

1986 May 10

[A. LOIZOU, J.]

EUROEXPRESS SHIPPING CO., S. A.,

*Plaintiffs,*

v.

THE SHIP TERRA NOVA,

*Defendant.*

*(Admiralty Action No. 421/85).*

*Admiralty—Appraisal and sale of ship under arrest pendente lite—Principles applicable—The Cyprus Admiralty Jurisdiction Order, 1983, rules 74-77.*

*Admiralty—Discharge of cargo on board a vessel under arrest ordered to be sold pendente lite—Notice and reasonable time should be given by the Marshal to the cargo owners to have the cargo discharged—Such directions to the Marshal not necessary in this case, as all those, having claim in the cargo, were represented in the proceedings.* 5

The plaintiffs in this action filed the present application for the appraisal and sale pendente lite of the defendant ship under arrest since 14.12.85 and for the discharge and storage of the cargo on board the said ship at the expense of the said cargo. Following the said application the Marshal of the Court filed a similar application for the sale of the ship pendente lite in order to cover the £14,292 expenses incurred until the filing of the application. Both applications were opposed. 10 15

The Court made the following findings, namely that notwithstanding repeated assurances that the money claimed by the Marshal was on its way, the owners of the ship failed to remit the same; that the maintenance of the ship was costing a high amount of daily expenses; that the ship was deteriorating—being an old ship already—owing to being under arrest for a long period; that in these circum- 20 25

stances the security for the claim of the plaintiffs will be reduced to the disadvantage of all those interested in the ship, including, if they have any residual interest, the defendants themselves; that the ship has not been bailed out, the wages of the crew were unpaid for sometime even before the arrest of the ship and their repatriation expenses were not met by the owners.

*Held, granting the application of the plaintiffs:*

(1) The effect of Rules 74-77 of the Cyprus Admiralty Jurisdiction Order, 1893, on which the plaintiffs' application was based, was discussed and expounded by this Court in *Almyr Maritime S. A. v. The Cargo on Board the Ship "Almyrta"* (1975) 1 C.L.R. 116. The principles governing the sale of cargo pendente lite apply equally in the case of similar orders regarding ships under arrest (*The Myrto* [1977] 2 Lloyd's Law Rep. 243 at p. 260 adopted in *Gruno v. The Ship "Algazera"* (1980) 1 C.L.R. 404 followed).

(2) Applying the principles as expounded in the above cases to the facts of this case the conclusion is that this is a proper case to grant the order for the sale pendente lite applied for by the plaintiffs.

(3) As regards the question of the discharge of the cargo the rule is that "if an arrested vessel has cargo on board and an order is made for the sale of the vessel only, the Marshal will advise the cargo owners to have the cargo discharged and will give them reasonable time for this to be done. (*The Selina Stanford*, (*Sh. Gaz.* December, 8 1908)). If no steps have been taken within the time allowed the Marshal will apply to the Court for directions" (Passage in British Shipping Laws, Admiralty Practice p. 172 para. 389). In this case, however, as all those having a claim in the cargo are represented in these proceedings, there is no reason why it should be further directed that they be advised by the Marshal to have the cargo discharged by themselves. Such a direction would only delay matters.

(4) No directions will be given at this stage as regards the Marshal's applications.

*Application granted. Costs, including costs of plaintiffs caveators, who appeared in these proceedings, against the defendants.* 5

**Cases referred to:**

*Almyr Maritime S.A. v. The Cargo on Board the Ship "Almyrta"* (1975) 1 C.L.R. 116; 10

*The Myrto* [1977] 2 Lloyd's Law Rep. 243;

*Gruno v. The Ship "Algazera"* (1980) 1 C.L.R. 404;

*The Selina Stanford* (Sh. Gaz. December 8, 1908).

**Application.**

Application by the plaintiffs for the appraisal and sale of the Ship Terra Nova pendente lite in order to cover the £14,292.- expenses incurred. 15

*St. McBride*, for the plaintiffs in Action No. 421/85 and the caveator in Action No. 431/85.

*Chr. Mitsides*, for the plaintiffs and caveators in Actions Nos. 432/85 - 447/85 and 449/85. 20

*M. Pelides*, for the plaintiffs in Action No. 30/86.

*V. Harakis*, for the defendant ship and its owners.

Marshal present.

*Cur. adv. vult.* 25

A. LOIZOU J. read the following judgment. The defendant ship was, on the application of the plaintiffs, arrested by order of the Court dated the 14th December, 1985, and has since then been under such arrest at the port of Limassol. It was a condition in the said order that the plaintiffs should lodge in Court the sum of Cyprus pounds £250, deposit for any expenses which might be incurred by the Marshal in connection with the custody of the ship whilst 30

under arrest subject to that amount being increased later on. It was also provided that the plaintiffs-applicants should lodge in Court any further amount that the Registrar of this Court would ask the plaintiffs to do with regard to the expenses of the arrest and failing to comply within three days from such demand the order of arrest to be discharged.

