

IN THE FEDERAL COURT OF AUSTRALIA  
WESTERN AUSTRALIA DISTRICT REGISTRY

No. W151 of 2002

BETWEEN:

**OLBERS CO LTD**

Applicant

- and -

**THE COMMONWEALTH OF  
AUSTRALIA**

First Respondent

**AUSTRALIAN FISHERIES  
MANAGEMENT AUTHORITY**

Second Respondent

**AMENDED STATEMENT OF CLAIM**

1. The Applicant is a company incorporated in the Russian Federation and is entitled to sue and be sued in its own name.
  
2. The First Respondent is Her Majesty the Queen in right of the Government of the Commonwealth of Australia.
  
- 3.2. The Second Respondent is an agency of the First Respondent Commonwealth of Australia;
  - (a) established pursuant to section 5 of the Fisheries Administration Act, (1991) (Cth) ("FA Act");
  - (b) being a body corporate with perpetual succession pursuant to section 10(1)(a) of the FA Act;
  - (c) that is entitled to sue or be sued in its corporate name pursuant to section 10(1)(c) of the FA Act;
  - (d) that is the statutory authority authorised by the First Respondent to administer, implement and enforce the Fisheries Management Act (1991) (Cth) ("the Act");

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- (e) that in its administration of the Act is obliged to give effect to the objects set out pursuant to section 3 thereof, and
- (f) that in its administration of the Act is obliged to have regard, and give effect, to the First Respondent's obligations pursuant to any applicable international treaty, agreement or protocol.
- 4.3. The Applicant is the owner of:
- (a) the fishing vessel the Volga ("the Vessel");
- (b) the nets and equipment that were at all material times on the Vessel ("the Equipment"); and
- (c) the fish that were on board the Vessel on 7 February 2002 when the Vessel was boarded as pleaded at paragraph 6 herein ("the Catch").
- 5.4. The Vessel is registered in the ship registry of the Russian Federation and is entitled to fly the Russian flag.
- 6.5. On 7 February 2002, the Vessel was boarded by Australian Fisheries officers and Navy personnel from an Australian military helicopter ("the military helicopter") in the Southern Ocean ("the Boarding").
- 7.6. When the Boarding Vessel was boarded took place, the Vessel it was in international waters in the Southern Ocean outside the Australian Fishing Zone as that expression is defined by section 4(1) of the Act ("the AFZ").
- 8.7. At no time prior to the Boarding did:
- (a) the said military helicopter or any Australian military ship require or order the Vessel to stop ~~while the Vessel was~~ in the AFZ; or
- (b) the Vessel receive any communication from the military helicopter or from any Australian military ship.
- 9.8. Shortly after the Boarding on 7 February 2002, the Master of the Vessel was served with a notice of apprehension purporting to be issued under the ~~Fisheries Management Act, 1994~~ ("the Act"). ("Notice of Apprehension").

10.9. The said aNotice of aApprehension claimed, *inter alia*, that the Vessel was apprehended under the Act and set out the grounds for apprehension relied upon by the Respondents.

11.10. The said aNotice of aApprehension did not:

- (a) inform the Master of the Vessel that the Catch had been apprehended or seized;  
or
- (b) give any grounds as to the basis for the apprehension or seizure of the Catch.

12.11. Following the Boarding, ~~T~~the Vessel was taken to the port of Fremantle in Australia under Australian Navy escort and arrived in the Port of Fremantle on 19 February 2002.

13.12. On 20 February 2002, the Master of the Vessel was served by the Second Respondent with a notice under s106C of the Act purporting to seize the Vessel, the Equipment and the Catch, ("Notice of Seizure").

14.13. On 21 March 2002, by letter from its legal representatives, Wilson Harle, the Applicant notified the Managing Director of the Second Respondent that the Applicant claimed the Vessel, ~~its nets, traps,~~ the Equipment and the Catch.

15.14. On 21 March 2002, the Second Respondent served notice on the Applicant under s106F of the Act stating that the Vessel, "together with all fish, nets and equipment on board" ~~its nets and equipment and Catch~~ were to be condemned as forfeited to the Defendant First Respondent pursuant to section 106G(2) of the Act unless proceedings were issued against the First Respondent within two months of the receipt of the notice ("the s106F Notice of Forfeiture Notice").

