IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2017
[2018] NZSC 17

BETWEEN	RUDI HARTONO AND OTHERS Appellants
AND	MINISTRY FOR PRIMARY INDUSTRIES First Respondent
	SAJO OYANG CORPORATION Second Respondent

Hearing:	14 November 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	K K Harding and C B Hirschfeld for Appellants C J Lange and E J Couper for First Respondent F M R Cooke QC, J Inns and E M Gattey for Second Respondent
Judgment:	2 March 2018

JUDGMENT OF THE COURT

A **The appeal is allowed, the judgment of the Court of Appeal is set aside (save as to the direction that the proceedings be transferred to the High Court) and the judgment of the High Court is reinstated.**

B **The respondents are jointly and severally liable to pay the appellants costs of $25,000 together with reasonable disbursements to be fixed by the Registrar if necessary. We allow for second counsel.**

C **The appellants are entitled to costs in the Court of Appeal to be fixed by that Court.**

D **All issues as to costs in respect of the District Court and High Court are to be determined in the High Court.**

REASONS
(Given by William Young J)

Table of Contents

The appeal

[1] Sajo Oyang Corporation (Sajo Oyang) of South Korea owned and operated the fishing vessels Oyang 70, Oyang 75 and Oyang 77. These vessels fished in New Zealand's exclusive economic zone under charter to a New Zealand company, Southern Storm Fishing (2007) Ltd. This venture turned out badly: the Oyang 70 sank on 18 August 2010; the Oyang 75 and the Oyang 77 were later forfeited to the Crown (as a result of convictions for offences against the Fisheries Act 1996 committed by their masters and officers); and Southern Storm Fishing is insolvent.

[2] The forfeiture regime under the Fisheries Act provides for relief to be sought by those who establish an "interest", as defined by s 256 of that Act, in forfeited property.[1] That section provides:

> **256 Provisions relating to forfeit property**
>
> (1) In this section, unless the context otherwise requires,—
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> **forfeit property** means any—
>
> (a) fish and any proceeds from the sale of such fish; or
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> (b) property used in the commission of the offence; or

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1 Fisheries Act 1996, s 256(3).

(c) quota—

forfeit to the Crown under any of sections 255A to 255D

interest *means*,—

(a) in the case of quota, an interest in the quota that is recorded on the Quota Register at the time of the forfeiture:

(b) *in the case of a foreign vessel*, a foreign-owned New Zealand fishing vessel, or a foreign-operated fish carrier,—

(i) ownership; and

(ii) *an interest, as determined by the Employment Relations Authority or any court, that any fishing crew have in unpaid wages*; and

(iii) an interest in costs incurred by a third party (other than the employer) to provide for the support and repatriation of foreign crew employed on the vessel:

(c) in the case of other forfeit property, a legal or equitable interest in that forfeit property that existed at the time of the forfeiture; but does not include any interest (other than an interest referred to in paragraph (b)) in a foreign vessel, a foreign-owned New Zealand fishing vessel, or a foreign-operated fish carrier.

…

(emphasis added)

Sub-paragraphs (b)(ii) and (iii) were inserted into s 256 in 2002.[2]

[3] Applications for relief in respect of the forfeiture of the Oyang 75 and Oyang 77 have been filed in the District Court by:

(a) Sajo Oyang in reliance on its ownership interests; and

(b) 26 crew members, 24 of whom were crew of Oyang 77 and two of whom had worked only on the Oyang 70.[3] They claim interests in the Oyang 75 and Oyang 77 in respect of unpaid wages.

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2 Fisheries (Foreign Fishing Crew) Amendment Act 2002, s 3(1).

3 One of the 24 crew members who worked on the Oyang 77 would appear also to have worked on the Oyang 70.

[4] The claims by the crew members are in part resisted by Sajo Oyang and the Ministry for Primary Industries. Their position is that unpaid wages constitute an "interest" for the purposes of s 256 only if, at the time of forfeiture, the claim constituted an extant interest in the vessel in the form of a maritime lien or a statutory claim in rem in respect of which proceedings had been issued. They accept that the 24 crew members who worked on Oyang 77 have an interest in that vessel in respect of any unpaid wages earned on that ship; this because immediately before forfeiture such unpaid wages gave rise to a maritime lien. They resist the claims in respect of vessels on which the wages were not earned ("the other vessel claims") on the basis that:

(a) such claims do not give rise to maritime liens;

(b) although sister ship claims – that is claims against vessels in common ownership with the vessel on which wages were earned – are provided for by s 5(2) of the Admiralty Act 1973 as statutory claims in rem, such claims give rise to an interest in the vessel only once proceedings are issued; and

(c) no such proceedings had been commenced before forfeiture.

