310:0004

Federal Court of Canada
Trial Division

088131053

T-2297-87

S.R. KROCHENSKI in his capacity as
Deputy Marshal of the Federal Court of Canada

Plaintiff

- and -

THE SHIP "GALAXIAS"
THE OWNERS OF THE SHIP "GALAXIAS"
AND OTHERS INTERESTED IN HER

Defendants

- and -

McMASTER, BRAY, CAMERON & JASICH, a partnership,
MARSHALL BRAY and TIMOTHY P. CAMERON,
those Defendants identified under numbers 24-87
in Schedule "A" to the Statement of Claim
in this action

Third Parties

-and -

NAFTIKON APOMAHICON TAMEION

Third Party

REASONS FOR JUDGMENT

ROULEAU J.

These reasons relate to the oral judgment rendered by me in the above-styled action in Vancouver, British Columbia, on January 6, 1988.

Although the facts are not substantially in issue in this matter, for the sake of easy reference, I include a very brief resume of how these parties came before the Court.

The Greek registered cruise ship **Galaxias** sailed from Piraeus, Greece, in the Spring of 1986. It proceeded through the Panama Canal and sailed up the Western Seaboard of North America having stopped in Acapulco, to engage a band of musicians. In June 1986, the **Galaxias** sailed into Vancouver Harbour with a full crew aboard. It was berthed there during the Summer of 1986 and by means of certain connections to the shore was established as a "floating hotel" for the enjoyment of visitors to the world exhibition in Vancouver, called 'Expo 86', being hosted by that city.

In the Fall of 1986, financial problems developed with respect to the continued operation of the **Galaxias** and, on September 1, 1986, it was arrested pursuant to a warrant issued by this Court on the application of Baseline Industries Ltd., a wharfinger. Since that date numerous claims have come to light including several wage claims, (Elias Metaxas et al, T-2406-87, Villaneuva-Velasquez et al, T-2325-86, and Katerelos et al, T-318-87), a possessory lien claim (Baseline), a mortgage claim (National Bank of Greece S.A.) and most importantly, a somewhat novel claim for a maritime lien purportedly legislated by the Greek government in favour of the Greek Seamen's union, Naftikon Apomahicon Tameion (hereinafter referred to as N.A.T.).

S.R. Korchenski, the plaintiff in this action, a Sheriff of British Columbia was appointed as a Deputy Marshal of the Federal Court of Canada, to carry out the Commission of Sale of the **Galaxias**. After one false start, wherein the ship was advertised for sale and no adequate offers were received, the Ship was readvertised in several international newspapers, pursuant to the Order of Madam Justice Reed, dated April 27,

1987 (subsequently amended, referred to throughout as the Order for Sale). As a result of this advertisement, an offer of $1.1 million was received from the defendant, Global Cruises S.A., and accepted, being the highest tendered. A Bill of Sale was drawn up in accordance with directives received from the Court with the concordance of some of the creditors of the Ship. The Order for Sale stated inter alia:

> 5. The M.V. Galaxias shall be sold, where is, as is, with all faults as they now lie, without any allowance for deficiency in length, weight, quantity or quality or any defect or error whatsoever, particulars not guaranteed, free and clear of all encumbrances.
>
> 6. The Deputy Marshall of the Federal Court of Canada shall be vested with the right to execute a Bill of Sale, transferring the vessel to the successful purchaser of the vessel, free and clear of all encumbrances.

Problems arose shortly thereafter. The time for the closing of the sale was extended several times, as the purchaser was encountering difficulties in financing the balance of the purchase price apparently due to questions raised by prospective investors regarding the status of the **Galaxias** in the Greek Registry. The purchaser became uneasy with respect to the attitude taken by the Minister of Merchant Marine in Greece regarding the transfer of title of the **Galaxias** clear of all encumbrances in the Greek Shipping Registry in Piraeus. The Minister objected to the issuance of the necessary Deletion Certificate and made it contingent on the satisfaction of the claims raised against the **Galaxias** in Action No. T-2406-86 by N.A.T., the Greek seamen's pension fund.

As a result of the refusal of the Minister to issue the necessary Deletion Certificate in Greece, and the reservations which the purchaser held with respect to the validity of the title passed to him in the Bill of Sale, Deputy Marshal Korchenski commenced this action against the purchaser Global, as well as all the claimants of the proceeds of the **Galaxias**. The Deputy Marshal seeks a Declaration from the Court that he has fulfilled his duty with respect of the Order of Sale or Commission of Sale, or any other contract that might exist between the parties and that furthermore, the Bill of Sale, worded pursuant to the Court Order of Sale does convey title in the **Galaxias** to the purchaser, "free and clear of all encumbrances".

