of forfeited vessels. This will increase the likelihood of crews being able to recover their wages," not guaranteeing it, increase the likelihood, "and allow the opportunity for third parties other than the employer to recover any support and repatriation costs." So there's nothing in this that suggests this will be something that deals with all cases, a more modest reform, we bring across the Admiralty Act structure, and we know the Admiralty Act structure is not perfect in the sense that it doesn't give people a right of interest in the property always, you actually have to, if sister vessel claims, to get a right in the property you need to have brought your proceedings. And that's why in effect Messrs Wallace and Cooper missed out on any ability to get rights before the vessels were forfeit in that case and why sister vessel crew don't get a right to be considered under 256. And again I just –

**WILLIAM YOUNG J:**

Yes, but it's really an argument that's sort of, it's because of, it's just because. I mean, there's no policy other than that it's corollary of borrowing, as the statute plainly does, admiralty law concepts.

**MR COOKE QC:**

Yes, I guess it is a just because, it makes sense, but a well-developed because, if I can put it that way. There are countless old cases about these distinctions.

**WILLIAM YOUNG J:**

Well, yes, but then we do have subsection (3) where what is, at the very best, a doubtful maritime lien is recognised as the third party claims, and then we have the odd, the very general language of the definition.

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

So what should we do, what should we make of it if we think the legislature just overlooked the difference between lien claims and statutory in rem claims?

**MR COOKE QC:**

Well, it's hard to say they overlooked it because they were referring to the Admiralty Act regime. So you can't say they misfired in that sense in not turning their minds to something.

**GLAZEBROOK J:**

Well, I'm not sure actually, because what they're saying is, "We want these unpaid wages to be paid," so they didn't seem to be seeing that there was a distinction as to whether one had made an in rem claim or not because they were – because obviously it's no guarantee you're going to be paid your unpaid wages because it depends on whether there is actually anything in rem forfeited property left over, doesn't it?

**ELIAS CJ:**

Or whether a Judge orders relief against forfeiture.

**GLAZEBROOK J:**

Yes.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

Is it convenient to take the adjournment at this stage? We'll take the adjournment for 15 minutes.

**COURT ADJOURNS: 11.33 PM**

**COURT RESUMES: 11.51 AM**

**ELIAS CJ:**

Yes, Mr Cooke.

**MR COOKE QC:**

Thank you, Your Honours. Can I return to this issue of third party repatriation costs because I believe I have the answer in terms of what the position at common law was? I believe the position at common law is that you are entitled to a third party –

**O'REGAN J:**

Could you just lift the microphone up?

**MR COOKE QC:**

I'm sorry. I believe the position at common law is that you were entitled to, in effect, to be subrogated to the crew members' rights for repatriation costs, although the commentary suggests that it is appropriate to get a Court order first before you incur the costs.

**WILLIAM YOUNG J:**

Does it deal with the case of *Petone*, the commentary?

**MR COOKE QC:**

The case of what, sorry?

**WILLIAM YOUNG J:**

Of *Petone*, as in town, the *Petone*?

**MR COOKE QC:**

You've lost me, I'm afraid.

**WILLIAM YOUNG J:**

Well when I just googled it I came up with Tetley.

**MR COOKE QC:**

Right.

**WILLIAM YOUNG J:**

And a reference to it to a case decided by Mr Justice Hill called the *Petone*.

**MR COOKE QC:**

I can't give you *Petone* but I can give you *The World Star* [1987] 1 Lloyd's Rep 452 (Admir).

**WILLIAM YOUNG J:**

So how recent is that? *The Petone's* quite an old case.

**MR COOKE QC:**

*World Star* is 1986.

**WILLIAM YOUNG J:**

Okay, well, that was of a 1984 book, so it postdates it.

**MR COOKE QC:**

I've got two authorities I can draw Your Honour's attention to. One's in the bundle of authorities, one isn't I'm afraid. So in the bundle of authorities is, second respondent's bundle of authorities, that's us, behind tab 27, is

*The World Star*, and I draw Your Honours' attention really I suppose to the head note on the right-hand column on the first page of the report (4), the evidence before the Court was that the plaintiffs paid an amount on airfares and other necessary expenses, "To enable 16 members of the crew to return to Korea; that was a necessary ingredient in the process of selling the ship and the plaintiffs were entitled to recover this; as to the payment of \$10,000 in respect of wages, the crew's claim to payment of wages had not been proved; the plaintiffs had obtained an order that they were subrogated to any rights which the crew might have to claim the amount among other sums and the plaintiffs would have the same priority out of the funds of Court as might have been established on behalf of the crew."

**WILLIAM YOUNG J:**

But the plaintiffs were the charterers.

**MR COOKE QC:**

I'm not sure that the identity of the third party –

**WILLIAM YOUNG J:**

Yes, whether it makes any difference or not, yes.

**MR COOKE QC:**

And the only other thing I can read from and, I'm sorry, I don't have copies to hand up, but I'm reading from *Thomas: Maritime Liens*, and I can make available copies for the Court later if it would assist. Paragraph 4.74 of that work refers to, "A body of judicial pronouncement which clearly supports a quasi subrogatory doctrine by which following upon payment the payor stands in the shoes of the payee and therefore enjoys the same rights in rem as the discharge payee."

**ELIAS CJ:**

A quasi subrogatory...



**MR COOKE QC:**

Quasi subrogatory doctrine.

**ELIAS CJ:**

Oh dear.