[5] The case thus comes down to whether sub-para (b)(ii) of the definition in s 256(1):

(a) encompasses only a claim for wages which, prior to forfeiture, was supported by a proprietary interest in the form of either a maritime lien or a statutory in rem claim where proceedings had been issued; or

(b) proceeds on the basis that claims for wages which are within the language of sub-para (b)(ii) are an interest, irrespective of whether they gave rise to a maritime lien or proceedings in rem had been commenced before forfeiture.

[6] The other vessel claims of the crew members were dismissed by Judge Kellar on what was, in effect, a preliminary question.[4] That decision was reversed on appeal by Nicholas Davidson J,[5] but Judge Kellar's decision was reinstated by the Court of Appeal which concluded that the claims for wages constituted interests for the purposes of s 256(1) only if either the wages were earned on the vessel in question or if proceedings in rem had been commenced before forfeiture.[6]

[7] The interpretation advanced by Sajo Oyang and the Ministry depends upon the premise that the operation of sub-para (b)(ii) of the definition is controlled by the admiralty rules applicable to claims for wages. This argument is advanced, at least in part, on the basis that para (b) should be read alongside para (c) of the definition and thus as extending only to claims which, at the time of forfeiture, constituted a "legal or equitable interest" in the vessel. This means that it will be necessary to address the principles of admiralty law on which Sajo Oyang and the Ministry rely. It will also be necessary to address whether there are principles of admiralty law which correspond to sub-para (b)(iii) of the definition.

[8] Against that background we will, in the succeeding sections of these reasons, discuss:

(a) the approaches taken in the Courts below;

(b) the Fisheries Act forfeiture regime;

(c) the relevant principles of admiralty law;

(d) the legislative history of the current definition of "interest"; and

(e) our interpretation of s 256.

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4 *Sajo Oyang Corp of Korea v Ministry for Primary Industries* [2015] NZDC 13876 [DC judgment].
5 *Hartono v Ministry for Primary Industries* [2015] NZHC 3307 [HC judgment].
6 *Sajo Oyang Corp v Ministry for Primary Industries* [2017] NZCA 182, [2017] NZAR 611 (French, Cooper and Winkelmann JJ) [CA judgment].

The litigation in the Courts below

[9] The primary argument advanced on behalf of the crew members in the Courts below turned on a circuitous approach to the definition of "interest" and "forfeit property". For reasons which will become apparent, there is no need to engage with this argument. A contention that the other vessel claims of the crew members were within the language of sub-para (b)(ii) of the definition was thus not at the forefront of the arguments advanced on their behalf. It was however addressed in passing and was dismissed on the basis that, as the crew members had not commenced in rem proceedings before forfeiture, their rights were not within the definition of "interest".[7]

[10] In the District Court and High Court, Sajo Oyang argued that before crew members could establish an interest in property, they must have had their claim to unpaid wages conclusively determined by the Employment Relations Authority or any court. The alternative approach, which found favour with the District Court and the High Court, is that the court hearing the relief application can itself determine, in the context of the forfeiture proceedings, the validity and extent of the wages claims.[8] This conclusion was not challenged in the Court of Appeal and we see no reason to revisit it.

[11] Because the amounts claimed for unpaid wages exceed the jurisdiction of the District Court, they were transferred by the Court of Appeal to the High Court.

The Fisheries Act forfeiture regime

[12] Article 73 of the United Nations Convention on the Law of the Sea provides:[9]

> *Enforcement of laws and regulations of the coastal State*
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> 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure

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7 See DC judgment, above n 4, at [17]; and CA judgment, above n 6, at [40]–[46].

8 *Sajo Oyang Corp of Korea v Ministry for Primary Industries* [2015] NZDC 6726 (Judge Kellar) at [47]; and HC judgment, above n 5, at [55]–[56].

9 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

…

[13] Before the Fisheries Act 1996 came into effect, fishing in New Zealand's exclusive economic zone was controlled by the Territorial Sea and Exclusive Economic Zone Act 1977 which contained procedures for seizure, detention and forfeiture of foreign fishing craft.[10] The Act also provided for the release against security of vessels which had been seized.[11] There was no provision for relief against forfeiture.

