

2. ADMIRALTY, SHIPPING AND AVIATION LAW

ADMIRALTY LAW

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Introduction

2.1 The High Court handed down an important decision in 2013 providing helpful clarifications on a rarely discussed but frequently encountered area of admiralty practice, which reviewed the private direct sale of an arrested vessel ordered to be judicially sold.

The Turtle Bay [2013] 4 SLR 615

2.2 The decision in *The Turtle Bay* [2013] 4 SLR 615 arose out of two admiralty actions *in rem* featuring the same plaintiff. The registered owner of the vessels the *Turtle Bay* and the *Tampa Bay* (“the Vessels”), a German entity, went into liquidation in Germany. The plaintiff, the mortgagee bank in respect of the Vessels, obtained the insolvency administrator’s consent to a private direct sale of the Vessels, and thereafter arrested the Vessels. The plaintiff also purported to enter into separate contracts with a named buyer to sell the Vessels at a specified price.

2.3 Having obtained judgment in default of appearance in both actions, the plaintiff filed applications seeking court sanction of a private direct sale in respect of each vessel (instead of applying for the Vessels to be appraised and sold through sealed bids placed by interested buyers) (“the sanction application”). The issue which Belinda Ang Saw Ean J considered was under what circumstances would the court sanction a private direct sale in respect of an arrested vessel, thereby suiting the arresting party’s own purposes and turning that sale into a judicial sale, which represents an important part of the court’s admiralty jurisdiction (“an admiralty judicial sale”): at [7].

Conceptual distinction between a private sale and an admiralty judicial sale

2.4 Before arriving at her decision, Ang J helpfully considered the conceptual distinction between a private sale and an admiralty judicial sale. Her Honour noted that in a private sale, the seller would in the

ordinary course have to warrant to the buyer that the subject vessel was unencumbered and not subject to any existing debts or liabilities whatsoever. To that end, the seller would usually provide the buyer with an indemnity that is usually counter-secured by a guarantee: at [10]. In contrast, the key (and attractive) feature of an admiralty judicial sale is the fact that the vessel is sold free from all liens and encumbrances; in other words, an admiralty judicial sale extinguishes any and all *in rem* claims attached to the subject vessel prior to that sale; a judicially sold vessel would therefore no longer be subject to an arrest on account of those claims: at [11].

2.5 In the light of the cleansing effect of an admiralty judicial sale, Ang J emphasised the protection which an admiralty judicial sale affords to existing *in rem* claimants against that vessel: at [15]. Ang J (at [16]) therefore adopted the reasoning of Waung J in *The Margo L* [1998] 1 HKC 217 at 218 and 219 (“*The Margo L*”), who opined that:

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 the well tried out method of appraisalment and sale by public tender. [emphasis added]

2.6 The court’s control over the sale process and ensuring that the vessel is sold at the highest price, not only protects the interests of all persons with *in rem* claims against the vessel, but also the defendant shipowner: at [17] and [33] (for he is the recipient of any balance of the proceeds of judicial sale after the *in rem* claimants, sheriff expenses and costs of arresting party are paid off). In this regard, Ang J noted the procedure prescribed in O 70 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which is to be followed in an admiralty judicial sale (at [17]–[21]):

(a) The sheriff’s appraisalment of the vessel’s value. The sheriff is to be assisted by professional and experienced appraisers who should act faithfully and impartially as court-appointed appraisers. The appraised value of the vessel is to be kept confidential, particularly when the court is asked to exercise its discretion to sell below the appraised value. That confidentiality preserves the integrity of the admiralty judicial sale process.

(b) The sheriff’s duty to realise the highest price from the sale for the benefit of all interested parties. In discharging that duty, the sheriff is:

- (i) entitled to obtain the services of a Classification Society to maintain the vessel in Class;
- (ii) entitled to arrange for repairs to the vessel; and

(iii) obliged to place advertisements to publicise the sale, and notify all other parties interested in the vessel, including but not limited to existing *in rem* claimants.

(c) The court's determination of priorities of claims, which binds the world.

2.7 This procedure, as Ang J pointed out, protects the integrity of the admiralty judicial sale process, as well as the interests of all parties who have an interest in the vessel and proceeds of sale: at [17]. In particular, while the marketing, advertisement and sale process notifies such parties of the intended admiralty judicial sale (at [20]), the confidentiality of the appraisal process, bids and eventual sale price preserve the integrity of the admiralty judicial sale process and the court's reputation for impartiality: at [18] and [28]. In this regard, Ang J also noted (at [24] and [25]) that the failure to adhere to the abovementioned process was a key reason why similar applications in the Canadian case of *International Marine Banking Co v Dora (No 2)* [1977] 1 FC 603 and the Hong Kong decision of *The Margo L* were dismissed.

Requirement of “powerful special features” or “special circumstances” before a court will sanction a private sale

2.8 In the light of the abovementioned purpose underlying an admiralty judicial sale, as well as the aforesaid procedural safeguards, Ang J opined (at [23]) that any substitute method of sale (for instance, a private direct sale) is advanced for the private purpose and benefit of the applicant, and is therefore *prima facie* unfair. Ang J therefore cautioned against the notion that there exists an established practice of the court, in the exercise of its admiralty jurisdiction, in sanctioning private direct sales of arrested vessels as admiralty judicial sales: at [8].