Global has filed a defence to the Statement of Claim and has also counterclaimed with respect to the costs and damages which it claims were brought about by the failure of the Deputy Marshal to convey the ship "free and clear of all encumbrances", and, as it presently stands, unregistrable in the Greek Registry. N.A.T. has been named a third party to this action, as have the law firm McMaster, Bray, Cameron & Jasich and many of the claimants to the proceeds of the sale.

THE POSITION OF THE DEPUTY MARSHAL

I am satisfied that the Deputy Marshal was at all times acting as an officer of the Court and was bound to carry out its orders with all due diligence. **(Stephens' Estate v. Minister of National Revenue** (1982) 40 N.R. 620 (F.C.A.).

It is not the position of the Deputy Marshal to question any Order of the Court, but merely to ensure that its terms were complied with and I am satisfied that he has done so.

Some jurisprudence with respect to the proper law of the contract of sale of the **Galaxias** was cited to me by counsel, but I have no difficulty in stating that it is the law of Canada which applies. Where a ship is sold by a judicial sale pursuant to a Court Order in Canada, I do not see that any conflict of laws problem arises with respect to the sale itself, (the disposition of the proceeds is a different question). The sale of the **Galaxias** has occurred as a result of the recognition of substantive rights held by the parties before this Court, and as a judicial sale is a remedy attaching to such rights, it is governed by the laws of Canada, the **lex fori (Orient Leasing Co. Ltd. v. The Kosei Mari** [1979] 1 C.F. 670).

Even if I am not correct in my assumption that the law of Canada would automatically apply to the sale of the **Galaxias**, counsel has pointed out that there exist in any event substantial connections with Canada which warrant a finding that Canadian law would apply even in construing conflict of law rules. It therefore remains for me to determine the nature of the title conveyed to Global pursuant to the Order of Sale.

TITLE CONVEYED BY A JUDICIAL SALE

It has long been recognized in both Canadian and British maritime laws that a court ordered sale in an action **in rem** such as the case before me, conveys the subject ship to the

purchaser free and clear of all liens. **The Tremont** [1841] 1 W. Rob. 163; 166 E.R. 534 (Eng. Adm. Ct.); **The Acrux** [1962] 1 LLoyd's Report 405, (Eng. Adm. Ct.) **Lietz v. The Queen** [1985] 1 F.C. 845.

The importance of this notion was discussed by Associate Chief Justice Noel (as he then was) in the case of **Vrac Mar Inc. v. Demetries Karamanlis et al** [1972] F.C. 430 at page 434:

> On the other hand, the Republic of Panama, after filing a **caveat** for $2,585.15, refuses to comply with the proceedings for sale of the ship, and observe the order of this Court giving the purchaser a clear title. I do not for the moment wish to characterize this action by that country. I would say nevertheless that the refusal to comply with a judgment of this Court after filing a claim, in addition to being an affront to a Canadian court, represents a refusal by that country to abide by the decisions of a court in another country, and an exception to a rule honoured by every nation in the world. Indeed, if other countries, or other debtors, decided to follow this bad example, it would create confusion in the area which can be effectively controlled only with the good faith of all seafaring nations. I therefore feel it is urgent and necessary, if the prestige of the decisions of our courts is to be maintained, and other countries or debtors dissuaded from following the example of the Republic of Panama, that the responsible authorities take steps to make the necessary amendments to the **Canada Shipping Act**, so that registration of a foreign vessel cannot be used to block registration in Canada of a ship sold under an order of this Court.

To me it is evident that the Court in ordering the judicial sale of a vessel within its jurisdiction is doing so pursuant to the laws of Canada, and that it is these laws that apply to the transaction. Although I agree with the view expressed by Noel A.C.J. above, I do not see any indication that despite his disappointment with the attitude taken by the

Government of Panama, that he considers the sale made in that case "free and clear of all encumbrances" to have been ineffectual in conveying clear title to the purchaser. If in fact there are other jurisdictions which will ignore the effect of a judicial sale in Canada, this is a political problem, in respect of which the Federal Court of Canada can be of no assistance.

In my opinion, the existence of a phrase such as "free and clear of all encumbrances" or anything of that ilk in a Bill of Sale pursuant to a Court Order, does not add to or subtract from any rights which the purchaser at such a sale will enjoy. The integrity of the Canadian judicial sale arises from its inherent nature and this is the only representation which the Court makes to the public in ordering the sale of the vessel. The prospective purchasers are free to inspect the vessel and determine its condition and value. The one aspect of the sale that the purchaser need not investigate is the title that the purchaser will receive under Canadian law whether so stated in the Court Order, or the Bill of Sale or not. The purchaser will take free and clear of all encumbrances according to the laws of Canada and although it is clear that Canadian Courts desire and expect that the Courts and governments of other nations will respect its orders and judgments, particularly in the area of maritime law, this is not an area over which the Federal Court exercises control, nor is it appropriate that it attempt to do so.