[14] The activities of foreign fishing vessels in the exclusive economic zone are now regulated by the Fisheries Act. For certain offending under the Fisheries Act, ss 255–255E provide for forfeiture of, inter alia, property used in the commission of the offence, which includes vessels. Section 255E provides:

255E General provisions relating to forfeiture

(1) If any property, fish, aquatic life, seaweed, or quota is forfeited to the Crown under this Act, such property, fish, aquatic life, seaweed, or quota, despite section 168, vests in the Crown absolutely and free of all encumbrances.

…

[15] A vessel, including a foreign fishing vessel, is subject to seizure under s 207(1) where a fisheries officer believes on reasonable grounds that the vessel has been used in the commission of an offence against the Act. Release of vessels on bond was provided for initially under s 208 of the Act but is now addressed under the general provisions of sub-pt 6 of pt 4 of the Search and Surveillance Act 2012. We were told that the Oyang 75 and Oyang 77 have both been released under bond and are no longer in New Zealand waters.

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10 Territorial Sea and Exclusive Economic Zone Act 1977, s 24.

11 Section 25.

[16] Section 256 addresses what happens to forfeit property. Under the procedure provided, the chief executive of the Ministry for Primary Industries must publicly notify details of the forfeit property and of the right to apply for relief.[12] Any person claiming an "interest" (as defined) may apply to the court for "relief from the effect of forfeiture on that interest".[13] Any application must provide the information stipulated in s 256(4). In the ordinary course of events, all applications will be heard at the same time.[14]

[17] Section 256(6) provides:

> The court shall, in respect of every application made under subsection (3),—
>
> (a) determine the value of the forfeit property, being the amount the property would realise if sold at public auction in New Zealand; and
>
> (b) determine the nature, extent, and, if possible, the value of any applicant's interest in the property; and
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> (c) *[Repealed]*
>
> (d) determine the cost to the Ministry of the prosecution of the offence which resulted in the forfeiture, and the seizure, holding, and anticipated cost of disposal of the forfeit property, including the court proceedings in respect of that seizure, holding, and disposal.

[18] Section 256(7) authorises the court to make orders providing for relief from the effect of forfeiture on any interest determined under s 256(6). In doing so, the court is to have regard to a number of matters including the position of the pre-forfeiture owner.

[19] By reason of s 256(8), no order may be made under s 256(7) unless:

> … it is necessary to avoid manifest injustice or to satisfy an interest referred to in paragraph (b)(ii) or (iii) of the definition of interest in subsection (1).

[20] Section 256(11) provides:

> Without limiting subsection (7), any order under that subsection may order 1 or more of the following:
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> (a) the retention of the forfeit property by the Crown:

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12 Fisheries Act, s 256(2).
13 Section 256(3).
14 Section 256(5).

(b) the return of some or all of the forfeit property to the owner at the time of forfeiture, with or without the prior payment to the Crown of a sum of money:

(c) the sale of some or all of the forfeit property, with directions as to the manner of sale and dispersal of proceeds:

(d) the delivery of some or all of the forfeit property to a person with an interest in the property, with or without directions as to payment of a sum of money to specified persons (including the Crown) prior to such delivery:

(e) the reinstatement (notwithstanding the forfeiture) of any interest that was forfeit or cancelled as a result of a forfeiture.

[21] Under s 256 as first enacted, "interest" in property other than quota was defined in this way:

> … a legal or equitable interest in that forfeit property that existed at the time of the forfeiture; but does not include any interest (other than ownership) in any foreign vessel or foreign-owned New Zealand fishing vessel or a foreign-operated fish carrier.

[22] Thus, in the case of a foreign vessel, ownership was the only interest recognised. This meant that the maritime lien of the crew of such a vessel in respect of unpaid wages was not recognised for the purposes of relief against forfeiture. It was against this legislative background that the 2002 amendments were enacted.

The relevant principles of admiralty law

[23] Admiralty law has always recognised that those who work on a vessel have a maritime lien over that vessel in respect of unpaid wages. Certain other claims (for instance in respect of damages resulting from a collision) also give rise to maritime liens, but only in relation to the vessel directly involved in the events giving rise to the claim. Because the expression is sometimes used in the cases, we will refer to that vessel as "the offending ship", albeit that this is not entirely apt in a wages claim.[15]

[24] Section 4(1) of the Admiralty Act confers admiralty jurisdiction in respect of, amongst other things:

…

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[15] For background on maritime liens, see *Laws of New Zealand* Maritime Law: Admiralty (online ed) at [26]–[40].