**MR COOKE QC:**

I think one member of the Court observed that this case had the capacity to draw us into the thickets, I think it was, so we're in a particular branch of a particular thicket. That work goes on to say at 475, "The great bulk of authority is opposed to the notion that any quasi subrogatory doctrine exists as a right but suggests that such an advantage may only assumed by a volunteer after application has first been made to the Court."

**WILLIAM YOUNG J:**

All right, so what's that book?

**MR COOKE QC:**

It's called *Thomas on Maritime Liens*. I'll make copies of the relevant passages available, I'm sorry I don't have copies, I was – I wasn't...

**ELIAS CJ:**

Thank you.

**WILLIAM YOUNG J:**

Okay, so it probably slightly favours your friends' argument...

**MR COOKE QC:**

No...

**WILLIAM YOUNG J:**

Because if you're only entitled to, third parties are only entitled to a claim if they seek the sanction of the Court first, then that seems to be missing from the third limb of the definition of "interest".

**MR COOKE QC:**

Well, we're trying to draw quite a – I wouldn't have thought so, I would have thought that when Parliament had brought that within that process that it's bringing the Admiralty Act law to that process, and I don't think there's –

**WILLIAM YOUNG J:**

But if the admiralty law requires prior approval by the Court would you say that's been brought in too?

**MR COOKE QC:**

Arguably, yes. But you should first go to the Court so this is what we intend to do, if that's what admiralty law requires.

**WILLIAM YOUNG J:**

But even after, say – and you'd have to do that before forfeiture probably, because the Court's got no jurisdiction whilst forfeiture's happening.

**MR COOKE QC:**

Well, we really are getting to the thicket there as to timing. So I think my more general point is that there's nothing that suggests the select committee were trying to reform the existing admiralty law and...

**WILLIAM YOUNG J:**

I agree with that.

**ELIAS CJ:**

But they don't of course, if it is just a self-contained process for forfeiture.

**MR COOKE QC:**

Well, they do. I mean, one of the questions before the adjournment was, you know, what's the policy behind this? If this was intended to change the requirements that exist in admiralty law to have your in rem proceedings in the High Court first before you got a sister vessel right, if that was intended it

would also be changing priorities because it's well established in the maritime law principles that the sister vessel statutory in rem right ranks behind other –

**WILLIAM YOUNG J:**

Behind what rights?

**MR COOKE QC:**

Secured creditors for instance.

**WILLIAM YOUNG J:**

I thought it came ahead of secured creditors.

**MR COOKE QC:**

No, that's not my understanding, and that's addressed at paragraph 49 of my submissions, written submissions, that the maritime lien proper ranks first but that secured creditors rank ahead of statutory lien claimants. So in my paragraph 49 crew members –

**ELIAS CJ:**

But this is only relief really against the Crown's interests in forfeiture.

**MR COOKE QC:**

But the Crown interests in forfeiture are to take title of the vessel free and without any encumbrances. So it defeats the secured creditors' right.

**GLAZEBROOK J:**

But secured creditors get no rights under this anyway.

**MR COOKE QC:**

That's kind of my point.

**GLAZEBROOK J:**

Well, I would have thought the point goes against you. Because you say it will muck up priorities, but in fact the secured creditors lose everything under this.

**MR COOKE QC:**

Yes. The maritime lien proper ranks first.

**GLAZEBROOK J:**

Because it's a foreign owned vessel.

**MR COOKE QC:**

The maritime lien ranks first, so allowing that maritime lien to be exercised won't interfere with priorities.

**WILLIAM YOUNG J:**

But say they had issued in rem proceedings, they would undoubtedly on your argument have an interest under the statute which would rank ahead of secured creditors.

**MR COOKE QC:**

I guess that's true.

**GLAZEBROOK J:**

Yes, that was the point I was making, that was all, that secured creditors don't rank anywhere under this legislation.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

It's not a property regime perhaps...

**MR COOKE QC:**

Oh, you can't say that. I mean, this clearly is to deal with property interests, because that's what the Crown takes, free of all encumbrances, that's what relief it gets –

**ELIAS CJ:**

But it's not a pre-existing property interest.

**MR COOKE QC:**

Well, that's the argument isn't it, and I say on the natural reading of these provisions you would say that it was, and I'm just concerned that we have this underlying concern about the merits or justice of the situation that influence –

**ELIAS CJ:**

Well, do you want to address that?

**MR COOKE QC:**

I will come to that.

**ELIAS CJ:**

Well, I'm not too sure that you really need to, Mr Cooke, I'm sure that members of this Court are focused on really the point of statutory interpretation.

**MR COOKE QC:**

Right.

**ELIAS CJ:**

We are feeling for what the policy behind the statute, not the policy behind maritime law more generally is, because that's an aid to interpretation.

**MR COOKE QC:**

Well, maybe with that indication I'll spend less time on it, but I will like to just briefly address it.