It is evident that in a private sale between parties that the inclusion or exclusion of a warranty or representation with respect to the existence of liens or encumbrances is of great significance as it may determine the respective rights of

the parties under the contract. For example in the case **Athens Cape Naviera S.A. v. Deutsche Dampfschiffarhts Gesellschaft et al** [1984] 2 LLoyd's Rep. 388, the significance of this phrase was exhaustively reviewed by Mr. Justice Scrutton when faced with construing a private sale where the contract contained the term "free from all encumbrances or any other debts whatsoever". It is to be noted that this discussion was predicated by the following comments at page 38:

> A maritime lien attaches to a vessel and can be enforced against the vessel despite a change in ownership, even if the writ is issued after the change in ownership. A maritime lien is an encumbrance on a vessel, not defeasible within a reasonable time by a change of ownership unless that change is effected by a sale by a court exercising Admiralty Jurisdiction.
>
> (emphasis added)

Counsel have brought to my attention several cases in the Federal Court in which the issue of the construction of a term such as the one under discussion in this case was addressed, albeit **in obiter**. In my view, none of these cases derogate from the general proposition which I have outlined, namely that the judicial sale has the effect of conveying the **res** to the purchaser free and clear whether it is so stated in the Bill of Sale and Order for Sale or not.

In the case of **Boudreau v. Registrar of Shipping, Custom House, Halifax, Arthur B. Earle** [1984] 1 F.C. 990, the registration of a ship's title with prior mortgages extinguished after a judicial sale was delayed by the respondent because the relevant Order did not contain an assertion that title was conveyed free and clear of all

encumbrances. Associate Chief Justice Jerome stated at page 993, referring to the Registrar's refusal to register clear title:

> These procedures, while not specifically authorized by statute or jurisprudence, are a matter of long established instructions to Registrars of British Ships.

The above case dealt primarily with a procedural problem based on the wording of the Court Order, and the Bill of Sale. The Court was quite clear in stating that the failure to include the words "free and clear of all encumbrances" in the Order for Sale had not in any way affected the title of the purchaser in the vessel.

Counsel have further pointed out to me the existence of the unreported decision of Associate Chief Justice Thurlow in **International Marine Banking Co. Limited v. The M/T Dora and Abyreuth Shipping Company Limited** T-2934-76, September 7, 1976. The Associate Chief Justice states at page 8 of the text of his reasons:

> One further point should be mentioned. In the Notice of Motion the plaintiff asks that the ship be advertised for sale as being "free and clear of all liens, charges, mortgages, encumbrances and claims". In my opinion that is the effect under the law of this country of a sale by this court of an action **in rem**.

The Associate Chief Justice went on to discuss **in obiter** the impact of including such a phrase in the court Order and advertisements relating to the sale and concluded that in his opinion such a phrase sould be omitted. To the extent that the term "claims" in this phrase could include a spurious claim, or one which is not recognized under Canadian maritime

law, I would agree with the Associate Chief Justice's comments. As stated above, the Canadian judicial sale does not carry with it the guarantee that the integrity of the sale will be recognized by all foreign governments and no wording should appear in the Bill of Sale or the Order which would suggest to purchasers that this is the case.

In the case before me however, the relevant Order and Bill of Sale contains the phrase "free and clear of all encumbrances" and for the reasons discussed, I believe that it was appropriate and correct to do so. I therefore find that the purchaser Global has had conveyed to it title to the **Galaxias** free and clear of all encumbrances.

Furthermore, I do not see anything in the Order, the Bill of Sale or the advertisement which would constitute either an express or implied covenant that the title of the **Galaxias** would be registrable in Greece. It would be impossible for a Canadian court to make such a covenant a term of a judicial sale. I am therefore of the opinion that the Deputy Marshal is entitled to the relief sought as follows:

a) a declaration that the obligations of the Deputy Marshal to Global Cruises S.A. pursuant to the Order for Sale and the Commissions for sale have been fully discharged by the delivery of the Bill of Sale referred to hereinabove and

b) a declaration that the execution and delivery of the Bill of Sale referred to hereinabove has vested title in the **Galaxias** free and clear of all encumbrances and fully satisfies the obligations of the Plaintiff to deliver such title to Global.