(o) any claim by a master or member of the crew of a ship for wages, and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under any of the provisions of the Maritime Transport Act 1994, is recoverable as wages or in the court and in the manner in which wages may be recovered:

…

[25] Section 5 provides:

5 Actions *in rem*

(1) In any case in which there is a maritime lien or other charge on any ship, aircraft, or other property for the amount claimed, the admiralty jurisdiction of the High Court may be invoked by an action *in rem* against that ship, aircraft, or property.

(2) In addition to the rights conferred by subsection (1), the admiralty jurisdiction of the High Court may be invoked by an action *in rem* in respect of all questions and claims specified in subsection (1) of section 4:

provided that—

…

(b) in questions and claims specified in paragraphs (d) to (r) of subsection (1) of section 4 arising in connection with a ship where the person who would be liable on the claim in an action *in personam* was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the jurisdiction of the High Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action *in rem* against—

(i) that ship if, at the time when the action is brought, it is beneficially owned as respects all the shares therein by, or is on charter by demise to, that person; or

(ii) any other ship which, at the time when the action is brought, is beneficially owned or on charter by demise as aforesaid.

…

The statutory in rem claims recognised by s 5(2) of the Admiralty Act have their origin in the Administration of Justice Act 1956 (UK)[16] which reflected the 1952 International Convention Relating to the Arrest of Seagoing Ships.[17]

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16 Administration of Justice Act 1956 (UK) 4 & 5 Eliz II c 46.

17 International Convention Relating to the Arrest of Seagoing Ships 439 UNTS 193 (opened for signature 10 May 1952, entered into force 24 February 1956). For the background to all of this

[26] "Maritime lien" is defined in s 2 of the Admiralty Act in this way:

> ***maritime lien,*** without derogating from the generality of the term, includes a lien in respect of bottomry, respondentia, salvage of property, seamen's wages, and damage

This non-exclusive definition effectively incorporates the existing law as to what claims give rise to maritime liens and s 5(1) plainly proceeds on the same basis.[18] Since a wages claim gives rise to a maritime lien in respect only of the offending vessel, claims in rem against sister ships can be brought only under s 5(2) and are thus necessarily subject to limits expressed in that subsection.[19] It follows that a sister ship claim will be defeated if there is a change in beneficial ownership after the cause of action arises but before the proceedings are issued. This is illustrated by the decision of the Court of Appeal in *Kareltrust v Wallace and Cooper Engineering (Lyttelton) Ltd*.[20]

[27] When the operator of a vessel is financially distressed, there is sometimes a practical necessity for third parties to pay the wages (including repatriation costs) of the crew members. This tends to occur in two situations:

(a) the vessel has not been arrested but wages are paid by a third party, usually to avoid the arrest of the ship at the suit of the crew; and

(b) when a vessel has been arrested, those charged with its control and/or sale sometimes pay unpaid wages and repatriation costs given that the crew members would otherwise either issue in rem proceedings themselves or perhaps occupy the vessel and refuse to leave until paid.

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see *The Banco* [1971] P 145 (CA).

18 The types of claims which are recognised as maritime liens in New Zealand are set out in Bevan Marten *Maritime Law in New Zealand* (Thomson Reuters, Wellington, 2016) at 242–243.

19 See William Tetley *Maritime Liens and Claims* (2nd ed, International Shipping Publications, Montreal, 1998) at 1032.

20 *Kareltrust v Wallace and Cooper Engineering (Lyttelton) Ltd* [2000] 1 NZLR 401 (CA) [*Kareltrust* (CA)].

