

CAN A CAVEAT AGAINST THE ARREST OF A SHIP BE VALIDLY ENTERED AFTER A WARRANT FOR ITS ARREST HAS BEEN ISSUED?

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1.0 Introduction

- 1.1 The arrest of a ship can cause significant disruption to the business of the owner or any person interested in it. In view of this, admiralty law allows a shipowner who has a foreboding of a claim which may lead to an arrest of their ship in any particular jurisdiction to file a caveat against its arrest. A caveat against arrest is an undertaking provided by the shipowner to anyone concerned that once an action has been commenced against the vessel, the shipowner shall enter an appearance in the action, and within three days either give bail in the action for the amount stated in the caveat or pay a sum that is equivalent to that amount into court¹. A caveat against arrest places an obligation on the arresting party to notify the owners of the ship of the claim and impending arrest before effecting the arrest, the owners are then given the opportunity to lodge security voluntarily to prevent the arrest of their ship.
- 1.2 The Admiralty Marshall² is required by the Admiralty Jurisdiction Procedure Rules to establish and maintain a register of caveats against arrest to record the filing of caveats. Before a warrant to arrest any ship is issued, the party applying for the warrant is required to search the register of caveats against arrest to ascertain whether there is a caveat³ in force with respect to the ship sought to be arrested⁴. Failure to do this may constitute grounds for the refusal of the application for the warrant of arrest.
- 1.3 The effectiveness of the arrest process depends to a significant extent on stealth, speed, and surprise and the default sequence of events is that the execution of a warrant of arrest immediately follows its issuance. However, this is not always the case. The author of this Issue has been personally involved in

¹ See generally Order 1 Rule 5 of the Admiralty Jurisdiction Procedure Rules 2011 (AJPR)

² “Admiralty Marshal” means the Chief Registrar of the Federal High Court. In practice, the Deputy Chief Registrars in the judicial divisions of the Federal High Court perform the functions of the Admiralty Marshall in their respective judicial divisions.

³ Order 8 Rule 10(1), AJPR. The Admiralty Marshall also maintains a register of caveats against release.

⁴ Order 7 Rule 1(2), AJPR

cases where the warrant of arrest of the ship was not executed immediately after it was issued. In one of the cases, the plaintiff waited until during the judges' annual vacation to execute the warrant, after having obtained the order of arrest two months earlier, ostensibly to make it more difficult for the shipowner to quickly secure the release of the ship unconditionally or otherwise. In another case, the claimant obtained the order of arrest but was unable to execute the warrant due to an administrative brick wall which put the Admiralty Marshall and the court bailiffs, without whom a warrant of arrest cannot be executed, out of circulation.

- 1.4 The question for determination in this Issue of Maritime Questions is whether a caveat filed in the intervening period between the issuance of the warrant of arrest and its execution would be considered valid and/or effective and whether a claimant who is aware of the existence of a caveat filed after the date the warrant of arrest was issued is entitled to disregard the same and proceed with the execution of the arrest warrant.