Can I just go back again to 256, because there are all cases where they actually turn on the wording and not the statute, and I've already highlighted I think the parts of 256 that indicate that this is concerned with somebody who loses an interest in the property by the forfeiture, and that's particularly the operative provision 256(3), and I've identified 256(4) which you've got to identify what your interest in the property is, whether it's legal or equitable. The one provision I didn't highlight was 256(6)(b), which indicates what the

Court does when it receives an application, “The Court shall in respect of every application made under subsection (3) first determine the value of the property,” and then (b), “Determine the nature, extent and, if possible, the value of any applicant’s interest in the property.” So that is again a clear statutory indication when you look at 256(3), 256(4), 256(6), that what you require to trigger an application for relief and to get relief is an interest in the property, that interest is affected by the Crown taking title absolutely, and in the process of identifying your entitlement to relief you’ve got to identify what your interest in the property is, whether it’s legal or inequitable and how it arises, and the Court determines that for the purpose of the application for relief against forfeiture. All that the definition of interest does is indicate the possible rights that can be considered under the section, it doesn’t bestow rights –

**ELIAS CJ:**

Well, that’s the question really.

**MR COOKE QC:**

Did Parliament intend to bestow rights on people that did not have it under the common law or the statute before that point? And, with respect, if you look at 256, it’s talking about interference with existing rights in the property, and all of the statutory language indicates that, with respect, and there’s nothing in the reform that suggested that Parliament intended to give rights where none existed.

**ELLEN FRANCE J:**

So why, in terms of 256(1)(c) is there the reference to, “Existed at the time,” but in relation to (b)?

**MR COOKE QC:**

Well, I can’t give you an answer that gives a complete response to that, apart from saying that (c) is not intending to identify a different kind of, or that (b) is not establishing a different kind interest from (c), and so I rather turn that

round and say that demonstrates that what 256 is looking it is interest in the property at the time of forfeiture.

**ELIAS CJ:**

Well, (c) is not foreign vessels, et cetera, so...

**MR COOKE QC:**

Correct. I think what Her Honour Justice France was putting to me was that because (c) had referred to the interest existing at the time of forfeiture that must mean that (b) didn't have to have that.

**ELIAS CJ:**

Yes.

**ELLEN FRANCE J:**

Well, yes, I mean, that's one approach. I suppose I was thinking also in part as to what was meant by the, "As determined by the Employment Relations Authority or any Court," quite what then that was adding.

**MR COOKE QC:**

Well, I think that is simply reflecting the fact that there should be a process, you would have thought, in the Employment Relations Authority, to identify what the wage claim was, so that's an independent requirement. But that still has got to lead to the interest in property under 256(3), as formulated by (4) and (6). I think that is, with respect, the natural reading of these provisions.

**GLAZEBROOK J:**

So the natural reading that you're reading is that an interest in unpaid wages doesn't just mean an interest in unpaid wages, what it means is an interest in unpaid wages that is an interest in the forfeited property, or that was just before forfeiture an interest in the forfeited property.

**MR COOKE QC:**

Or put another way, 256(1)(b) just is a definition of the word "interest".

**ELLEN FRANCE J:**

So it sets out what interest potentially might qualify.

**MR COOKE QC:**

Qualify, yes, and then you've got to apply 256(3).

**ELLEN FRANCE J:**

And then 256(3) says –

**MR COOKE QC:**

(3) tells you what that interest is going to be, it's going to be an interest in the property which is if the Court relieves the effect of forfeiture on that interest in the property and what sort of interest in the property we're talking about, the one that is identified by subsection (4) because you've got to tell the Court what it is, it's got to be legal or equitable, for example, and (6), the Court has got to decide, well, what is the nature, extent and possible value of the application's interest in the property, those are independent. This section is not driven by a defined term, defined term just tells you what qualifies. The machinery of the section as it always operated was to deal with a situation where an interest equitable or legal in the property being forfeit meant the Crown defeated your right to that property and you had come to the Court and say, "In the circumstances we should be relieved from the effect of forfeiture on our interests." If, and there's no problem about maritime lien claimants, they have an interest in the property, it arises, as the authority says, as they work but people like suppliers of –

**ELIAS CJ:**

Sorry, under this relief against forfeiture provision where do they come in?

**MR COOKE QC:**

Who's "they", sorry?

**ELIAS CJ:**

Sorry, those who have an interest in the maritime lien.



**MR COOKE QC:**

They come within 256(3), they have an interest in the forfeit property as they worked, that's how the maritime lien operates as described in *Kareltrust* by reference to *The Heinrich Bjorn*.

**ELIAS CJ:**

But they're not within the definition. They're not within –

**MR COOKE QC:**

They were wages interest –

**ELIAS CJ:**

Oh, I see, a legal or equitable interest.

**MR COOKE QC:**

Yes, they have a legal equal interest in the property.

**ELIAS CJ:**

Yes, I see.

**MR COOKE QC:**

And there is a long list of potential claimants –

**ELIAS CJ:**

Well why does that exclude though foreign vessels, foreign owned New Zealand fishing vessels or foreign operated fish carriers?

**MR COOKE QC:**

That's for other forfeit, that's dealing with property other than the vessel. So a maritime lien arises in relation to the vessel by the crew.

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

But bearing in mind, this section used to exclude everything except the owner's interest.

**ELIAS CJ:**

Except the owner's interests, yes.

**O'REGAN J:**

Are you saying there's significance in the fact that in the later sections it doesn't just use the defined term "interest", it says, "Interest in the property," is that your point?

**MR COOKE QC:**

Yes.

**O'REGAN J:**

So you're saying that the defined term is something generic but it's then narrowed down that it has to be in the property and unless it is it doesn't –

**MR COOKE QC:**

Yes, that's right, because that's what the section was all about. The section was all about giving people relief from the fact the Crown took the property. If you had an interest in that property, you could come to the Court and say, "Hey, I had a secure creditor," et cetera. That's the whole machinery that existed in these provisions.