There are a number of cases in which those who have made such payments have sought to claim the benefit of the maritime liens to which the crew members had been entitled in respect of their wages.[21]

[28] Those who make such payments do not thereby derive a direct entitlement to a maritime lien. This is because the recognised maritime lien categories are not engaged. Such payments may in some circumstances give rise to a claim recognised by ss 4 and 5 of the Admiralty Act (for instance under s 4(1)(p) which encompasses any "claim by a master, shipper, charterer, or agent in respect of disbursements made on account of a ship"). There is, however, no general entitlement to recover such payments. As well, the authorities are generally to the effect that those who make such payments are not subrogated to any maritime liens which the recipients may have had[22] and that there is no right to assign maritime lien claims,[23] albeit that there is some controversy as to these points.[24] A person who contemplates making such payments in respect of a ship that has been arrested may apply to the court to sanction the payments and, upon such sanction being given and the payments being made, the payer is entitled to reimbursement from the proceeds of the sale of the ship.[25]

[29] As we will explain, sub-para (b)(iii) of the definition of "interest" is addressed to the position of those who, for reasons of charity, have supported foreign crew members stranded in New Zealand as result of the arrest or forfeiture of a vessel. We

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21 For example, see: *The Cornelia Henrietta* (1866) LR 1 A & E 51 (Admir); *The St Lawrence* (1880) 5 PD 250 (PDA); *Clark v Bowring & Co* 1908 Sess Cas 1168 (1 Div); and *The Petone* [1917] P 198 (PDA).

22 The leading authority is *The Petone*, above n 21, in which there was a full review of the authorities by Hill J. There are earlier cases to the contrary, see for instance: *The Tagus* [1903] P 44 (PDA) at 54 where Phillimore J observed, but without citing authority on the point, "that the man who has paid off the privileged claimant stands in the shoes of the privileged claimant" and has a lien accordingly. To the same general effect is the judgment of the Court of Session in *Clark v Bowring & Co*, above n 21. *The Petone* was doubted and restrictively distinguished in *Rhind v The Zita* [1924] NZLR 369 (SC) but it is generally seen as stating the law correctly – see for instance: *The Leoborg (No 2)* [1964] 1 Lloyd's Rep 380 (PDA) at 383 per Hewson J; *ABC Shipbrokers v The ship "Offi Gloria"* [1993] 3 NZLR 576 (HC) at 581 per Holland J; *The Sparti* [2000] 2 Lloyd's Rep 618 (HKCFI) at 622–623 per Waung J; and *The ship "Hako Endeavour" v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21, (2013) 211 FCR 369.

23 *The Sparti,* above n 22.

24 See for instance: DR Thomas *British Shipping Laws: Volume 14 – Maritime Liens* (Stevens & Sons, London, 1980) at [474]–[476]; and William Tetley *International Maritime and Admiralty Law* (Éditions Yvon Blais, Quebec, 2002) at 506.

25 The practice was stated by Dr Lushington in *The Cornelia Henrietta,* above n 21, at 52 where retrospective sanction was given but on the basis that in the future parties inclined to make such payments without prior sanction "will do it at their peril".

are not aware of any cases in which those who have provided such support have claimed against the vessels on which the crew members worked. As is apparent from what we have just said, such a claim would face difficulties.

[30] Amongst the issues addressed in the *Kareltrust* case was the effect of forfeiture on statutory in rem claims relating to work carried out on vessels prior to forfeiture.[26] In that case, proceedings were not issued until after the vessels were released and thus were not extant at the time of forfeiture. The vessels were subsequently released by the Minister to their previous owner, Karelrybflot. The Court of Appeal concluded that, in those circumstances, the right to claim in rem rights revived upon the owner regaining title to the vessels:

> **[53]** On our reading of s 107C(2), then, the release of a vessel restores ownership to the owner at the time of forfeiture. The *status quo ante* resumes. The mortgages, claims and other interests are likewise restored. It would be extraordinary if they were not. It would create a considerable anomaly, not to say unfairness and hardship, if an owner could pay the Crown a perhaps modest "redemption fee" and thereby obtain release of an unencumbered vessel. The personal debts would remain but the owner would be in a position to sell the vessel without accounting to the creditors.
>
> …
>
> **[61]** The conclusion reached in the preceding section of this judgment is that, like a mortgage over the vessel, statutory claims *in rem* also revive upon a release from forfeiture. So, where a proceeding has been brought prior to forfeiture invoking the *in rem* jurisdiction, although the Crown took the vessel freed from the rights of the claimant in relation to the vessel, the *in rem* claim could be pursued once there was a redemption. The claims of Wallace and Cooper against the vessels could therefore be asserted after the release.

