

1983 August 30

[A. Loizou, J.]

COMMERCIAL BANK OF THE NEAR EAST LTD.,

Plaintiffs.

v.

THE SHIP "PEGASOS III" NOW LYING AT LIMASSOL PORT,

Defendants.

(Admiralty Action No. 300/77).

5 *Admiralty—Practice—Judgment against ship—Order for sale—Proceeds of sale—Highest bidder declining to complete sale—Ship sold at lower price—Marshal recovering damages for breach of contract from highest bidder—Whether damages part of the proceeds of sale—And whether application for a declaration that they should form part of the proceeds of the sale may be made as an application in the original Action or by way of a separate originating application.*

10 The applicants-plaintiffs having obtained judgment against the defendant ship applied for the determination of the priorities of the various claims and for an order directing that they be paid their judgment-debt and costs out of the proceeds of the sale whereupon the Court having determined the priorities made also, an order for payment of the judgment debt out of the
15 proceeds of the sale. The Marshal put up the ship for sale by auction and it was knocked down to the highest bidder ("Photiades") for £181,000. Photiades however refused to pay the value of the ship and the ship was put up for sale again and was knocked down to the highest bidder for the sum of £103,000.

20 In an action (No.19/78) by the Marshal against Photiades for damages the Court awarded to him the sum of £78,000 as damages for breach of contract; and by means of the present application the defendants applied for a declaration that any amounts paid or to be paid in Court in the fund of the proceeds
25 of sale of the ship "Pegasos III" in accordance with the judgment of the Court delivered in Admiralty Action No. 19/78 are and/

or should be treated as proceeds of the sale of the ship "Pegasos III".

The plaintiffs opposed the application on the following grounds:

- (a) That the application should not have been made as an application in Admiralty Action 300/77 but by way of a separate originating application. 5
- (b) That the Court lacked jurisdiction because the amounts adjudged in Action 19/78 were in Law damages for breach of contract and they could not be treated as proceeds of sale and be put all in one basket. 10

Held, (1) that there is no merit in the contention that the present application should not have been made as an application in Admiralty Action No. 300/77 but by way of a separate originating application; that this was an application by a party desiring to obtain an order from the Court as regards the proceeds of the sale which were the outcome of the proceedings in Action No. 300/77; that the application could have been made by anybody desiring an order, as well as an order for the payment out to him of monies in Court, or by the Marshal for directions from the Court if he felt that he needed any as regards the proceeds of the sale or any other amount coming to him in connection thereto and such application had to be made as an application in the proceedings in which he had been appointed to act as regards the appraisalment, the sale and the collection of the proceeds of such sale by the Court. 15 20 25

(2) That these proceeds which would have been recovered had Photiades not committed breach of contract were recovered as damages for such breach and this does not change their legal character and they form part and parcel of the proceeds of the sale of the ship, because the true proceeds was the price fetched at the first auction; accordingly applicants are entitled to the remedies sought. 30

Application granted.

Cases referred to:

Photiades v. Director of Ports and Another (1982) 1 C.L.R. 244. 35

Application.

Application by plaintiffs for a declaration that any amount paid or to be paid in Court in the fund of the proceeds of sale

of the ship "Pegasos III" should be treated as proceeds of the sale of the said ship and for an order directing the payment of any moneys to be deposited in Court to the plaintiffs.

St. McBride, for applicants.

5 *M. Vassiliou*, for respondents-plaintiffs in Action No. 237/77.

Cur. adv. vult.

A. LOIZOU J. read the following ruling. By the present application the plaintiffs/applicants seek:

- 10 (a) Declaration that any amount paid or to be paid in Court in the fund of the proceeds of sale of the ship "PEGASOS III" in accordance with the judgment of the Court delivered on 12.4.1982 in Admiralty Action 19/78 as varied by consent on 20.4.1983 are and/or
- 15 should be treated as proceeds of the sale of the ship "PEGASOS III".
- (b) An order of the Court directing that the above plaintiffs be paid any moneys to be deposited in Court as in (a) above in or towards satisfaction of the judgment-debt and costs in accordance with the order as to
- 20 priorities made in this action on 15.12.1978.
- (c) Any other order or relief as the Court may think fit.
- (d) The costs of this application.