For foreign vessels the only qualifying interest was an ownership interest. This Russian case came out *Udovenko* and the Court said, "Well, we will let the wages interest qualify as well for these foreign vessels," but that doesn't mean they were creating a new right, a sister vessel right from crew members to obtain a right in the property when they didn't have one. It's still, the select committee makes it plain, they were bringing across the existing legal framework.

**ELIAS CJ:**

I'm sorry, I still find it a little bit difficult to fit the definition within what you say are the operative provisions if you say – because the type of interests are defined so there are only the three types of...

**MR COOKE QC:**

Interests that qualify.

**ELIAS CJ:**

Interests that qualify.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

So if you don't come within (b)(ii) but you have a maritime lien.

**MR COOKE QC:**

Well how could you have a maritime lien if you didn't come within (b)(ii)?

**ELIAS CJ:**

I see. You say they are all captured?

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

Any wages is captured by the pre-existing interests recognised either under the Admiralty Act or maritime law?

**MR COOKE QC:**

Yes. There's a confusion about the Admiralty Act because it actually covers maritime liens as well so that doesn't define the difference but the – what the section is saying is ownership interests qualify for your relief but wages interest qualify as well but you've still got to show that the wages interest

leads to an interest in the property and it's very difficult to read these provisions, especially (3) which is the operative provision. You apply to the Court for relief from the effect of forfeiture on that interest, interest in the property.

**ELIAS CJ:**

Well, I mean on one view (3) isn't really an operative provision it's a procedural provision.

**MR COOKE QC:**

I guess that's true.

**ELIAS CJ:**

So where's your –

**MR COOKE QC:**

(6) and (7) is then the operative provision.

**ELIAS CJ:**

(6), yes.

**MR COOKE QC:**

So (6)(b), the one that I was relying on earlier, you've got to determine the nature, extent and, if possible, the value of the applicant's interest in the property which earlier has to be a legal or equitable one.

**ELIAS CJ:**

Except legal or equitable is under (c) which is not in the case of foreign vessels.

**MR COOKE QC:**

No, legal or equitable is under 4(b)(i).

**ELIAS CJ:**

I see, yes.

**MR COOKE QC:**

You've got to identify the interest in the property and identify whether it's legal or equitable then the Court, under (6), determines the nature –

**ELIAS CJ:**

Yes I see.

**MR COOKE QC:**

– of the interest in the property, and then (7), having determined the matter specified in (6), having regard to the list of considerations at the end of (7), “Make an order or orders providing relief from the effect of forfeiture on any of the interest determined under (6).”

**GLAZEBROOK J:**

What if interest doesn't mean itself interest in the property, you can't say in the case of quota an interest in the quota that's recorded in the quota register but it must, but that's only defined in the interests and it still must be interest in the property. Doesn't “interest” mean interest in the property, as defined, because all of the other definitions give you an interest in the property? I mean, you can't have a dual definition for some of it but not for the rest of it.

**MR COOKE QC:**

Well that isn't quite right in (c), is it, 256(1)(c), which talks about a legal interest in the forfeit property, so it's not self-defining. Ownership by nature I suppose –

**GLAZEBROOK J:**

But that's what interest, interest means interest in the property under (c). So you can't say interest means interest in the property but under (3) it has to be interest in the property in the property. What you're saying is for (b)(ii) that interest has to be interest in the property, so interest doesn't mean interest in the property it means interest. Then you have to go on and say in the property, but in the case of (c) that defines interest in the property and you

can't go on then to say in the property, in the property. So only for two do you say interest in the property, in the property, you don't for (c).

**MR COOKE QC:**

I understand the point but, of course, you know, legislation is never beautifully drafted. We look at what the words are and what was intended in light of its purpose and I'm not just relying on one little section, there's a whole scheme of this is talking about when someone's got a proprietary interest, legal, equitable in property that is nabbed by the Crown under the forfeiture provisions. They can get relief from the effects of the forfeiture on that interest.

**WILLIAM YOUNG J:**

Mr Cooke, just looking at (a) and the definition of interest (b)(ii)...

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

If you added in the words after wages, "which, but for forfeiture, could it be enforced against that vessel," then that would make it clear that the in rem claims were within the definition.

**MR COOKE QC:**

Well, I accept that you could come up with some verbal formulation that would achieve that.

**WILLIAM YOUNG J:**

And it's at least arguable that it's implicit that it is implicit that those words are there which is a variation of the point Justice Glazebrook's just made to you and when you look at the provision...

**MR COOKE QC:**

That would be saying that Parliament did intend to give you rights that you didn't have at common law or under the Admiralty Act beforehand.

**WILLIAM YOUNG J:**

It's consistent with the end of subsection (2) that you're given a right to apply to the Court for relief from the effects of forfeiture.

**MR COOKE QC:**

Yes, well I still say that –

**WILLIAM YOUNG J:**

Okay, well this is a key issue in the case I think.

**MR COOKE QC:**

Yes it is, it is, and what we're debating is whether Parliament did have that intention in 2002 to give seafarers greater rights than the common law gave them.

**GLAZEBROOK J:**

Well they don't really have greater rights, do they, because if they hadn't been forfeiture they would have had an in rem claim.

**MR COOKE QC:**

No, they would only have had their in rem claim when they bought it.

**GLAZEBROOK J:**

No, but they would have had the right to bring in – they would have had the right to bring an in rem claim if there hadn't been forfeiture.