16.15. These proceedings were issued on 21 May 2002 pursuant to section 106G of the Act ("the proceedings").

17. The proceedings are issued without prejudice to any rights and remedies available to the Russian Federation under the United Nations Convention on the Law of the Sea, 1982 ("UNCLOS") in the International Tribunal for the Law of the Sea.
- 18.16. On or about the date of issue of these proceedings, the Catch was sold by or on behalf of the First Respondent and the First Respondent has retained the proceeds of the that sale ("the sale").
- 19.17. Under the Act, a foreign flagged ship may be boarded by Australian authorities outside the AFZ provided the statutory requirements conditioning for the exercise of the powers under ss84 and 87 of the Act are fulfilled.
- 20.18. Any purported exercise of powers conferred by the Act by the Second Respondent, its servants or agents, preparatory to, in the process of or following the Boarding over in respect of the Vessel, Equipment or and Catch was invalid and unlawful because there was no pursuit falling within section 87(1)(a) of the Act for either or both of the following reasons:
- (a) no order to stop was issued to the vessel while within the AFZ; and
  - (b) the purported pursuit was not commenced inside the AFZ as required by s87(1) of the Act.
- 21.19. In the alternative, any exercise of powers by the Second Respondent, its servants or agents over the Vessel, Equipment and or Catch was invalid and unlawful because any purported pursuit was terminated or interrupted so that the statutory requirements conditioning of s87(1)(b) of the Act for the exercise of powers of pursuit under section 87(1)(b) of the Act outside the AFZ were not met.
- 22.20. Further, any purported exercise of powers conferred by the Act by the Second Respondent, its servants or agents, over the Vessel, the Equipment and or Catch was invalid and unlawful because contrary to the requirements of section 84(1)(a) of the Act there were no reasonable grounds to believe that the Vessel had been used, was being used or was intended to be used for fishing in the AFZ as required by s84(1)(a) of the Act.

- 23.21. Further, any purported exercise of powers conferred by the Act by the Second Respondent, its servants or agents, over the Catch was invalid and unlawful because no notice was served in respect of the Catch in accordance with section 84(1A) of the Act.
- 24.22. In the premises, As a result of the matters set out in paras 17—21 above, the Respondents can establish no legal basis whether under the Act or otherwise at law for the seizure and detention of the Vessel, and the Equipment, or the Catch and such seizure and detention was and is illegal.
23. Accordingly, the Applicant claims the relief specified in the Application.
25. At all material times both the Second Respondent knew any attempt to seize or detain the Vessel, Equipment or Catch would damage the Applicant's business because it would prevent the Applicant utilising the Vessel and Equipment for commercial purposes and deny the Applicant the benefit of the Catch.
26. At all material times the First and Second Respondents severally owed the Applicant a duty of care:
- (1) to take reasonable care not to misrepresent to the Applicant their statutory powers over the Vessel, Equipment or Catch;
  - (2) to take reasonable care not to act unlawfully by purporting to obtain and/or exercise, statutory powers over the Vessel, Equipment or Catch to which they were not lawfully entitled, and
  - (3) to take reasonable care in the exercise of any statutory powers over, the Vessel, Equipment or Catch that had lawfully accrued to them.
27. In the premises, the Second Respondent by the unlawful seizure and detention of the Vessel and Equipment, and its issue of the Notice of Apprehension, Notice of Seizure and Notice of Forfeiture breached its duty of care to the Applicant pleaded at paragraph 26 and as a result the applicant has suffered loss and damage.

#### PARTICULARS OF LOSS AND DAMAGE

Full particulars of loss and damage will be provided prior to trial.

28. In the premises, the First Respondent by the unlawful sale of the Catch breached its duty of care to the Applicant pleaded at paragraph 26, and as a result the Applicant has suffered loss and damage. Including, the probable proceeds of sale of the Catch had the Respondents not intervened.

PARTICULARS OF LOSS AND DAMAGE

Full particulars of loss and damage will be provided prior to trial.

29. Further, or in the alternative, to the damages claimed by the Applicant at paragraph 28 herein:

- (a) the First Respondent received and retained the proceeds of the sale to the use of the Applicant, and
- (b) the applicant suffered loss and damage being the difference between the proceeds of the sale and the amount that the Catch would otherwise have realised had it been sold by the Applicant.

30. Further or alternatively, the Second Respondent's unlawful seizure and detention of the Vessel, Equipment and Catch was a misfeasance in public office because the Second Respondent:

- (1) knew the seizure and detention of the Vessel, Equipment and Catch was unlawful;
- (2) knew that its issue of the Notice of Apprehension, Notice of Seizure and Notice of Forfeiture were unlawful and that the First Respondent had no right or entitlement to the Vessel, Equipment or Catch;
- (3) despite its knowledge pleaded herein, intended that the Applicant accept the unlawful seizure and detention of the Vessel, Equipment and Catch and surrender any claim to the Vessel, Equipment or Catch by its issue of the Notice of Apprehension, Notice of Seizure and Notice of Forfeiture, and
- (4) relied on the unlawful seizure and detention of the Vessel, Equipment and Catch to allow the First Respondent to sell the Catch and unlawfully retain the benefit thereof.

AND THE APPLICANT CLAIMS:

- (1) A declaration that the Second Respondent's seizure and detention of the Vessel, Equipment and Catch was unlawful and that the Vessel, Equipment and Catch are not forfeit.
- (2) An Order of this Honourable Court that the Vessel and Equipment be delivered up and returned to the Applicant.
- (3) An Order of this Honourable Court that the proceeds of the sale of the Catch be remitted to the Applicant.
- (4) Damages.
- (5) Interest.
- (6) An Order of this Honourable Court that the Respondents pay the Applicant's Costs.
- (7) Such further Orders as this Honourable Court deems fit.

Dated this 21<sup>st</sup>/~~4<sup>th</sup>~~<sup>th</sup> day of ~~May~~July 2002

C Shanahan  
CP SHANAHAN