The Deputy Marshal is entitled to his costs.

Although I do sympathize with the problems encountered by Global in Greece, I am dismissing the Counterclaim. The ship has been duly registered in Antigua, and as I have stated previously, I am satisfied that the Deputy Marshal has fulfilled all of his obligations to the Court and hence to the purchaser. I am hopeful that the Order with respect to the payment of the claim to N.A.T. in the main action (T-2297-87) will in some way allay the concerns that Global has exhibited in filing the Counterclaim.

The third party proceedings fall.

I would like to add **in obiter** that in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This does not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognized in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior global enforceable overriding jurisdiction, this is what we all must live with.

Undoubtedly it would be very easy for the members of this Court to avoid the matter ever being raised and return to the former practice of deleting phrases such as the ones under discussion from all Orders for Sale of a ship. However, admiralty lawyers and all lay people in the shipping world,

involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from Court sales of vessels and render some ships completely unsaleable. The legitimate claims of many Canadian and foreign creditors would thus be defeated by the resulting ridiculously low payments into court of purchase prices.

P. Rouleau

JUDGE

OTTAWA

April 8, 1988

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: T-2297-87

STYLE OF CAUSE: S.R. Krochenski
- v. -
Ship "Galaxias" et al.

PLACE OF HEARING: Vancouver, B.C.

DATES OF HEARING: January 4, 5, 6, 7 & 8, 1988

REASONS FOR JUDGMENT OF: The Honourable Mr. Justice Rouleau
DATED: April 8, 1988

APPEARANCES:

J.E. Gouge K. Bridge	for Plaintiff
M. Bray	for Third Parties
C. O'Connor	for Global Cruises

SOLICITORS OF RECORD:

Lawson Lundell Vancouver	for Plaintiff
McMaster & Co. Vancouver	for Third Parties
Ladner Downs Vancouver	for Global Cruises

Judicial review - Maritime law - Commissions of sale - Lex fori / Maritime law - Sales of ship - Title conveyed by judicial sale

Indexed as:
Krochenski v. Galaxias (The)

Contrôle judiciaire - Droit maritime - Commissions de vente - Lex fori / Droit maritime - Ventes de navire - Titre de propriété conféré suite à une vente en justice
Répertorié :
Krochenski c. Galaxias (Le)

14p

Federal Court of Canada

Court No. T-2297-87

BETWEEN:

S.R. KROCHENSKI in his capacity as Deputy Marshal of the Federal Court of Canada

Plaintiff

- and -

THE SHIP "GALAXIAS", THE OWNERS OF THE SHIP "GALAXIAS" AND OTHERS INTERESTED IN HER

Defendants

- and -

McMASTER, BRAY, CAMERON & JASICH, a partnership, MARSHALL BRAY and TIMOTHY P. CAMERON, those Defendants identified under numbers 24-87 in Schedule "A" to the Statement of Claim in this action

Thir parties

- and -

NAFTIKON APOMAHICON TAMEION

Third party

REASONS FOR JUDGMENT

The "Turtle Bay"

[2013] SGHC 165

High Court — Admiralty in Rem No 37 of 2013 (SUM No 1036 of 2013) and Admiralty in Rem No 44 of 2013 (SUM No 1040 of 2013)
Belinda Ang Saw Ean J
15 March, 5 April 2013; 26 April 2013

Admiralty and Shipping — Practice and Procedure of Action in Rem — Judicial Sale of Vessel
Admiralty and Shipping — Practice and Procedure of Action in Rem — Sheriff's Duties and Responsibilities

30 August 2013

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff as registered mortgagee ("the Bank") of the *Turtle Bay* and the *Tampa Bay* commenced Admiralty in Rem Nos 37 and 44 of 2013 (collectively, "the ADM Actions") and arrested the *Turtle Bay* and the *Tampa Bay* (collectively, "the Vessels") in Singapore on 29 January 2013 and 5 February 2013 respectively.