2.0 When is a caveat required to be filed?

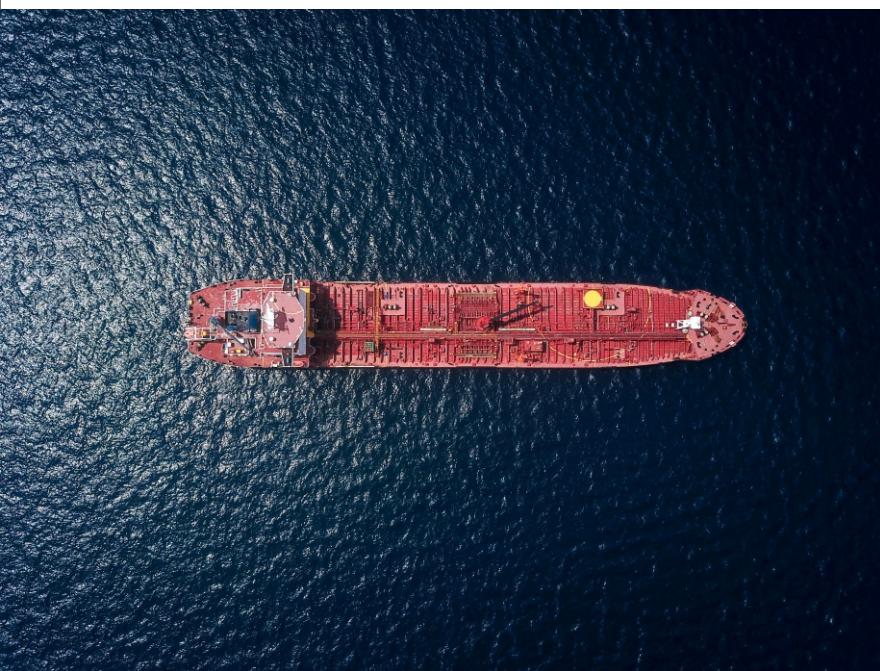
- 2.1 The author is not aware of any Nigerian law that stipulates a deadline for the filing of a caveat against the arrest of a ship, as it relates to a particular claim. The law only (on the one hand) entitles a caveator to file the caveat against arrest, and (on the other hand) requires a potential arrestor to first confirm that there is no caveat against the arrest of the targeted ship before applying for a warrant of arrest. The purpose of the caveats search is to ascertain whether a caveat is in force, without more, which means that the *raison d'etre* for caveats is to give notice to the plaintiff that the caveator is willing and ready to provide alternative security, thereby making an arrest needless and avoiding the inconvenience and disruption which a ship arrest can potentially cause a shipowner. If at any time before the execution of the warrant of arrest the caveator, say via email forwarding a certified true copy of the caveat entered, notifies the plaintiff of the existence of a caveat, can the plaintiff disregard the caveat and proceed as he wishes? In the view of the author, law and common sense indicate that the plaintiff cannot do this.
- 2.2 The ship arrest process comprises three distinct steps – the filing of the writ of summons and statement of claim; the application *ex parte* for the warrant of arrest; and, if the order is granted, the execution of the warrant of arrest on the ship – which, although they are taken in rapid succession, and culminate in the arrest and detention of the ship, they are exclusive steps. A plaintiff can file a writ in an action *in rem* without applying for the issuance of a warrant of arrest. He can also (after commencing the suit) apply for and obtain a warrant of arrest, but not execute the same on the ship. It is the author's view that at any time before the execution of the warrant of arrest, a caveat can be filed and brought to the notice of the plaintiff, and the plaintiff is required to, upon notice of the existence of the caveat hold his horses and, at the very least, consider the substance of the undertaking contained in the caveat.
- 2.3 Although the AJPR is reticent on the point, Order 6 Rule 8 of the AJPR leaves a clue. It provides as follows:

Where –

- a. a proceeding is commenced as an action in rem against a ship or other property; and
- b. a caveat against the arrest of the ship or other property is in force or is filed, after the proceeding is commenced.

a sealed copy of the writ of summons shall be served on the caveator as soon as practicable after the person on whose behalf it was issued becomes aware of the existence of the caveat.

Although the meaning intended in the paragraph would have been clearer without the oxford comma between the words “filed” and “after” in paragraph (b) above (instructively, Grammarly suggests that it be removed⁵), the presence of the comma, the author argues, does not detract from the



meaning intended. It could be argued that the comma was used to emphasise the time of the filing. It is not uncommon to see sentences like “...he panicked and hurriedly parked his car, right behind the building...” highlighting the location of the parking. Analysing the paragraph further, does it make sense to say “...is in force or is filed” when they mean the same thing? Is a caveat against arrest that has been filed not in force? In the author's view, the Rule contemplates two scenarios - where a caveat against the arrest of the ship already exists at the time of the commencement of the suit (i.e “is in force”) and where it is

filed thereafter (i.e “is filed, after the proceeding is commenced”).