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

So why would Parliament, when deciding whether you should have relief, say, “No, we’ve taken away your right to reply because we’ve forfeited but, sorry, that’s just too bad.”

**MR COOKE QC:**

Well that's the existing –

**GLAZEBROOK J:**

Well it's not the existing law though, is it?

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

Well no because the existing law is that they have a right to apply against a sister ship and make an in rem claim, that's been taken away by forfeiture.

**MR COOKE QC:**

Yes. The right to do it.

**GLAZEBROOK J:**

Well the existing law doesn't take into account forfeiture, it's the forfeiture regime that takes away that right to apply. It's not that you – I accept that you don't have a right to the vessel until you make, or any interest in the vessel until you make an in rem claim.

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

But the forfeiture regime has taken away that right.

**MR COOKE QC:**

But let's –



**GLAZEBROOK J:**

It hasn't taken away an existing proprietary right, which is probably just another way of putting your point, but why would Parliament when it's giving relief against forfeiture exclude your ability to make an in rem claim because of the forfeiture?

**MR COOKE QC:**

But the same point could be made about the forfeiture provisions more generally. We're dealing with a foreign one here but let's imagine this was a domestic situation where there are all sorts of people, there's a long list of potential people who could attain in rem rights under the Admiralty Act but who haven't brought in rem proceedings before a New Zealand vessel is forfeit. They don't have a right to come to the Court for a New Zealand vessel and say, "I've got to have relief against forfeiture because my ability to bring proceedings that may result in an in rem right has been prejudiced," they don't have that right.

**GLAZEBROOK J:**

Or no, that's because there's a specific regime and presumably because they just, with a New Zealand flagged vessel have all of the rights to proceed against the owners of that vessel.

**MR COOKE QC:**

Which is why I keep on wanting to address the underlying issue here which is the concern about the situation of the foreign crew.

**WILLIAM YOUNG J:**

And that's the name of the leading statute, the Foreign Fishing Crew Wages And Repatriation Bond Bill.

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

So can I just go one further step. Why is it, as a matter of policy, right that the crew members shouldn't have a claim for their wages able to be dealt with by the forfeiture clause? What's the good reason for saying these people are stuck to their remedies in Indonesia or they should chase these boats to Paraguay, this boat to Paraguay?

**MR COOKE QC:**

Well I mean –

**WILLIAM YOUNG J:**

Is there a good reason?

**MR COOKE QC:**

The only good reason I can give is that that is how maritime law operates. They would have had to have brought their proceedings in rem beforehand. And the other thing I have to say about this –

**GLAZEBROOK J:**

You keep saying that but the maritime regime doesn't have anything to do with forfeiture. Forfeiture is something that's been engrafted on it. Under the maritime regime they kept their rights in rem.

**MR COOKE QC:**

And they do here.

**WILLIAM YOUNG J:**

Well, yes, providing your people get the boat back and they can locate it in Paraguay.

**MR COOKE QC:**

Well that's the practical issue but the reality is that this case is really about a lot of money that's sitting in a bank account. What happens with international vessels is they get arrested, there's a negotiation with the Ministry of

Fisheries. The Ministry of Fisheries get from the vessel owners an amount which they have assessed is going to be the likely amount that the vessel owners are going to have to apply when the relief for forfeiture regime gets applied and the vessels go and the vessels now are off somewhere else and the in rem rights, assuming that operates as intended, will still be in existence. The real argument is not about the applicant's interests in the vessel at all, it's just that there's a lump of money sitting in a bank account in New Zealand it's convenient to enforce against. It's really what the underlying issue is about, is the lump of money and the bank account in New Zealand because it's easier for the foreign vessel owners with New Zealand lawyers to now get at that sum of money. It's got very little to do with –

**WILLIAM YOUNG J:**

Say they are owed the wages, presumably its disputed?

**MR COOKE QC:**

We have to presume that that's – yes.

**WILLIAM YOUNG J:**

Okay, then it would be, I mean I suppose from my point of view it would be a result to be avoided that these people don't get paid the money they're owed, that's putting it rather crudely.

**MR COOKE QC:**

As I understand it, there have been two cases of foreign vessels that happened to be in these situations. The *Udovenko* was the Russian one back in 1998 and this one and there is, there had been, until the law was changed, 27 foreign vessels fishing the EEZ, all of which presumably could have claims that they are being underpaid under the New Zealand framework. We've just got a coincidence here that we happened to have these vessels arrested in two cases in New Zealand since 1996. This is a very blunt instrument to try and deal with a bigger policy issue that really arose in the first place because the New Zealand Parliament decided we don't have the vessels to fish our EEZ so we're going to let foreign vessels with foreign crews come in and fish

that EEZ, and they brought with them their practices and their cultures. It's a hard world out there and there are plenty of vessels around the world that are unpleasant working conditions.

**WILLIAM YOUNG J:**

They don't comply with the minimum wages legislation...

**MR COOKE QC:**

And there's no magic when the vessels cross the 200 mile limit, they didn't suddenly change to a different type of vessels. So that's the underlying policy which we –

**GLAZEBROOK J:**

Or they were supposed to because they signed –

**MR COOKE QC:**

I know they were supposed to.

**GLAZEBROOK J:**

They signed provisions that they would comply with New Zealand employment legislation.

**MR COOKE QC:**

I understand that but the reality was that that –

**ELIAS CJ:**

Well doesn't that simply mean that if it's not enforced here, that obligation, it won't be enforced anywhere?

