ADMIRALTY LAW IN PAPUA NEW GUINEA THE "FEDERAL HURON"

By

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In the Papua New Guinea case of *The Federal Huron*[1] the National Court of Justice invoked its constitutional power to develop underlying law to overcome a legislative anomaly that left half of the country with only a pre-1840 Admiralty law jurisdiction.

In May 1982 the ship "Federal Huron" arrived in Port Moresby from Houston, Texas with a cargo of modular homes for the OK Tedi Mining project. Five pieces of cargo were damaged in unloading and the plaintiff consignee issued a writ claiming damages. The ship was arrested under a warrant for arrest in rem, and was released when security was provided. The defendant pleaded (inter alia) that an action in rem for damage to cargo was not a cause of action known to the law of Papua New Guinea. At first instance, Bredmeyer J. held that the Colonial Courts of Admiralty Act 1890 (Imp) ("the 1890 Act"), which would have supported an action in rem for damage to cargo, ceased to apply in Papua New Guinea when the country gained independence on 16th September, 1975. His Honour was prepared, however, to uphold the action on the basis of the Court's constitutional power to formulate appropriate laws.

On appeal, the Supreme Court of Papua New Guinea (Kidu CJ, Pratt and Woods JJ) in a joint judgment initially referred to the conflicting single judge decisions on point. Kapi J. in *Milan Capek* v. *The Yacht Freja*[2] and Miles J. in *Milan Capek* v. *The Yacht Freya (no. 2)*[3] both decided that on independence the Constitution continued the Admiralty jurisdiction conferred by the 1890 Act. However, in *New Guinea Cocoa (Export) Co. Pty. Ltd.* v. *Basis Vedbaek (Owner of the M.V. Aya Trigon)*[4] Bredmeyer J. concluded, as he did in the present case, that the 1890 Act ceased to operate on Independence Day and that the only Admiralty jurisdiction that remained was the inherent English Admiralty law.

Although the origin of the inherent English Admiralty law has been lost in the mists of time, before 1840 rights of action in rem were thought to be available in respect of collisions between ships, salvage, seaman's wages and bottomry. The Admiralty jurisdiction of the English High Court was clarified and enlarged by the Admiralty Court Act 1840 and the Admiralty Court Act 1861, s.6 of the 1861 Act extending the right of action in rem to damage to cargo. The 1890 Act conferred the expanded Admiralty jurisdiction on all courts in British Possession with unlimited civil jurisdiction.[5]

The Court considered separately the operation of the 1890 Act in relation to the previous Territory of Papua and the Protectorate of New Guinea. Papua became a British Possession by virtue of Letters Patent issued on 8th June, 1888, and remained a British Possession until Independence Day (1975). This was despite Letters Patent issued in 1902 for Australia to make laws for the territory pursuant to s.122 of the Commonwealth Constitution, which

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1. [1988] 1 Lloyd's Rep. 288.
2. (1980) PNGLR 57.
3. (1980) PNGLR 161.
4. (1980) PNGLR 205.
5. *Supra* n.1 at 291-2.

culminated in the Papua Act 1905 (Cth). Their Honours were of the view that the Letters Patent merely transferred control of Papua to Australia on behalf of the British Government and did not surrender possession to Australia. Accordingly, the 1890 Act continued to apply of its own force to Papua until Independence.[6] In 1945, there was a purely administrative merger of the territory of Papua and the mandated territory of New Guinea. The Papua and New Guinea Act 1949 (Cth), which repealed the Papua Act 1905, made provision for the setting up of a Supreme Court of the Territory of Papua and New Guinea with the jurisdiction to be provided by ordinance. The Supreme Court Ordinance 1949 (Cth) conferred on the new Court the same jurisdiction in relation to Papua as was in force in the territory before commencement of the Act. Until independence the Court in Papua, therefore, had the jurisdiction conferred by the 1890 Act.