On the 20th December 1985, the plaintiffs filed an ex parte application seeking the following reliefs:

- 10       “(a) the appointment by the Court or Judge of the Marshal of the Court or any other person or persons to appraise the defendant ship TERRANOVA, now under the arrest of this Honourable Court.
- 15       (b) an order for the sale pendente lite of the said defendant ship TERRANOVA with or without appraisal and for the payment into Court of the proceeds of sale.
- 20       (c) for the discharge and storage of any cargo on board the said defendant ship TERRANOVA at the expense of the said cargo by the Marshal of the Court.
- 25       (d) for any other order and/or direction necessary under Rules 74 to 77 of the Rules of the Supreme Court in its Admiralty Jurisdiction.”

In fact the application was based on the Rules mentioned in paragraph (d) hereinabove set out. The facts relied upon are set out in the accompanying affidavit in which the affiant states that the master and the crew of the defendant ship all of Italian nationality had not been paid for the last two months and that they were then consulting an advocate to institute proceedings for their unpaid wages and that the Italian Consul was concerned with their repatriation. Furthermore that a skeleton crew would be needed for the safe maintenance of the defendant ship and for the same purpose bunkering and provisions had to be supplied. In that way the defendant ship should be considered as waste asset.

On the same day the Court directed that notice of the said ex parte application be given to the defendant ship and her master and same was fixed on the 27th December, 1985, for hearing on which date the application was further adjourned to the 3rd January 1986, as no service had been effected in the meantime. On the 21st December, 1985, the Marshal of the Court filed an application for directions and approval for the purchase of bunkers, food and drinking water, and the payment of the expenses for the use of motor-launches for communication with the shore. The Court was informed thereby that the supplies on board the defendant ship were minimal and their replenishment was considered essential for the safety of the ship, its crew and its cargo which consisted of about two-thousand tons of iron which remained on board after the ship had left unlawfully the port of Alexandria without discharging same as a result of a dispute between the shippers and the consignees and that its seventeen member crew remained without any assistance for a long time until she came to Limassol for help. In the meantime further directions were sought by the Marshal and an application for repatriation of the crew was granted on the 4th January 1986, subject to a skeleton crew being left for the safety of the ship. The repatriation expenses were directed to be paid by the plaintiffs in the first instance unless other arrangements were made. The crew was thereafter repatriated, a skeleton crew of five was engaged by the Marshal and directions were sought by him from the Court about their remuneration and the payment of the costs of certain essential repairs to the ship.

On the 3rd January, 1986, when the application was fixed before me for the first time the owners of the defendant ship appeared and applied for its adjournment to the 18th January, 1986, when, a direction for the opposition to be filed within one month, was made. On the same day an unconditional appearance was entered in the action and directions were made as to pleadings.

On the 19th February 1986, the Marshal sought further directions as to the manner in which the expenses for maintaining the skeleton crew could be met and the Court di-

rected that the Marshal should consider the possibility of applying for sale pendente lite or release the ship after notice to the plaintiffs and the caveators.

5 On the 15th March, 1986, an application for the sale of the ship pendente lite in order to cover the £14,292 expenses incurred until then by the Marshal was filed and served on the plaintiffs, the defendants and all other interested parties who had either instituted proceedings against the ship or filed caveats. The Marshal's application  
10 was opposed by the owners of the defendant ship and the grounds given in the affidavit dated the 21st March, 1986, filed in support of their opposition are in effect the following:-

15 (a) That the ship-owners and/or their advocate learned for the first time through the said application that the expenses incurred were in the region of £14,292 and that in the past no amount of money was asked from them for either full payment of such expenses or contribution towards them.

20 (b) That after the service of the said application, counsel for the defendants communicated immediately with the ship-owners (SIDER LINE) and informed them about the amount in the application, and that in response the ship-owners by repeated telephone calls and telexes informed  
25 the said advocate's office that they were willing to pay any expenses which were necessary for the maintenance of the ship.

30 (c) That as "it is known" under the Exchange Control Laws of Italy for money to be sent out of the country proof has to be given, to the authorities about them or at least the Marshal should seek same in writing.

(d) That some time is necessary for the money to be remitted.

35 (e) That the ship-owners never refused to pay the afore-said amount or any amount as they were never asked to pay same and that it is not just and fair for the ship to be sold as they have a good defence especially in action 421/85 in which they have a counterclaim.