**MR COOKE QC:**

Which is why in the end Parliament needed to change the regime and there was a ministerial inquiry into all of this regime as a consequence of the ministerial inquiry. What has happened is that these foreign vessels have to be brought on shore. You either have to be a New Zealand owned vessel or you have to be on demise charter which means you are under the control of a

New Zealand fishing company, and Immigration New Zealand now has requirements that the crew have to be paid into a New Zealand bank account or have to be paid in cash and Immigration New Zealand also has to make sure that the New Zealand employer has to be of good financial standing.

**ELIAS CJ:**

So we're not going to muck up the whole system if these people get an interest?

**MR COOKE QC:**

What you will be mucking up is the relief against forfeiture provisions adopting an artificial interpretation of them to deal with a bigger issue.

**GLAZEBROOK J:**

Well I don't see that we are, it just seems to me to be dealing with what the wording says. There's been a definition that's put in there and that definition has said that wages, out of all of the types of claims that could be made against a vessel are excluded.

**MR COOKE QC:**

We just go back to the debate we've had about what the wording of the legislation means, but I was really, I was itching to do it, of course, but I was responding to the questions from the Court about the underlying issue here which was about the practicality of foreign crews being able to enforce their rights.

**WILLIAM YOUNG J:**

Well we just have to accept that it is practicable because that's what the law requires, is that right?

**MR COOKE QC:**

Right, so –

**WILLIAM YOUNG J:**

We can't say, I mean it wouldn't really be a reason for construing the legislation so that they don't get paid –

**MR COOKE QC:**

In a particular way.

**WILLIAM YOUNG J:**

– because it's impractical to expect people to comply with the legislation.

**MR COOKE QC:**

And so the real question – sorry.

**ELIAS CJ:**

Sorry, well, but my question was rather directed at your in terrorem argument that this is going to have significant ramifications when if it only applies to seamen who are owed wages you say that in fact all of that is in hand anyway.

**MR COOKE QC:**

For the future. I don't think I was trying to put an in terrorem argument in that sense. All I was saying is that there is a bigger policy issue that had to be addressed by the Parliament. They decided in '96 to let the vessels in, when they reviewed the position here after the Russian vessel they only adapted a change to the law modestly. It's only been recently as a consequence of a ministerial inquiry, and I can make that report available if it's of convenience to the Court, and Your Honour Justice Young has mentioned the subsequent amending legislation after the ministerial inquiry. It changes the regime and as I understand it, we used to have about 27 foreign vessels fishing the EEZ, we're now down to 11 and the 11, one of them is New Zealand owned and the others are operated by the major fishing companies. So everything has moved on in terms, these vessels now go elsewhere in the world and the economic advantage that New Zealand saw in having the EEZ fished, because we didn't have the vessels, has gone with that but we've decided

that, you know, it's just too much for our international reputation to have vessels of this kind.

And in the meantime we've got the forfeiture provisions which have only arisen since 1996 on two occasions for these foreign vessels and all I'm saying is you shouldn't adopt an interpretation of the forfeiture provisions in light of this background concern about the ability of foreign crew to realistically enforce their claim for unpaid wages. We shouldn't artificially interpret those because of that desire. It's not really an in terrorem argument.

**ELIAS CJ:**

I just don't understand how it ever arises in the altered circumstances that you are postulating as applying now.

**MR COOKE QC:**

Well they still are, 11 foreign vessels or –

**GLAZEBROOK J:**

But what I don't understand is these have only arisen because there has been forfeiture, mostly these foreign vessels there's been no forfeiture.

**MR COOKE QC:**

Correct.

**GLAZEBROOK J:**

Presumably because they complied with their quota obligations. There's not going to be forfeiture because they've been guilty of trafficking persons or not paying proper wages, the only forfeiture comes if they've been –

**MR COOKE QC:**

Fisheries offences, yes.

**GLAZEBROOK J:**

Yes, and presumably the rest of the 27 or however many vessels have been complying, they have observers on board to make sure they are complying?

**MR COOKE QC:**

Presumably.

**GLAZEBROOK J:**

So to say it's only arisen twice is presumably because...

**MR COOKE QC:**

Everyone else is obeying.

**GLAZEBROOK J:**

Everybody else has complied with their quota obligations and the people who were owed money could have arrested those vessels presumably if they wished to or sister vessels. Either they didn't enforce their rights which they had for the minimum wage under the agreements and the New Zealand Employment Court, as I understand it, were given authority to hear wages claims, so either those people haven't done that or they were paid properly, we don't know although the ministerial inquiry would suggest that they weren't paid properly.

**MR COOKE QC:**

But my point is that that regime is regulated by its own set of principles including the ability of crew of foreign vessels to make claims in rem if they wanted to. It's got very –

**GLAZEBROOK J:**

And that was only taken away by a forfeiture regime otherwise they – or the vessel being sold off or it disappearing out of the jurisdiction.

**WILLIAM YOUNG J:**

Or sinking.



**GLAZEBROOK J:**

Or sinking or whatever.

**MR COOKE QC:**

The realities of the forfeiture regime is they don't really affect the in rem rights because what happens as a matter of practice is that the vessels immediately get released because the international UNCLOS requires them to be released on bond, and what really happened was there was an argument about the sum of money.

**WILLIAM YOUNG J:**

Yes, but once they're released on bond they can't be seized.

**GLAZEBROOK J:**

Yes, that's what one would have thought.