- 2.4 Furthermore, considering that Rule 8(a) opens with the words “where a proceeding is commenced as an action in rem...”, what then is the use of the words “...after the proceeding is commenced...” in Rule 8(b) if not to qualify the timing of the filing of the caveat? The author's understanding of the above Rule is that if a shipowner becomes aware of the commencement of an action in rem, as long as the warrant has not been executed, he can still take steps to forestall the arrest of his ship by filing a caveat against arrest and notifying the plaintiff of the existence thereof
- 2.5 since such notice is the only reason a plaintiff is required to search the register of caveats against arrest in the first place. From the moment the plaintiff becomes aware of the existence of the caveat, the effect of the caveat kicks in and the plaintiff will be required to serve the caveator a sealed copy of the writ of summons for necessary action. If the caveator is not guilty of undue delay in making good

⁵ Grammarly: “It appears that you have an unnecessary comma before the dependent clause marker **after**. Consider removing the comma”

⁶ Order 9 Rule 1 of the AJPR

on his undertaking by providing a bank guarantee or paying cash into court, the need for the arrest is obviated and a plaintiff will be acting in bad faith if he goes ahead to arrest the ship.

3.0 No logic to arresting a ship without first considering the caveat against arrest

- 3.1 If the shipowner/caveator makes good on his caveat undertaking, it produces the same outcome that an arrest avails the plaintiff which is alternative security for his claim. It is therefore illogical and pointless to arrest the ship after having notice of a caveat against its arrest without first considering the caveat. We are reminded that an application for a warrant of arrest constitutes an undertaking to the court to pay on demand the Admiralty Marshal's expenses in relation to the arrest⁶. Why would any commercially (not emotionally) driven plaintiff prefer to proceed to arrest a ship and expose himself to the liability of paying the Admiralty Marshall's expenses, when he can simply accept security from the shipowner?
- 3.2 Perhaps a stronger disincentive for disregarding a caveat in force is the potential liability to pay damages for wrongful arrest. A plaintiff's refusal to honour a caveator's undertaking and insistence on executing a warrant of arrest on a ship can come within the contemplation of occasioning an arrest unreasonably and without good cause under Order 11 of the Admiralty Jurisdiction Procedure Rules and it is doubtful that he can validly argue that his reason for disregarding the caveat was that by the time he received notice of the caveat the warrant of arrest had already been issued. From a substance-over-form perspective, that would certainly constitute acting in bad faith. Where the value of the caveat is equal to or more than the sum of the claim, and there is no other valid reason why the caveat should be disregarded, proceeding to arrest the ship will, in the author's view, amount to needless arrest for which the plaintiff may be liable to pay damages.
- 3.3 Derived from the Latin word "*cavere*", which means "to be on one's guard", a caveat (instructively known as a caution in some other jurisdictions) is a warning to a potential arrestor to apply caution and refrain from arresting the ship until he can show to the satisfaction of the court that he had good and sufficient reason to arrest the ship while the caveat was in force.
- 3.4 In England, a caveat can be entered after a warrant is issued but before its execution. In *The "Johnny Two"*⁷, Sheen J in providing a useful outline of ship arrest procedure stated inter alia as follows: "If a caveat against arrest is entered after a warrant is issued but before arrest is effected, the plaintiff's solicitors will be put on notice of the caveat and asked if they still wish to arrest...".
- 3.5 On a final note, a party seeking a warrant of arrest is required to undertake to pay damages to the shipowner defendant if the arrest is eventually adjudged wrongful. Where however the shipowner enters a caveat before the warrant of arrest is executed, it will be impractical to reconcile an undertaking to pay damages with the caveat against arrest. An undertaking from an arresting party to pay damages if the arrest is eventually adjudged wrongful, and an undertaking from the shipowner to accept service of the writ and provide alternative security for the plaintiff's claim to obviate the need for an arrest are decidedly incompatible.

⁷[1992] 2 Lloyd's Rep 257; See also Nigel Meeson and John Kimbell, *Admiralty Jurisdiction and Practice*, Fourth Edition, Informa London 2011, page 162.



For further discussion on this subject, do feel free to get in touch with:

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