On the 28th March, 1986, opposition was also filed to the plaintiff's application for sale pendente lite. An affidavit was filed in support thereof and it may be worth quoting therefrom the following paragraphs:

"8. The defendant vessel is not, by reason of the continued arrest, deteriorating or its value diminishing to any appreciable extent. Furthermore, the weather conditions no longer obtain or are likely to recur with the passing of the winter and the advent of spring and in any case do not affect the ship in its present situation. Moreover, I am further advised that the vessel has enough bunkers on board to raise its anchor and dock should the need arise and otherwise manoeuvre effectively.

10. Already on the ship TERRA NOVA it exists a skeleton crew for her safety.

1. The defendant ship it's a new one and certainly is not a wasting asset. On the contrary she is very valuable to her owners.

12. The owners of the ship never had the chance to oppose the warrant of arrest because it was made absolute before having the chance to appear. Certainly, though, and these are my instructions, they shall apply to have the warrant of arrest set aside. In relation to what it is mentioned to the Affidavit of Mr. McBride, about a conversation made with me this is not something helpful to the application.

14. The defendant is covering all the expenses, though, the applicants failed to comply with the payments of the repatriation expenses, something which voluntarily the defendant and her owner did."

On the 28th March, 1986, counsel for the defendant ship and its owners applied for a short adjournment as he had received as he informed the Court instructions through telex to the effect that the ship-owners had given instructions for the remittance of the amount claimed by the Marshal to cover all his expenses. No objection was raised to that application for adjournment and it was intimated

by counsel for the plaintiffs that same might be left for hearing by the 7th April when another pending application had been fixed in the hope "as counsel stated that the money promised will arrive by then".

5 On the 7th April, 1986, counsel for the ship-owners made a long statement which I need not repeat here and concluded by saying that he contacted his clients and the money are on their way. All applications were then ad-  
10 here that in spite of the repeated assurances of counsel appearing for the owners of the defendant ship that in-  
structions had been given to a bank to remit them and that the money were on their way, nothing arrived. The  
15 explanation for this failure given by counsel is that the appropriate Authorities in Italy have not given permission for their remittance, but this in my view does not make in  
any way the fears of counsel for the plaintiffs-applicants unjustified.

20 In the case of *Almyr Maritime S. A. v. The Cargo on Board the Ship "Almyrta" now in the port of Limassol Consisting of 2900 Metric Tons of Cement*, (1975) 1 C.L.R. 116 I had the occasion to consider Rules 74 - 77 of the Cyprus Admiralty Jurisdiction Order, and I said the following:

25 "The present application is based on the Cyprus Admiralty Jurisdiction Order, 1893, rules 74 to 76, 203 to 205 and 215. Rule 74 reads as follows:-

30 'It shall be lawful for the Court or Judge, either before or after final judgment on the application of any party and either with or without notice to any other party, by its order to appoint the Marshal of the Court or any other person or persons to appraise any property under the arrest of the Court, or to  
35 sell any such property either with or without appraisal, or to remove or inspect and report on any such property or to discharge any cargo under arrest on board ship'."

Rules 74 to 77 seem to contain in effect, in a combined way—without this meaning that they are identical—



what is provided for in England by Order 50, rule 2 and Order 51, rules 14 to 16 of the pre 1962 Rules, now Order 29, rule 4 and Order 75, rules 12 and 23 of the new Rules of the Supreme Court (Revision), 1965. Guidance, therefore, in interpreting rules 74 to 77 may be derived from the manner the said English Orders were applied. As pointed out in a note to Order 50, rule 2 in Roscoe's Admiralty Practice, 5th ed. at p. 351 — 5

“Under this rule it is that the Court will order the sale of a vessel which remains under arrest and against which expenses are accumulating, and which is deteriorating, if in the interests of all parties a speedy sale would appear to be desirable: *The Loisa* (1905), Fo. 307; *The Carl Hindric* (1903) Fo. 468; *The Reigate* (1905), Fo. 309. In the case of perishable articles an order for sale should be made rather than an injunction; *United Fruit Co. v. Frederic Leyland and Co., Ltd., and Others* [1930], 47 T.L.R. 33.” 10 15

Furthermore as stated in British Shipping Law, Vol. 1, Admiralty Practice, 1964 at paragraph 276, after stating in the preceding paragraph that the words “goods, wares or merchandise” to be found in Order 50, rule 2, are wide enough to cover a ship, it is said that - 20

“Typical grounds for an application are that a ship is costing a disproportionate amount in daily expenses, e. g. of dock dues, shipkeepers, etc., or that she is deteriorating owing to being under arrest for a long period, or that a cargo is perishable.’ 25

The continuing and mounting expenses of arrest and the fact that goods are deteriorating, are among the good reasons which a Court may consider in ordering the property to be sold. (See also Halsbury's Laws of England, 4th ed., Vol. 1, paragraph 434 and the authorities cited therein).” 30

Needless to say that the principles governing the question of orders for sale pendente lite of cargo apply equally in the case of similar orders regarding ships under arrest. 35

This proposition in addition to what I said in the "*Almyrta*" case is fully supported by what Brandon J. said in *The Myrto* [1977] 2 Lloyd's Law Rep. p. 243 at p. 260 where he summed up the position as follows:

5 "The question whether an order for the appraisement and sale of a ship under arrest in an action in rem should be made pendente lite arises normally only in a case where there is a default of appearance or defence. In such a case it has been a common practice  
10 for the Court to make such an order on the application of the plaintiffs on the ground that, unless such order is made, the security for their claim will be diminished by the continuing costs of maintaining the arrest, to the disadvantage of all those interested in  
15 the ship, including, if they have any residual interest, the defendants themselves.