**WILLIAM YOUNG J:**

Under the statutory in rem procedure because they are no longer, they are owned by the Crown, they are no longer owned by the...

**MR COOKE QC:**

Yes, but once the relief against forfeiture regime gets applied where the bond is being set with an eye to what the owner will have to pay to get the total back, that's when the in rem right will be able to be re-exercised again.

So here there was no action brought by the crew in rem after the vessel is arrested before the convictions and that –

**GLAZEBROOK J:**

But that would have gone on. Say they had been, that would have gone, wouldn't it?

**MR COOKE QC:**

No.

**WILLIAM YOUNG J:**

Well it would have gone but there would have been an –

**GLAZEBROOK J:**

No, I understand that but say it weren't and there was no relief against forfeiture given.

**MR COOKE QC:**

But I accept that when you have brought proceedings, when you have complied with the Admiralty Act to get your right in the property to assist a vessel you do have a right in the property which have met the Admiralty Act requirements and that would enable you to apply for relief against forfeiture, but when you don't do that you don't have the right in the property. You've got to claim for unpaid wages but you don't have an in rem right and that's what's well established at common law and under the statute. You've got to do things to get –

**GLAZEBROOK J:**

I think we're probably just making the same points.

**MR COOKE QC:**

Yes. So we probably are going round in circles and I think I've probably got off my chest this business about the change in the law. I can make the ministerial report which I described earlier, it is 160 pages long.

**ELIAS CJ:**

I don't think it really bites, does it. I mean it's not directly relevant.

**MR COOKE QC:**

Okay.

**ELIAS CJ:**

Thank you.

**MR COOKE QC:**

I will make available that passage from –

**WILLIAM YOUNG J:**

The maritime law.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

Thomas, was it?

**WILLIAM YOUNG J:**

Thomas.

**MR COOKE QC:**

Thomas, yes, but I'm banging my head against a brick wall so unless Your Honours have any –

**ELIAS CJ:**

No, I think you've made some very good points which we will have to consider.

**MR COOKE QC:**

That's a very nice way of putting it, Your Honour. So unless there are any further questions those are my submissions.

**ELIAS CJ:**

Yes, thank you. Yes, Ms Harding, do you want to be heard in reply?

**MS HARDING:**

Yes thank you Your Honours. Parliament decided not to amend the Admiralty Act, it decided to amend the Fisheries Act. It decided as a matter of public policy that it needed to protect the issue about unpaid wages and

support and repatriation costs and to make that available to seek relief from forfeiture from.

I agree with Your Honours that the natural reading is straight forward. The interest in unpaid wages is as it said. Although the – if we have a look at section 256, there's a lot of use of the word "and" but it doesn't mean you have to have all things. In section 256(1)(b)(i) it says, "Ownership and an interest in unpaid wages (ii), and (iii) the support and repatriation costs." So there's no suggestion you'd have to have all those interests.

And in (iv) the same thing, subsection (b)(i), "Whether the interest is legal or equitable;" and (ii) "Whether the interest is by way of security; and if the interest is by way of security what the security arrangement is;" (iv) "Whether the interest is maintained on a register;" and (v) "Any other interests in the property." You wouldn't necessarily have to have all those things together at once.

So that links back to something I was talking about before in subsection (4) that interest is well covered. That the interest created here is the one under section 256(b)(ii), that it's the interests that the crew have in the wages which could be legal, it could be equitable or it could be other in (v). I'm open to it being any of those interests. They don't have a security interest registered.

The language, as we've discussed, is in the unpaid wages and Parliament created this statutory other option to seek for wages. So you could have the process under the ERA Act, the Employment Relations Act 2000, you could apply in rem but the problems with those is that a foreign company operating foreign vessels can deny jurisdiction. It would be problematic to pursue in personam or in the ERA.

So the forfeiture is a really significant thing because the Crown takes it free and clear. The legislation aims to promote the chances for the crew to be able to recover unpaid wages and that's the theme and the amendment does

talk about foreign fishers and the specific problems there is with dealing with foreign vessels, foreign companies that run these vessels and foreign fishers.

So accordingly, we submit that Parliament's intent is to facilitate the claims for fishing crew wages in relation to the nexus to the employment relationship. It would cover the sister ship because of the things that we've talked about before. They were in the class of people that had the right to bring in rem proceedings, that right to exercise, that right was taken away by the forfeiture. There is public policy that goes to the protection of seamen and the protection of wages for seamen and the protection of the Minimum Wage Act 1983 and their policy which is fundamental and in the national interest.

I also note when we were talking about the language that in section 256(1)(c) that also loops back to section 256(b)(ii) because while it says in the case of other forfeit property, a legal and equitable interest in that property and that existing at the time of forfeiture other than an interest in (b), it loops back up so you can have an interest in other forfeit property, that relates to something in (b)(ii) or (b)(iii). So you can have an interest in your unpaid wages and other forfeit property.

So I'm not sure how far, I won't take the argument too far but potentially our sister ship could be other forfeit property being other to the person or we still argue that under section 256(1)(b) property using the commission of the offence that *Oyang 75* was clearly forfeit property. It was used in an offence. It was forfeited. It then created a problem and the fishing crew have in the employment nexus that they have unpaid wages, they were denied an opportunity to be able to get their wages in a way that would enforce it over the most trusty source which is over the vessel which is the most consistent with policy that there should be something anchored over a vessel where possible and the forfeiture really takes away that right so they need relief to be able to claim that.