2 The ADM Actions were commenced after the defendant shipowner had gone into liquidation in Germany. I should imagine that the effect of the

defendant's insolvency on the ADM Actions would be governed by German insolvency law. As to whether there were any insolvency issues arising under German law from the defendant's liquidation, none were identified and explained in the Bank's affidavits. The principles in *In re Aro* [1980] Ch 196 followed in *The Oriental Baltic* [2011] 3 SLR 487, *The Hull 308* [1991] 2 SLR(R) 643 and *The Convenience Container* [2007] 4 HKLRD 575 that deal with the commencement of *in rem* proceedings either before and after the insolvency of a defendant came to mind, and I had wondered whether those cases differed from the facts of the present case before me. Be that as it may, in the affidavits supporting the arrest of the Vessels, the Bank disclosed that the German insolvency administrator was aware of the Bank's intention to enforce the mortgages and gave written consent to the direct sale of the Vessels which the Bank intended "to carry out after arresting the [Vessels]".[1]

3 It was not surprising that with the liquidation of the defendant shipowner, no appearance was entered by the latter to the ADM Actions. The Bank duly filed two applications for default judgment (one for each of the Vessels) on 26 February 2013. On the same day, the Bank separately applied for a sale of each of the Vessels (together, "the Sanction Applications"). By prayer 1(a) of both the Sanction Applications, the Bank sought the court's approval or confirmation of a private direct sale of the *Turtle Bay* and the *Tampa Bay* on the terms of two contracts dated 5 February 2013 and 9 February 2013 respectively (*ie,* after the arrest of each Vessel) that were

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[1]Dr Clemens Hillmer's Affidavit sworn on 28 January 2013 (ADM 37/2013) at [27] & Exhibit "CH-12" at p 270; Dr Clemens Hillmer's Affidavit sworn on 28 January 2013 (ADM 44/2013) at [27] & Exhibit "CH-12" at p 270.

entered between the Bank and a named buyer for a specified price each ("the Direct Private Sale").[2] On 26 February 2013, the Bank was seeking judicial approval of a private sale *pendente lite*, but that was no longer the position after default judgment was obtained on 15 March 2013. Strictly speaking, the Sanction Applications were for orders approving the Direct Private Sale after judgment.

The Sanction Applications

4 The Sanction Applications were initially listed for hearing on 15 March 2013, but they were adjourned for the Bank's lawyers to conduct further research on the law.

5 At the adjourned hearing on 5 April 2013, counsel for the Bank, Mr Mark Tan ("Mr Tan") sought to justify the Bank's case by distinguishing the steps taken by the Bank to arrange the Direct Private Sale from the settled proposition of law that any attempt to arrange a private sale of an arrested vessel after the court has commissioned the Sheriff to appraise and sell the vessel constituted contempt of court (*The APJ Shalin* [1991] Lloyd's Rep 62; *The Jarvis Brake* [1976] 2 Lloyd's Rep 320).

6 I did not accept this distinction as a proper justification. Although a party is clearly in contempt of court if it arranges a private sale after the court commissions the Sheriff to sell a vessel, it does not necessarily follow that this party is *never* in contempt of court if it arranges a direct sale before the court

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[2] Ute Haverkamp 2nd Affidavit (ADM 37/2013) at Exhibit UH-15 at p 12); Ute Haverkamp 2nd Affidavit (ADM 44/2013) at Exhibit UH-15 at p 12).

so commissions the Sheriff. Much depends on the circumstances of the case. For instance, a sale could potentially constitute contempt of court in the light of evidence that impropriety had occurred in connection with the sale to the possible detriment of *in rem* creditors of the arrested vessel. In my view, it made no difference to the legal enquiry that a direct sale of an arrested vessel was made expressly subject to the court's approval.

7 Mr Tan's submissions did not deal squarely with the fundamental issue at hand. He did not address the legal basis of the Bank's Sanction Applications. The concern of this court was that the Bank was essentially seeking the court's approval or confirmation of the Direct Private Sale (see [3] above) so as to attract the effect of a judicial sale in respect of the Vessels. The main issue was under what principles, circumstances and conditions should the court sanction the Direct Private Sale that was entered between the Bank and the named buyer in order to suit its own purposes, and turn it into an admiralty judicial sale (*ie,* a judicial sale made *specifically* pursuant to the court's *admiralty* jurisdiction)? In doing so, the court would be plainly departing from the normal order that the Sheriff sells a vessel by appraisement, advertisement and inviting bids to purchase the vessel: see Order 70 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the RSC").

8 As this court saw it, simply because mortgagee banks (as arresting parties) have in the past applied for and obtained orders that sanctioned the private direct sales of arrested vessels would not be of assistance as they were not conclusive of the matter. It would be misguided to think that from those instances there now existed in Singapore an established practice of the court,

in exercise of its admiralty jurisdiction, to sanction private direct sales of arrested vessels as judicial sales.

9 The Sanction Applications were dismissed on 26 April 2013. I gave brief oral grounds for refusing the Sanction Applications. I had then indicated to Mr Tan that I would publish full written grounds in due course. I am grateful to Mr Tan for subsequently drawing to my attention the recent English decision of *Bank of Scotland plc v The Owners of the MV "Union Gold"* [2013] EWHC 1696 ("*The Union Gold*") where the Bank of Scotland plc sought orders of sale of four vessels to named purchasers at named prices. I will comment on *The Union Gold* in due course.