Where defendants to an action in rem against a ship appear in the action with the intention of defending it, they almost invariably obtain the release of  
20 the ship from arrest by giving bail or providing other security for the claim satisfactory to the plaintiffs. For this reason there appears to be no reported case in which the Court has had to consider in what circumstances it would be right to make an order for  
25 appraisalment and sale of a ship pendente lite in a defended case."

The aforesaid passage was quoted by Demetriades J. in *Gruno v. The Ship "Algazera"* (1980) 1 C.L.R. 404 which also turned on the question of sale pendente lite of  
30 a ship under arrest.

Applying to the facts of this case the principles hereinabove expounded I have come to the conclusion that this is a proper case to grant the order for sale pendente lite applied for. The grounds for it are that the maintenance  
35 of the ship is costing a high amount of daily expenses. Her owners having failed to remit the money necessary for her maintenance as promised repeatedly by them. She also is deteriorating—being an old ship already—owing to being under arrest for a long period. In these circumstances the

security for the claim of the plaintiffs will be reduced by this continuing costs of maintaining the arrest to the disadvantage of all those interested in the ship, including, if they have any residual interest, the defendants themselves. The ship has not been bailed out, the wages of the crew were unpaid for some time even before the arrest of the ship and their repatriation expenses were not met by the owners. Finally the condition and age of the vessel makes doubtful the amount that can be secured from her sale. 5

As regards paragraph (c) of the reliefs sought, namely the discharge and storage of the cargo on board the defendant ship by the Marshal of the Court and at the expense of the said cargo, it has to be pointed out that the position is as set out in the British Shipping Laws, Admiralty Practice p. 172, paragraph 389 where it is stated that "if an arrested vessel has cargo on board and an order is made for the sale of the vessel only, the Marshal will advise the cargo owners to have the cargo discharged and will give them reasonable time for this to be done (*The Selina Stanford (Sh. Gaz December 8, 1908)* ). If no steps have been taken within the time allowed, the Marshal will apply to the Court for directions." This practice has been consistently followed by this Court in a number of cases. 10 15 20

Since all the parties having a claim on the cargo, though conflicting ones, are represented in these proceedings and consequently fully aware of the situation and understandably so, they have not taken any steps themselves, I see no reason why I should further direct that they be advised by the Marshal to have the cargo discharged by themselves. Such time, however short, would only delay matters and increase its further deterioration through prolonging its being submerged in seawater, which, as stated in Court, is seeping in the hold of the defendant ship where the cargo is stored and on the other hand delay the implementation of the order for appraisalment and sale of the defendant ship. 25 30 35

I shall therefore grant the relief sought in respect of the cargo as well.

For all the above reasons I hereby order as follows:

1. That the defendant ship "TERRA NOVA" which is under arrest in the port of Limassol, be appraised and sold.

5 2. That the Marshal himself or any one or more experienced person or persons he may choose, appraise the said ship according to the true value thereof and immediately after carrying out of such appraisement furnish forthwith to the Registrar of this Court a statement in writing showing the value of the appraised ship and also  
10 the amount of the fees, costs, charges and expenses incurred.

3. That the ship in question be sold by the Marshal by public auction or private treaty for the highest price that could be obtained for it but for not less than the appraised  
15 value unless the Court on the application of the Marshal allows it to be sold for a lesser amount.

4. Immediately upon completion of the sale the gross proceeds thereof should be paid into Court and a statement signed by the Marshal showing the amount so paid, as well  
20 as all fees, costs, charges or expenses incurred in carrying out the sale should be furnished to the Registrar of the Court. Such statement should be accompanied by any vouchers necessary to show the amount of the monies expended.

25 5. That the cargo on board the said defendant ship "TERRA NOVA" be discharged and stored by the Marshal of the Court at the expense of the said cargo.

6. Costs of this application including the costs of plaintiffs caveators who appeared in these proceedings to be  
30 paid by defendants.

Having reached the aforesaid result I do not propose at this stage to give any directions on the application of the Marshal and same should remain in the file to be taken up in the future if need arises.

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*Order accordingly.*