The rights do need a sensible construction. A sensible construction is quite simple and it is also in the name of the amending legislation. There is no

public policy harm in to facilitating the foreign crew and the employment nexus relationship to be able to have their unpaid wages paid. It does create a windfall otherwise that would be quite wrong to deny the interest.

It does not change the priorities in relation to the sister ship. How the priorities would work. If you made a claim over *Oyang 75* and you worked over *Oyang 75* being the property that was forfeited and His Honour, in the process under section 256(6)(b) found their unpaid wages and you had claimed as a worker on *Oyang 75* you would have priority over the person who didn't work on *Oyang 75* but, say, worked on *Oyang 70* that sunk, you would be next in line for the wages, which would be relevant if on the sale of the vessels the fund was small and not able to pay everyone.

**ELIAS CJ:**

How's that? Is that in term of...

**MS HARDING:**

Priority.

**ELIAS CJ:**

Well, is it? Where's that derived from? Is that just the discretion the Judge would have in granting relief?

**MS HARDING:**

My learned friend talks about priorities and the risk of changing them. How priorities –

**ELIAS CJ:**

Well he's talking about property interests.

**MS HARDING:**

Yes. Well there is priority in how you pay seamen over a sister ship. For a start, if you worked on a ship the maritime lien people have their interest first

for the pay-out then followed by other people in the list. And as you go down the list a sister ship claim fills in there.

**ELIAS CJ:**

That's in the admiralty jurisdiction. You'd say it would apply by analogy here, would you?

**MS HARDING:**

In terms of the people that – yes. I would think in terms of the –

**ELIAS CJ:**

I mean, there's nothing in the legislation here to establish any priority as between the seamen you represent according to whether they actually served on the ship.

**MS HARDING:**

It would be a factor that the presiding Judge would consider at the end when he was considering orders and how he would manage the payouts because we start looking at the costs for the sale of the ship, in relation that's the most priority, and then you prioritise down from there who else has made claims in respect of the wages or repatriation costs. In our case a person did make a claim for support and repatriation costs but his claim was denied on the decision of the 22<sup>nd</sup> of April 2015 by His Honour Judge Kellar, that was Mr Coulston, so he had made a claim. And another lady had also made a claim for interpreting costs as part of support and repatriation and her claim at the hearing we had on the 16<sup>th</sup> of April 2015 was decided that the Crown were going to pay it so it didn't have to go forward into this process.

So we did have two people making a claim under section 256(1)(b)(iii) and then the crew also came forward to make a claim under section 256(b)(i)(ii) and the owners of the property have made a claim under section 256(1)(b)(i) for ownership. So we did have all three parts of the section in play. Mr Coulston, turned out that he had been reimbursed by the Crown for the

money he spent on accommodation and food for the crew that came off the vessel.

**ELIAS CJ:**

That's all right, we don't need to know exactly what happened, I was just interested in your reference to the different priorities and wondering what source there was.

**GLAZEBROOK J:**

Actually it was, I would suggest, repatriation costs are part of the cost of sale.

**MS HARDING:**

Yes, that's true. In *The Madonna* case in 1811 that's how that decision was dealt with as well. It came in with the maritime lien before they went to deal with the bottomry bond issue.

But in terms of priority for *The "Leoborg"* (No2) [1964] 1 Lloyds Rep 380 (Admir), it just talked about how you would pay out the seamen. In our case there were fishermen that hadn't been paid from *Oyang 75* but their claims were resolved by the second respondents, prior to forfeiture or after forfeiture, it came up at the Court of Appeal hearing that they had resolved those issues so they didn't make a claim for relief against forfeiture. So if they had, if you worked on the ship you were probably a high priority then if you were on the ship that sunk. So in my submission –

**GLAZEBROOK J:**

Where would the work on the ship come in in terms of relief against forfeiture?

**MS HARDING:**

Sorry, I didn't quite hear the question, Your Honour.

**GLAZEBROOK J:**

So people – oh, you mean worked as crew members or worked in another capacity?



**MS HARDING:**

I was just trying to make the point that there's no need to worry that this legislation would be changing how the priorities get paid out in a claim, it still takes basically the general flow in the Admiralty Act in terms of wages. Those who worked on the ship –

**GLAZEBROOK J:**

Well I think though the priority was made more generally in terms of secured creditors but as secured creditors don't get a look in –

**MS HARDING:**

That's right.

**GLAZEBROOK J:**

– for foreign fishing vessels it probably makes no difference which I think was...

**MS HARDING:**

I didn't mean to take you down a rabbit hole, that was just, that was my point that we wouldn't be upsetting admiralty law and all the centuries of jurisprudence about those kind of things because this law targets a specific problem. It targets the specific New Zealand problem we had with foreign fishing vessels, the specific problem we have with unpaid wages and the problem that arises on forfeiture where they cannot get practically paid over the vessel and this legislation provides this solution for that to deal with the New Zealand problem so it is not exported off shore to chase a vessel which would be inappropriate and against our public policy to deal with these issues that are raised in New Zealand. And there is that consistent public policy, as we have said, of protecting the seafarers and their case about wages and it remains centrally relevant to this legislation and was in Parliament's mind when they made the changes to the law.

Thank you Your Honours.

**ELIAS CJ:**

Yes, thank you Ms Harding. Thank you counsel for your assistance. We will reserve our decision in this matter.

**COURT ADJOURNS: 12.45 PM**