25 The application is based on Admiralty Jurisdiction Order 1893, rules 111, 112, 203 and 237 and on the general practice and inherent jurisdiction of the Court.

30 The applicants/plaintiffs obtained judgment against the ship "PEGASOS III" and applied for the determination of the priorities of the various claims and for an order directing that they be paid their judgment-debt and costs out of the proceeds of sale. This Court, after hotly contested proceedings, adjudged that the order of priority in the case was as follows:-

- (a) Marshal's charges and expenses, as hereinabove determined.
- 35 (b) The applicants' mortgage debt as per the judgment

given in their favour on 15th October, 1977, in Action No. 300/77; and

- (c) The claims of all opponents which should rank *pari passu inter se* and all other claims, not coming under categories (a) and (b) above. 5

And made an order for payment out of the proceeds of the sale accordingly. That order was confirmed on appeal by the judgment of the Appeal Court delivered on 27th May, 1983.

The proceeds of the sale in respect of which the application for priorities was made, were realized at an auction effected on the 4th January, 1978, when the ship was knocked down to the highest bidder for the sum of C£103,000. That was, however, the second auction that the Marshal of this Court conducted after the value of the ship was appraised and the reserved price was fixed at C£180,000. The first auction took place on the 15th December, 1977, at which a number of persons interested were present, including a certain Takis Photiades. That auction was concluded and the Marshal knocked down the said ship to the highest bidder who was the said Takis Photiades who had made a bid for the sum of C£181,000. A record was prepared and signed by the Marshal and the said bidder to the effect that the ship was so knocked down. After the signing of the said record, he was asked to pay forthwith the deposit being 10% of the value of the ship but he left without paying and on the following day when asked by the Marshal to pay, he refused to do so alleging that the auction was null and void and not properly conducted and that in any event he did not bid personally but as an agent of a group of companies. That dispute was the subject of Admiralty Action No. 19/78 in which the said Photiades was the plaintiff seeking: A declaration that the public auction for the sale of motor vessel "PEGASOS III" held by defendant at Limassol on the 15th December, 1977, and the subsequent knocking down of the said ship to plaintiff is null and void and of no legal effect whatsoever and for an order of the Court setting aside the sale and knocking down of the said ship at the price of C£181,000. The defendant in that action was The Director of Ports and Marshal of the Admiralty Court of Nicosia. It may be pointed out that at the material time the holder of the office of Director was also the Marshal of the Admiralty Court. 10
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The defendants in that action counterclaimed for damages against the plaintiff for C£78,000.—which was the deficit between the price at which the ship was knocked down to the plaintiff in the first auction and the amount realized at the second auction.

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By the judgment of the Court delivered on the 12th April, 1982, and reported as *Takis Photiades v. The Director of Ports and Marshal of the Admiralty Court of Nicosia* (1982) 1 C.L.R., p. 244, the plaintiff's claim was dismissed and judgment was given against him on the counterclaim for the sum of C£78,000.—with interest at 9% p.a. as from the 4th January, 1978, till the date of judgment and legal interest as from that date till payment, the learned trial Judge having been satisfied that the sale had been concluded and that by his refusal to comply with his undertaking to pay the amount for which he bid at the auction, the plaintiff had committed a breach of contract of sale and therefore he was liable to pay damages which were accepted as having been proved to amount to C£78,000. Copy of the judgment is appended to the affidavit filed in support of this application.