Distinction between a private sale and an admiralty judicial sale

10 I begin with the distinction between a private sale and a judicial sale of a vessel. A private sale of a vessel between the vendor and purchaser transfers title in the vessel to the purchaser, subject to the *in rem* liabilities existing at the time of the sale and delivery of the vessel. Naturally, as a condition of the sale, the vendor would have to warrant that the vessel was unencumbered and that there were no existing debts or liabilities whatsoever. Typically, the vendor would provide an indemnity that was counter secured by a guarantee.

11 In contrast with a private sale, an admiralty judicial sale gives the purchaser a clean title to the vessel that is free from all liens and encumbrances (*The Tremont* (1841) 1 Wm Rob 163; *The Acrux* [1962] 1 Lloyd's Rep 405 at 409 and more recently in *The Cerro Colorado* [1993] 1 Lloyd's Rep 58 at 60, 61 and Ryan J in *Readhead and Others v Admiralty Marshal, Western Australia District Registry and Others* (1998) 87 FCR 229

at 242F). In other words, the admiralty judicial sale extinguished all *in rem* claims that were attached to the vessel prior to the sale and the vessel was no longer subject to arrest by virtue of those claims. The upshot of this should enable the Sheriff to sell an arrested vessel at the market price of the vessel rather than at a "forced sale" price.

12 This unique and important legal consequence of an admiralty judicial sale is an ancient *in rem* doctrine recognised in most admiralty jurisdictions. William Tetley QC in *Maritime Liens and Claims* (1st Ed, Business Law Communications Ltd, 1985) traced this doctrine at pp 468, 470-471:

> As Brown D.J. said in the *The Trenton* [4 F. 657 at p. 663]:
>
> > No one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries.
>
> The finality and integrity of the judicial sale and the validity of the new title of ownership are therefore essential to the full realization of the maritime lien.
>
> ...
>
> All jurisdictions have recognized the importance of the principle that the judicial sale of a ship be final and that the purchaser receive a clear title, free of all charges whatsoever.
>
> An early explicit statement is found in the Ordonnance de la Marine of 1681 at Book I, Title XIV, art. 1:1
>
> ...
>
> > ... All ships and other vessels may be arrested and disposed of under law; and all privileges and hypothecs will be purged by the decree which will be made in the following form.
>
> The leading English judicial statement is by Dr. Lushington in *The Tremont* [(1841) 1 W. Rob. 163 at p. 164] who, in referring to the Admiralty Court, said:
>
> > The jurisdiction of the Court in these matters is confirmed by the municipal law of this country and by

> the general principles of the maritime law; and the title conferred by the Court in the exercise of this authority is a valid title against the whole world, and is recognized by the Courts of this country and by the Courts of all other countries.
>
> The same principle had been enunciated in earlier decisions, including *The Flad Oyen* [(1799) 1 C. Rob. 134 at p. 138] and *The Helena* [(1801) 4 C. Rob. 3], and has been followed in subsequent judgments such as *Castrique v. Imrie* [(1869-70) L.R. 4 H.L. 414] and *The Ruby* [[1898] P. 52]. The integrity and finality of the foreign judicial sale has been upheld in France, in the U.S. and in Canada.
>
> An equally famous dictum is of Brown D.J. in *The Trenton* [4 F. 657 at p 659]
>
> > In short, the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description, is the law of the civilized world.

13 Dr Lushington's statements in *The Tremont* are fundamental to admiralty judicial sales. Indeed, many legal systems continue to give effect to admiralty judicial sales of foreign courts as a matter of comity. This recognition of the legal consequences of an admiralty judicial sale is important to a purchaser who intends to register the vessel in a different jurisdiction.

14 In the present case, it was reasonable to presume that as in any private sale, the Bank's named buyers required the warranty and indemnity mentioned in [10] above. It would also not be surprising to find the Bank unwilling to be so bound. The best commercial solution would be to seek the court's approval of a private sale to obtain the advantages that an admiralty judicial sale would confer *ie,* clean title of the Vessels.