[31] The Court then commented on the nature of a statutory in rem claim where proceedings have not been issued:

> **[62]** But, even if that had not been the case, we are of the view that the respondents would have been in a position to assert their statutory *in rem* claims after the release so long as the vessels remained in the beneficial ownership of Karelrybflot. This is because the respondents' claims had not been made, by invoking the s 5(2) jurisdiction, when the forfeiture occurred. The respondents had at that time an ability or right to proceed *in rem* under s 5(2)(b) against any ship owned by the person against whom they had the right to bring an *in personam* proceeding under s 4, namely Karelrybflot. No right *in rem* attached, however, to the vessels to which supplies were made by

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[26] *Wallace and Cooper Engineering Ltd v Orlovka* HC Christchurch AD 93-99/98, 19 July 1999; *Wallace and Cooper Engineering Ltd v Orlovka (No 3)* HC Christchurch AD 93-99/98, 20 August 1999; and *Kareltrust* (CA), above n 20.

> 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.
>
> **[63]** The ability to proceed *in rem* thus piggybacks upon the proceeding *in personam*. It is a remedial procedure or enforcement right; it 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. …
>
> **[64]** The statutory proceedings in this case, and thus the respondents' rights against Karelrybflot's 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.
>
> **[65]** Mr David said that if the Court were to take this view it would produce the questionable result that a forfeiture would destroy the claim against the ship of a mortgagee (and, he would argue, of someone with a maritime lien) and it would also destroy the interest of someone who had already taken advantage of s 5(2) and brought a statutory *in rem* proceeding. All of them would have existing rights which they would lose on forfeiture. Yet a claimant who had before that time neglected to assert an *in rem* claim would not. We can see the force of this argument – and it reinforces our view that the statutory provision for a release was intended to revive all such interests – but it must fail because of the nature of the unutilised right to bring a claim *in rem*. As has been observed, it cannot even qualify for the description of an inchoate right, which can be given to a maritime lien.

[32] The general tenor of the judgment is that forfeiture of a vessel suspends any rights in relation to the vessel, including maritime liens and statutory in rem claims (whether the subject of existing proceedings or not) and such claims are permanently extinguished if the vessel is disposed of by the Crown to a third party. If, however, the vessel is released to the owner, any pre-existing claims are revived. We say "general tenor" because the Court did not conclude that maritime lien claims revive, but that plainly was the view that the Court preferred.

[33] The primary relevance of the *Kareltrust* case is that it forms part of the background to the enactment of the 2002 amendments to which we now turn.

The legislative history of the 2002 amendment

[34] The 2002 amendment[27] to s 256 was a response to a particular set of problems with the crew of the fishing vessels involved in the *Kareltrust* case – problems which

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[27] The 2002 amendment was effected by the Fisheries (Foreign Fishing Crew) Amendment Act 2002.

gave rise to separate proceedings which were between the crew and Karelrybflot.[28] We will refer to this as the *Karelrybflot* case. The Karelrybflot vessels had been operated by a New Zealand company. This company became insolvent and when the vessels were forfeited under the Fisheries Act 1983, the crew were left unpaid and stranded in New Zealand unless prepared to accept the terms on which Karelrybflot was willing to repatriate them to Russia. Their claims for unpaid wages were upheld in the High Court and in the Court of Appeal albeit that the amounts awarded to them in the High Court were reduced on appeal.

[35] For the purposes of what follows, some dates are important. The plaintiffs were not paid from 1 October 1997. This was because of the inability of the New Zealand operator to pay wages due to its impecuniosity, the vessels not generating fishing revenue and the unwillingness of Karelrybflot itself to pay the wages in New Zealand. The vessels were forfeited on 23 February 1998. Crew members nonetheless continued to occupy the vessels. The claims for wages were allowed in respect of the period up until 10 March 1998 (thus after the forfeiture of the vessels). Charitable assistance was given to the crew members albeit that the timing of this is not clear from the judgments. It is, however, highly probable that this, in substantial part, was provided after forfeiture. We will come back to the significance of the timing later.

[36] The difficulties faced by the crew members involved in the stand-off with Karelrybflot resulted in the introduction by Graham Kelly MP of the Foreign Fishing Crew Wages and Repatriation Bond Bill – a private Member's Bill.[29] This was on 15 June 2000. Having passed its first reading on 2 August 2000, the Bill was referred to the Primary Production Committee. The Committee called for submissions but did not produce a consultation paper.

[37] The primary goal of the Bill as introduced was to create a fund, or guarantee of equivalent money under an insurance scheme, out of which support and repatriation

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[28] *Udovenko v A O Karelrybflot* HC Christchurch AD 90/98, 27 April 1999 (interim decision); *Udovenko v A O Karelrybflot* HC Christchurch AD 90/98, 24 May 1999; and *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA).