An integral part of Papua New Guinea attaining independence was the "wiping clean of the legislative slate" in the creation of an independent state with its own Constitution and the adoption by the new state of the laws existing immediately before Independence. Legislative independence from Australia was achieved by the Papua New Guinea (Independence) Act 1975 (Cth). The legislative slate was wiped clean by the Laws Repeal Act 1975 ("Act No. 93"), which repealed all enactments applying to or adopted by Papua New Guinea including English Acts, but excluding English Acts applying of their own force, such as the 1890 Act. Schedule 2.6 of the Constitution immediately filled the legislative vacuum by re-enacting all laws repealed by Act No. 93.

Their Honours held that the Supreme Court Ordinance 1949 (Cth) (which could be amended or repealed by the Papua New Guinea House of Assembly pursuant to a 1973 amendment to the Papua New Guinea Act 1949 (Cth)) was not repealed by Act No. 93 but rather by its immediate predecessor in time, the Statute Law Revision (Independence) Act 1975 (Act No. 92). Accordingly, since the Supreme Court Ordinance 1949 (Cth), pursuant to which the Court acquired the jurisdiction conferred by the 1890 Act, was not among those laws repealed by Act No. 93, it too was not re-enacted by sch. 2.6 of the Constitution.

Further, the area known as Papua ceased to be a British Possession on Independence Day so the 1890 Act no longer applied by its own force. The final result was that the statutory extensions contained in the 1840 and 1861 Admiralty Acts no longer applied to Papua after Independence.[7]

Their Honours were also of the view that the statutory extensions contained in the 1840 and 1861 Acts were not caught by sch. 2.2 of the Constitution, which adopted the common law of England. Subsection 3 of the schedule reads:

> The principles and rules of the common law and equity are adopted as provided by sub-ss. (1) and (2) notwithstanding any revision of them by any statute of England that does not apply in the country by virtue of Schedule 2.6.

Their Honours observed (inter alia) that the natural meaning of the word "notwithstanding" in the sense of the subsection was "irrespective"; that there had been a deliberate plan to wipe the legislative slate clean at Independence and to adopt such foreign statute law as thought suitable to the country in specific terms; and that the Constitution empowered the Court to develop underlying law, presumably in order to fill gaps where the common law had been affected by statutes which had not been adopted. Their Honours concluded:

> The end result so far as concerns the previous territory described as Papua is that the 1840 and 1861 Admiralty Acts were not brought into operation after Independence

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6. *Ibid.* at 293-4.
7. *Ibid.* at 295-6.

> as a means of modifying the common law and accordingly Papua is left with foundations, namely, the pre-1840 common law jurisdiction in Admiralty matters and very little structure.[8]

In other words, the Court held that in relation to Papua there was no Admiralty jurisdiction in relation to damage to cargo so the arrest of the ship was unlawful.

The Court then scrutinised the law in relation to New Guinea. In May 1921, Australia accepted a mandate from the League of Nations to make laws for the former German territory of New Guinea. Section 14 of the Laws Repeal and Adopting Act 1921 (Cth), adopted as the laws of the territory those "Acts, Statutes and Laws of England as are in force in the State of Queensland" on 9 May, 1921. The 1890 Act was such an Act. Pursuant to the power conferred by the 1973 amendment to the Papua New Guinea Act 1949 (Cth), the Laws Repeal and Adopting Act 1921 (Cth) was repealed by Act No. 93 and therefore revived by sch. 2.6 of the Constitution.[9]

Since sch.2.6 of the Constitution only revived Acts repealed by Act No. 93 "to the extent to which they [previously] applied", an anomaly arose in that, while the Constitution unified the country, the 1890 Act had been re-enacted with respect to part of the country only i.e. New Guinea. The point was of vital importance to the case at hand because the plaintiff's cause of action stemmed from acts occurring in Port Moresby, which was in pre-Independence Papua, not in pre-Independence New Guinea. The route out of this anomaly of different laws for the two parts of the country lay in schedules 2.3 and 2.4 of the Constitution which impose a duty upon the Court to develop underlying law. Schedule 2.3(1) provides that:

> If in any matter before a court there appears to be no rule of law that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System, and in particular of the Supreme Court and the National Court, to formulate an appropriate rule as part of the underlying law having regard — . . . (c) to analogies to be drawn from relevant statutes and custom; and (d) to the legislation of, and the relevant decisions of the courts of, any country that in the opinion of the court has a legal system similar to that of Papua New Guinea . . .