Principles and effect of an admiralty judicial sale

15 As stated, an admiralty judicial sale gives to the purchaser title to the vessel that is free from all liens and encumbrances. The legal premise and effect of an admiralty judicial sale that confers on the purchaser clean title of the vessel is that existing maritime claims of all *in rem* claimants against the vessel are transferred to the sale proceeds of the vessel (*The Acrux* [1962] 1 Lloyd's Rep 405 at 409). Such *in rem* claimants include persons that may not have filed *in rem* writs or caveats against release, but have an interest in the vessel and sale. It is worth noting that the existing maritime claims of *in rem* claimants against the vessel are divested by the judicial sale in proceedings to which these claimants are not a party to and in which they may well have no notice of. While these maritime claimants are nonetheless allowed to participate in the sale proceeds, this concomitant transfer of maritime claims (and priority) from the vessel to the proceeds of sale in court is the *raison d'etre* of the principle that a judicial sale is for the protection and benefit of all persons interested in the *res*; it is not only for the interest of the arresting party alone.

16 As William Waung J in *Den Norske Bank ASA v Owners of the ship "Margo L"* [1997] HKEC 767 ("*The Margo L*") opined:

> The role of the Admiralty Court is to ensure that any sale of the vessel is effected in such a way as to protect all Admiralty claimants not merely the Plaintiff who arrested the ship or who requested ex parte the Admiralty Court to sell the ship or who has obtained ex parte a very large judgment (which can be set aside when contested by interested competing claimants) or who has a high priority claim. The best way (which is also the normal way) that the Admiralty Court ensures protection for all Admiralty claimants is by insisting upon the sale of the ship being done by all the well tried out method of appraisement and sale by public tender.

17 To protect the interests of all persons with *in rem* claims against the vessel including the defendant shipowner, the court has to have entire control over the sale process thereby safeguarding the propriety and integrity of the sale process and, ultimately, instilling confidence and standing of the judicial sale from this jurisdiction. To this end, there are comprehensive procedures in O 70 for a court ordered judicial sale to be carried out by the Sheriff pursuant to a commission for appraisement to ascertain the value of the vessel, by the placement of advertisements and invitation to submit bids for the purchase of the vessel.

18 Once the Sheriff is commissioned to appraise and sell the vessel, he is under a duty to first appraise the vessel to ascertain the value. The Sheriff would be assisted by professional and experienced appraisers who as court-appointed appraisers have to act faithfully and impartially. The amount of the appraised value is kept confidential so as not to affect the price at which bids are received. Ordinarily, the Sheriff would accept the highest bid price unless it is below the appraised value. When the court is asked to exercise its discretion to approve a judicial sale where the highest bid price is below the appraised value, the Sheriff hands over the confidential appraisement report of the court-appointed appraiser in a sealed envelope for the court's consideration. At no point in time would the amount of the appraisal be revealed to the public. In doing so, the integrity of the judicial sale process is preserved.

19 The duty of the Sheriff is to realise the highest price from the sale for the benefit of all interested parties (*The Silia* [1981] Lloyd's Rep 534 at 535; *The Margo L*). In *The Honshu Gloria* [1986] 2 Lloyd's Rep 63, Sheen J found

that the Admiralty Marshal was entitled to obtain the services of a classification society prior to the commission of sale in order to retain the vessel in class to achieve the highest price for the vessel. Similarly, in *The Westport (No 2)* [1965] 1 Lloyd's Rep 549, the Admiralty Marshal was permitted to arrange for repairs to the feed-water pump of the vessel in order to ensure that the vessel could be sold as a going concern at a higher price.

20 The placing of advertisements not only publicise the sale to a wider audience interested in bidding for the vessel to obtain the best possible bid price, but they also serve to notify the sale to all others interested in the vessel so that they can come forward and establish their maritime claims. These interested parties include other claimants that may not have issued *in rem* writs or filed caveats against release but have an interest in the vessel and sale.

21 Finally for the sake of completeness, in relation to the rights of *in rem* claimants against the vessel that have been transferred to the sale proceeds by virtue of the judicial sale, there is a comprehensive procedure in the RSC for the priority of these claims to be determined and for the distribution of the sale proceeds among all who come forward and establish their maritime claims within a specified time (see O 70 r 21(2)). The proceeding is entirely *in rem*, and it binds the world.

Court's discretionary power to order a judicial sale

22 The power of the court to sell a vessel under arrest after judgment *in rem* is obtained against that vessel is well established. I have referred to the court's discretion with respect to the confirmation of judicial sales, in particular, where the highest bid price received by the Sheriff was below the

appraised value (see [18] above). In one sense, such an application to sell below the appraised value is illustrative of the function of a judicial sale in which two competing concerns in a judicial sale are balanced: that of accepting the highest bid price at a fairly conducted Sheriff's sale on the one hand, and weighing that concern against the purpose to be achieved by a judicial sale, which is to benefit all persons interested in the *res* on the other (see [15]-[17] above) . There is no doubt that the court has discretion to refuse to confirm a judicial sale *below* the appraised value where the disparity between the highest bid price and the valuation of the court-appointed appraiser is so great as to possibly result in a sale that is relatively cheap and, on its face, prejudicial to the other *in rem* creditors and the defendant shipowner. The unfettered discretion to refuse the bid price could be exercised even in the absence of evidence suggesting that the sale was conducted unfairly or that a higher realisable sale price was possible.