[29] Foreign Fishing Crew Wages and Repatriation Bond Bill 2000 (42-1).

costs for foreign crews could be provided.[30] This was opposed by the fishing industry which, amongst other things, suggested a voluntary scheme. In the end, the Committee proposed amending s 256 of the Fisheries Act by inserting sub-paras (b)(ii) and (iii) into the definition of "interest".

[38] The results arrived at by the Select Committee (that is the insertion of sub-paras (b)(ii) and (iii) of the definition of "interest") were explained in its report in this way:[31]

> We have decided that … voluntary mechanisms … and an ability to recover costs in some circumstances are the best means at present by which to address the issue of support and repatriation for foreign fishing crews in the event of bankruptcy of the New Zealand charter partner. With the assistance of the three SeaFIC initiatives, we believe the existing legal mechanisms under minimum wage legislation and the Admiralty Act 1973 provide adequate means to allow foreign fishing crews to address wage disputes.
>
> The recognised difficulty is still in the area of support and repatriation of foreign fishing crews. While the New Zealand Immigration Service already requires a guarantee of maintenance, accommodation and repatriation from the New Zealand agent of any foreign crew, this does not work in circumstances where the New Zealand agent has gone bankrupt.
>
> We believe that the responsibility for providing support and repatriation for foreign fishing crews following the bankruptcy of the New Zealand agent should lie with the fishing industry. It is the New Zealand fishing industry that has the benefit of utilising foreign fishing crews in New Zealand. It is the industry that therefore needs to bear the risks associated with using such crews.
>
> To assist in recovering costs in this area, we recommend that section 256 of the Fisheries Act 1996 be amended. Section 256 of the Fisheries Act 1996 deals with the court's disposal of vessels that have been forfeited to the crown as a result of fisheries prosecution. Under this section, parties can register their interest in any forfeited property for consideration by the court when disposing of this property.
>
> While the court currently has the discretion to consider any "legal or equitable interest" in any forfeited property for a New Zealand-owned fishing vessel, the definition of "interest" under section 256 of the Fisheries Act 1996 currently states that this does not include any interest (other than ownership) for any foreign-owned fishing vessel.
>
> We consider it appropriate that the courts should have the opportunity to consider wages, support and repatriation costs when disposing of forfeited vessels. This will increase the likelihood of crews being able to recover their

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30 Foreign Fishing Crew Wages and Repatriation Bond Bill 2000 (42-1) (explanatory note) at 1.

31 Foreign Fishing Crew Wages and Repatriation Bond Bill 2000 (42-2) (select committee report) [Select Committee Report] at 5–6.

> wages under the Admiralty Act 1973 and allow the opportunity for third parties (other than the employer) to recover any support and repatriation costs for foreign crews that may be incurred.
>
> Amending section 256 will provide any third party with the opportunity to recover costs associated with support and repatriation if the bankruptcy of the New Zealand agent was the result of a fisheries prosecution. We consider that the responsibility for providing crews with appropriate support and repatriation be addressed by the New Zealand fishing industry.

[39] Sub-para (b)(iii) of the definition was intended to confer an interest on charitable third parties who provided support akin to that provided to the Karelrybflot crew members. We think it clear that those third parties did not have in rem claims against Karelrybflot's vessels which had crystallised before forfeiture[32] and there is no reason why the Committee would have thought otherwise.[33]

Our interpretation of s 256

[40] The language used in the definition of "interest" and the report of the Select Committee show a general awareness of the principles of admiralty law which govern claims for unpaid wages. Indeed, the Admiralty Act is explicitly referred to in the Committee's report.[34] The variation of language[35] between sub-paras (b)(ii) and (b)(iii) is consistent with a general understanding that claims for wages may be brought against not only the vessel on which the crew member worked but also other vessels. This might be thought to denote an understanding of the availability of sister ship claims.

[41] On the other hand, there is nothing in the legislative history to suggest a close familiarity with the detail of law relating to maritime liens and statutory in rem claims. The distinction between wages claims supported by maritime liens and those supported only by statutory claims in rem was not an issue in the *Karelrybflot* case. Although the distinction between maritime liens and statutory in rem claims was

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32 This is generally for the reasons already discussed. As well, those who provided support did not take assignments of the wages claims; the support provided did not correspond to the obligations of Karelrybflot and there was thus no obvious factual basis for subrogation and proceedings were not commenced at all to recover the support, let alone commenced before forfeiture.