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On the 20th April, 1983, the matter came up once more before the learned trial Judge who had dealt with the case on an application to set aside the said judgment that had been obtained in default of appearance of the plaintiff and the following settlement was reached:

“There will be a stay of execution under the following conditions:

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If the defendant in the counterclaim and judgment-debtor in these proceedings pays within two days the sum of C£3,000.- then there will be a stay of execution till the 1st July, 1983, and thereafter from month to month, so long as the judgment-debtor pays C£500.- on the first day of each month with any accrued interest on the amount of C£10,000.- or any balance thereof at the rate of 3 per cent per annum.

Failure to pay anyone instalment will render the whole judgment-debt payable forthwith.

If the judgment-debtor pays regularly his instalments

and he pays a total amount of C£13,000.- plus interest at 3 per cent on any instalment on arrear as hereinabove, then this judgment-debt will be deemed as fully satisfied.

There will be ten days grace for each instalment.

Furthermore, the amount of this judgment will be payable 5
to the fund of the proceeds of the sale of the said ship which
is administered by the Registrar of this Court.

The application to set aside the judgment is dismissed with
no order for costs."

The application was opposed on the following three grounds: 10

"(a) That the Court lacks jurisdiction to make the declara-
tion sought by the application and/or the application
is not tenable in Law.

(b) That the amount mentioned in the application, para.
(a), are damages given for breach of contract and/or 15
otherwise as it appears in the attached judgment dated
12.4.82.

(c) The applicants do not disclose in their affidavit whether
the mortgage debt has been satisfied by execution and/
or payment of the collateral security mentioned in the 20
Mortgage Deed and/or in the loan agreement and/or
Deed of Guarantee and/or other documents already
filed in Court."

In arguing the first ground of the opposition, counsel for the
respondents has maintained that the present application should 25
not have been made as an application in Adminartly Action
No. 300/77 but by way of a separate originating application.
To my mind there is no merit whatsoever in this contention.
This is an application by a party desiring to obtain an order
from the Court as regards the proceeds of the sale which were 30
the outcome of the proceedings in Action No. 300/77. The
application could have been made by anybody desiring an order,
as well as an order for the payment out to him of monies in
Court, or by the Marshal for directions from the Court if he
felt that he needed any as regards the proceeds of the sale or 35
any other amount coming to him in connection thereto and such
application had to be made as an application in the proceedings

in which he had been appointed to act as regards the appraisal, the sale and the collection of the proceeds of such sale by the Court.

5 As regards the contention that this Court lacks jurisdiction, counsel for the respondents linked it also with ground (b) of his opposition and maintained that since the amount adjudged to be paid under the counterclaim in *Photiades* case (*supra*) were in law damages for breach of contract, they could not be treated as proceeds of sale and put them all in one basket, as he put it.

10 In actions for damages for non acceptance of goods, the normal measure of damages is the contract price less the market price at the contractual time for acceptance. This represents the amount the seller must obtain to put himself in the position he would have been in had the contract been carried out. The
15 Marshal of the Court did nothing else and secured nothing more than the difference in the price between the first auction at which *Photiades* bid and the second auction at which the actual proceeds were realised.

20 The Marshal raised the counterclaim to cover the short fall between the amount the ship fetched in the two auctions and he was the only person to defend the proceeds of the sale of the ship and safeguard same. These proceeds which would have been recovered had *Photiades* not committed a breach of contract were recovered as damages for such breach and this does not
25 change their legal character though they form part and parcel of the proceeds of the sale of the ship, because the true proceeds was the price fetched at the first auction.

In conclusion I shall deal briefly with the third ground of the
30 opposition. This is answered by the contents of paragraph 3 of the affidavit filed in support of the application that apart from the sum of C£35,329.400 mils paid by the Registrar out of the proceeds of sale of the ship "PEGASOS III", the defendants have paid no money towards the judgment-debt and in any event this point is irrelevant for the purposes of this application.

35 For all the above reasons I have come to the conclusion that the applicants are entitled to the remedies sought under paragraphs (a) and (b) of the application, with costs.

Application granted with costs.