2.9 In this regard, Ang J followed the recent English decision of Teare J in *The Union Gold* [2013] EWHC 1696 (“*The Union Gold*”) in finding that there are at least three concerns with an application for a direct private sale of an arrested vessel (at [28] and [33]):

(a) Any such sale could be carried out without the usual appraisal process conducted by the sheriff.

(b) Court sanction of the sale of an arrested vessel to a named buyer at a named price would have the effect of revealing the arresting party's valuations of the vessel to potential buyers. In contrast (and as set out above), the appraisal process, bids and eventual sale price under an admiralty judicial sale are all carried out with the strictest

confidentiality. That confidentiality preserves the integrity and fairness of the admiralty sale process.

(c) Perhaps most importantly, there is a risk that the arrested vessel would not be sold for the best possible price.

2.10 In the light of the foregoing considerations, Ang J followed the position taken by the Hong Kong and English courts in finding that there must exist “powerful special features” or “special circumstances” before the court would be prepared to depart from the prescribed procedure in an admiralty judicial sale: at [29]. Furthermore, an arresting party would have to adduce “[c]ogent evidence” of such exceptional circumstances to warrant court sanction of a direct private sale: at [32]. It would therefore be “misguided” for potential admiralty claimants to think that there exists an established practice of the court, in the exercise of its admiralty jurisdiction, to sanction private direct sales of an arrested vessel: at [8].

2.11 What constitutes “powerful special features” or “special circumstances” is, of course, a fact-sensitive exercise: at [32]. Examples of such “powerful special features” or “special circumstances” can be found in the Canadian Federal Court decision of *Bank of Scotland v “NEL” (The)* (1997) 140 FTR 271 (“*The NEL*”) and *The Union Gold*. In the former case, there was a significant risk that the cargo on board the vessel could cause severe damage to the vessel if left on board. The alternative, discharging the cargo, was found to be very expensive. Furthermore, the arresting mortgagee had found a prospective buyer who was willing to carry the cargo to its destination and pay 20% more than the valuation of the vessel as appraised by shipbrokers.

2.12 In *The Union Gold*, Teare J sanctioned a private sale on the basis that a prompt private direct sale would preserve a long-term contract with preserved business for the vessel and jobs for those on board. Furthermore, the arrested vessel in that case was an old ship which was unlikely to attract any other buyers.

2.13 With these considerations in mind, Ang J found that the plaintiff had failed to satisfy the abovementioned threshold for four reasons (at [35]–[38]):

(a) First, Ang J found the plaintiff’s evidence as to the steps it had taken to bring the sale of the arrested vessels to the market at large to be wanting. Her Honour held (at [38]) that the mere fact that no other *in rem* claimants had stepped forward was not a reason for the court to sanction a private sale.

(b) Ang J also found the prospective private sale prices were “*not significantly higher*” than the respective appraised values of the Vessels. While her Honour did not go into exact figures,

potential applicants may wish to bear in mind the fact that a 20% mark-up was a factor in favour of granting a private sale in *The NEL*.

(c) The Ang J also found that there was “scant information” about any other serious bidders which the plaintiff’s shipbrokers in that case alleged they had considered.

(d) Finally, Ang J held that estimated expenses of maintaining the Vessels under arrest were, *per se*, insufficient to constitute “powerful special features” or “special circumstances” warranting court sanction of a private sale. However, her Honour appeared to leave open the possibility that such expenses could warrant a private sale where such expenses are disproportionately high *vis-à-vis* the potential value of the arrested vessel: at [37].

2.14 On account of the above factors and bearing in mind the fact that the plaintiff had purported to enter into sale contracts for the Vessels with a named purchaser for a named price to suit its own purposes (at [26] and [33]), Ang J dismissed the sanction application.

2.15 The decision of *The Turtle Bay* may also be significant for applicants seeking to persuade the court to sell an arrested vessel below her appraised value. In any such application, the court will have regard to two competing concerns: accepting the highest bid, and the purpose to be achieved in an admiralty judicial sale, *viz*, to benefit all persons interested in the vessel: at [22].

2.16 In the light of how an admiralty judicial sale extinguishes all *in rem* claims against the vessel, Ang J opined (at [11]) that the sheriff ought to be able to sell an arrested vessel at the market price, rather than at a “forced sale” price. Ang J’s observations could therefore make it more difficult for arresting parties to sell an arrested vessel below her appraised value. This is notwithstanding her Honour’s observations that the court has the unfettered discretion to refuse a bid price even in the absence of evidence suggesting that the sale was conducted unfairly, or that a higher realisable sale price is possible: at [22].

2.17 The decision in *The Turtle Bay* is a timely and welcome reaffirmation that the process of judicial sale must generally be carried out in a fair and transparent manner which safeguards the collective interest of all parties interested in the arrested vessel. It is not only the process which, in most instances, will yield the highest sale price for the vessel but one which, in all instances, will ensure the vessel is sold to her highest bidder. The concern that a vessel may be disposed of (with the beneficial cleansing effect of getting rid of all *in rem* claims) at an agreed price below her appraised vessel by the arresting party (usually a

financial institution) to a pre-arranged party, under a veil of opacity to suit the former's private interest, is frequently associated with a private direct sale. *The Turtle Bay* effectively puts an end to that practice (save in exceptional circumstances) and in doing so, brings the law of Singapore in line with the UK, Canada and Hong Kong.

SHIPPING LAW

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2.18 In 2013, no cases on shipping law were reported in the Singapore Law Reports.

AVIATION LAW

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2.19 In 2013, no cases on aviation law were reported in the Singapore Law Reports.