33 In saying this we have considered the material which was placed before the Committee.

34 Select Committee Report, above n 31, at 5–6.

35 Sub-paragraph (b)(ii) is not confined to the specific vessel on which the crew member worked but sub-para (b)(iii) provides only for recoupment of support/repatriation of "crew employed *on the vessel*" (emphasis added).

fundamental to the result of the *Kareltrust* case, that case did not concern wages and, in any event, the Court of Appeal judgment supports the view that the effect of forfeiture on a statutory in rem claim is the same as its effect on a maritime lien claim. The associated rights come to an end upon forfeiture. If the vessel is released to the owner, the claims revive but if the vessel is disposed of to a third party, the claims and any associated rights are extinguished. In a scheme addressed to "relief from the effect of forfeiture on" the interests specified, there is no obvious policy reason to distinguish between maritime liens and statutory in rem claims if the effect of forfeiture on such claims is the same.

[42] The language of sub-para (b)(ii) is expressed in terms which in both their particularity (the contemplation of proceedings in the Employment Relations Authority which does not have an in rem jurisdiction) and generality (the absence of any distinction between claims against the offending ship and sister ships) give no hint of an intention to encompass other vessel claims only where proceedings in rem have been commenced before forfeiture. To put this another way, it might be thought that different language would have been used if the legislative purpose was to recognise as interests claims for wages only if:

(a) supported by maritime liens; or

(b) where statutory in rem proceedings had been commenced before forfeiture.

[43] For the reasons just given we see the other vessel claims as within sub-para (b)(ii) on its most natural reading. Sajo Oyang and the Ministry, however, contend that a contextual reading of s 256(1) as a whole supports the view that a pre-forfeiture legal interest is required. On their argument, we should interpret sub-para (b)(ii) on the basis that:

(a) there is a general rule (reflected in para (c)) that legal or equitable interests in forfeited property that existed at the time of forfeiture are to be recognised for forfeiture purposes;

(b) the concluding part of para (c) provides for an exclusion in respect of foreign vessels which is subject only to para (b); and

(c) para (b) operates as an exception to that exclusion and is thus engaged only where the para (c) general rule applies – that is to interests which satisfy not only the language of sub-paras (b)(i), (ii) and (iii) but independently were legal or equitable interests in the forfeited property at the time of forfeiture.

[44] This interpretation could be made to work with sub-para (b)(ii) as wage claims within its terms can give rise to interests in vessels which crystallise before forfeiture. But it simply does not work with sub-para (b)(iii). This is because this sub-paragraph was plainly intended to recognise those who provide charitable support of the kind provided to the Karelrybflot crew members despite those parties not having had an interest in the vessels before forfeiture. It follows that it is not possible to treat para (b) as engaged only in the case of interests which, independently of that paragraph, were legal or equitable interests prior to forfeiture.

[45] We recognise that this means that there is some asymmetry in the way in which s 256 operates as between foreign and locally owned fishing vessels but this asymmetry is:

(a) a necessary consequence of para (b) when read as a whole;

(b) not a surprising outcome of a parliamentary process focused almost exclusively on the position of the crew of forfeited foreign vessels; and

(c) consistent with the vulnerable position of such crew and the reality that, given bonding and release arrangements that apply in respect of foreign fishing vessels, at the time of forfeiture, such vessels may be outside the jurisdiction of the New Zealand courts and thus beyond the practical reach of any wages claims.

[46] On this basis we construe sub-para (b)(ii) as providing that claims for wages within its language constitute an "interest", irrespective of whether they gave rise to a maritime lien or if proceedings in rem had been commenced before forfeiture.

Disposition

[47] Accordingly, the appeal is allowed, the judgment of the Court of Appeal is set aside (save as to the direction that the proceedings be transferred to the High Court) and the judgment of the High Court is reinstated.

[48] The respondents are jointly and severally liable to pay the appellants costs of $25,000 together with reasonable disbursements to be fixed by the Registrar if necessary. We allow for second counsel.

[49] The appellants are entitled to costs in the Court of Appeal to be fixed by that Court.

[50] All issues as to costs in respect of the District Court and High Court are to be determined in the High Court.

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