Schedule 2.4 provides that:

> In all cases, it is the duty of the National Judicial System, and especially of the Supreme Court and the National Court, to ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time, except insofar as it would not be proper to do so by judicial act.

In determining whether there was "no rule of law . . . applicable and appropriate" the Court considered the submission that the utility of the Mareva injunction meant that actions in rem were not applicable and appropriate, that is, that due to the Mareva injunction there was either no gap in the law at all or if there were a gap there were other remedies available.

Their Honours were of the view that distinct advantages arose from an action in rem which were not matched by the Mareva injunction, which included:

1. Rights in rem arising out of a maritime lien travel with the vessel regardless of ownership and automatically come into existence upon the happening of the event giving rise to the lien. By contrast, the Mareva injunction is a personal action preventing the owner from doing certain things to the asset;
2. A maritime lien gives rise to a claim in the nature of a security with a specific ranking of priorities;

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8. *Ibid.* at 299-300.
9. *Ibid.* at 300-3.

3. The Court has a discretion whether to issue a Mareva injunction. By contrast, once a writ of summons and praecipe have been filed, the registry must issue a warrant arresting the vessel;
4. There may be difficulty in identifying the proper defendants or in arranging proper service in the case of an action for a Mareva injunction. No such difficulties arise when a vessel is arrested.

Accordingly, the Court held, the Mareva injunction supplements but does not supplant actions in rem so it was appropriate for the Court to develop the underlying law.[10]

Their Honours concluded that:

> In the final analysis . . . there is a serious defect in our law, at least concerning that area of the country previously described as Papua. Whether that defect could be described as a gap, a hole, a hiatus, or otherwise, is perhaps a matter of terminology. But it is there and the availability of other remedies does not, in our view resolve the problem . . . There is for the whole of the country that underlying law which arose from the practice and procedure of the Admiralty Courts of England before 1840. It must follow that the maritime lien for salvage and collision for example would not only attach but could be enforced in any part of post Independence Papua New Guinea. When one comes to the liens and rights of arrest which derive from the 1840 and 1861 Admiralty Acts of the United Kingdom, then such can only be enforced if the vessel were in waters previously described as [the] territory of New Guinea. Such situation cries out for a remedy and we believe that remedy is available to this Court.
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> If sch.2.3 in the Constitution were the only section dealing with the matter of development, we would feel constrained to restrict any ruling merely to an action of the sort brought before the learned trial Judge. We would formulate an appropriate rule of law concerning damage to cargo as part of the underlying law having regard more particularly to par. (d) of sch.2.3. The relevant legislation is that of the United Kingdom, the Commonwealth of Australia and its States, and that part of this country previously called New Guinea.
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> We do not think the matter rests there however because under sch.2.4 there is a duty on the Court to develop a coherent system of law and in the performance of that duty we believe the relevant coherent system of law here is not only to adopt that part of the 1861 Act which deals with damage to cargo but the entire Act together with its predecessor in 1840. By so doing, one would then bring the law applicable in both areas of the country into a unified whole.[11]

Consequently, the Court corrected the "omission through error" arising from the "rush of legislation which flooded through the Legislative Counsel's office immediately prior to Independence" by declaring that there was an Admiralty jurisdiction for the whole of Papua New Guinea within the parameters contained in the 1890 Act.

In that way the court held that the one jurisdiction was shared by the unified State. In the result, the arrest was lawful and the appeal dismissed.

Since that decision the Admiralty Act 1987 (P.N.G.) has come into force. The Act expressly sets out the jurisdiction of the National Court in relation to actions in rem. The case of *The Federal Huron*, however, was a masterly decision establishing authoritatively the basis for certain areas of constitutional law in that country. Shipping cases have a penchant for doing that and this was no exception.

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10. *Ibid,* at 306.
11. *Ibid.* at 307.