23 Notably, a party seeking to obtain the court's sanction of a private direct sale is essentially departing from the comprehensive procedure in the RSC. Therefore, any substitute method of sale (and its propriety) would have to be weighed against the purpose to be achieved by a judicial sale order granted in the normal way. More often than not, the substitute method of sale, for example, a court sanctioned private sale (as was the case here), is advanced for the applicant's own purpose and benefit and is *prima facie* unfair.

24 In *International Marine Banking Co v Dora [No. 2]* [1977] 1 FC 603 at [7] ("*The Dora*"), the plaintiff applied for the private sale of the vessel and submitted that the sale price of CAD 5.9 million was the best price obtainable.

The Canadian court refused to allow the sale after examining sale process. In doing so, it held at [17]:

> Accordingly I am not prepared to approve the procedures followed either as being a satisfactory substitute for what might have been prescribed by the Court had an application been made, or as calculated to achieve the best price obtainable. The fact of the matter, as I view it, is that the procedure is one prescribed by the plaintiff as satisfactory for its own purposes and the proposed sale which has resulted from it is not a sale by the Court at all but a sale by the plaintiff for which it now seeks the endorsement of the Court to give the transaction the appearance of a sale by the Court. I would not, therefore, be prepared to grant the order sought even if I were satisfied that the 5.9 million price is as high as any price likely to be obtained on a sale by the Court.

25 Similarly, in *The Margo L*, the plaintiff bank applied to sell the vessel to a buyer found by the plaintiff, and at a specified price. Waung J noted that a private sale at a pre-determined price to a named purchaser was not generally the accepted way to sell the vessel for the best possible price. In that case, he considered the valuation certificates produced by the plaintiff bank to show that a proper appraisement of the vessel in question had been done and held:

> In this case, Den Norsk Bank which is a ship finance specialist is asking the Court (as it has done repeatedly on a number of occasions) to depart from the normal mode of sale and to allow its proposed purchaser Hudson to buy the Vessel at US$3.4 million. In support of this application, the Bank relies on three brief Valuation Certificates from three valuers who valued the Vessel at respectively US$2.5 million, US$2.75 million and US$3.2 million. Unfortunately as often happens in this sort of maritime valuation of ships, no detailed analysis was shown in these Valuation Certificates as to the factors and reasons which led to these valuations being given and in the absence of analysis and reasons, there can be no proper weighing of the strength of any of these Valuation Certificates or why one should be preferred over the other or why any one should be accepted. This most unsatisfactory nature of the valuations of the Vessel is however only one aspect of why the Court cannot allow private sale.

26 As I see it, these two decisions resonate with our admiralty jurisprudence and reflect the court's concern with a substitute method of sale (see [23] above). In this case, the Bank, as mortgagee in possession, wanted the court's sanction of the Direct Private Sale to obtain the perceived advantages of both judicial and private sales for its own benefit. The divergence in the interest of the Sheriff acting pursuant to a commission for appraisement and sale and such a party must necessarily require the court to exercise caution when dealing with this sort of hybrid sale application and to carefully scrutinise each application.

27 Recently, Teare J in *The Union Gold* held that as a matter of general principle the court should not order a sale to a buyer found by the arresting party notwithstanding that the proposed price appeared to be at or about the market value of the vessel. In *The Union Gold*, the applicant mortgagee bank arrested four small cargo vessels on 24 May 2013, and thereafter applied for an order that they be sold *pendente lite* to named buyers at named prices. The defendant shipowner owed the mortgagee bank EUR 4.5 million on a loan that was secured by mortgages over three of those four vessels (the three vessels were *Union Emerald*, *Union Silver* and *Union Gold*). In addition, the aggregate debt of EUR 13.5 million was separately secured by a mortgage on the fourth vessel (*Union Pluto*). Besides the bank, there were other creditors with *in rem* claims against the vessels. The bank had received an offer to purchase all four vessels at various prices which either exceeded the highest valuations obtained by the bank or were within the range of the valuation. For example, the bank received an offer of EUR 329,000 which was in excess of the bank's valuation of *Union Pluto*. I will come to the facts of the fourth vessel, *Union Pluto*, in due course.