

1978 October 4

[TRIANAFYLLIDES, P.]

EVANGELOS KYRMIZOUCES,

*Plaintiff,*

v.

THE SHIP "PHILIPOUPOLIS" NOW LYING  
IN THE PORT OF LIMASSOL,

*Defendant.*

(Admiralty Action No. 310/78).

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*Admiralty—Appraisalment and sale of ship pendente lite—Ship under arrest loaded with cargo not itself under arrest—Both exposed to grave risks—Value of ship not sufficient to satisfy claims against her and may be diminished if she continues to be under arrest—Expenses entailed by arrest will continue to mount to the prejudice of all those who have claims against her—Sale will not only protect the interests of plaintiff and of all the claimants, but, also, the interests of the ship-owners—Order for the sale of the ship, for the discharge and delivery of the cargo to its owners and for the payment of repatriation expenses to the crew—Rule 74 of the Cyprus Admiralty Jurisdiction Order, 1893.*

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The plaintiff in this action moved the Court for an order of appraisalment and sale pendente lite of the defendant ship. The ship was arrested on July 31, 1978 on the application of the plaintiff following the filing of an action by him claiming various amounts for wages and emoluments.

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In addition to the claim of the plaintiff there were other claims against the ship and the total of all claims pending against her was about 375,000 U.S.A. dollars; there were filed seven caveats by claimants other than the plaintiff.

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The expenses entailed by the continuing arrest of the ship amounted to between C£ 200 and C£ 250 per month.

The appraised value of the ship as found by the Marshal was 200,000 U.S.A. dollars.

In a report\* dated September 26, 1978 the Marshal stated that the vessel was anchored without anyone on board and that with the change of the weather, should there be a strong wind blowing, the ship ran the risk of dragging her anchor and either coming into contact with another vessel or going aground. The Marshal further drew attention to the fact that the cargo of cement, which was loaded on the vessel, might be contaminated with sea water.

10        *Held*, that taking into consideration all relevant aspects of this case and, in particular, the situation in which the defendant ship and her cargo are exposed to grave risks (see the report of the Marshal dated September 26, 1978), the fact that the value of the ship is not sufficient to satisfy the claims made against her and such value may be diminished considerably if  
15        the ship continues to be under arrest in the circumstances described in the said report of the Marshal, and that the expenses entailed by the ship's continued arrest will continue to mount to the prejudice of all those who have claims against such ship, this Court has decided that it should grant the application of  
20        the plaintiff for an order for the sale of the ship *pendente lite*, because it is of opinion that such a course is the better one for the protection of the interests not only of the plaintiff, and of all the others who have claims against the defendant ship, but, also, of the owners of the ship, too; and that, therefore, it hereby  
25        makes an order for the sale of the ship, for the discharge and delivery of the cargo to the persons entitled thereto (see the "Myrto" (1978) 1 Lloyd's Rep. 11 at p. 14) and for the payment of the repatriation expenses of the crew (pp. 537-38 *post*).

*Application granted.*

30        Cases referred to:

*Almyr Maritime S.A. v. The Cargo on Board the Ship "Almyrta"*  
(1975) 1 C.L.R. 116 at pp. 118, 119-120;

*The Westport* [1965] 2 All E.R. 167;

35        *The "Myrto"* [1977] 2 Lloyd's Rep. 243 at pp. 259-260; [1978]  
1 Lloyd's Rep. 11 (C.A.) at p. 14;

*Baring Shipping Co. v. The Ship "Eurotrader"* (1978) 1 C.L.R.  
93;

*The "General Serret"* [1925] 23 Ll. L. Rep. 14.

\* Quoted at pp. 529-30 *post*.

**Application.**

Application for an order that the defendant ship be appraised and sold pendente lite.

*N. Anastassiades*, for the plaintiff.

*C. Velaris*, for the defendant.

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*Cur. adv. vult.*

The following decision was read by:

TRIANTAFYLIDIS P.: At the present stage of the proceedings in this action I am dealing with an application, filed by counsel for the plaintiff on September 2, 1978, for an order that the defendant ship should be sold pendente lite and that the proceeds of the sale should be paid into Court.

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The present action was filed on July 31, 1978, and on the same day there was issued, on the application of the plaintiff, a warrant for the arrest of the defendant ship.

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The arrest was duly effected and counsel appearing for the defendant did not oppose it; so, eventually, the order for the arrest of the ship has been made absolute. It has been provided by means of a term in such order that the defendant ship may be released if there is filed a security bond for the sum of C£ 3,500 answerable for the satisfaction of any order or judgment for the payment of money which may be made against the ship or its owners in this action; but until now no such security has been given and the ship continues to be under arrest.

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On September 2, 1978, counsel for the plaintiff applied for the appraisal and sale of the defendant ship and on September 13, 1978, an order for the appraisal of the ship was made by consent. According to a relevant report filed by the Marshal, and dated September 26, 1978, the value of the ship is 200,000 U.S.A. dollars.

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The claim of the plaintiff, as it is set out in the petition which was filed on September 8, 1978, is for:-

"A. The sum of STG. £ 3,277.20 and/or the equivalent in Cyprus currency for wages and emoluments till the 31/8/78 as above.

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B. The sum of C£ 190,400 mils being various costs and

expenses incurred by the plaintiff in maintaining himself till the 31st August, 1978.

- 5 C. Judgment for his wages, emoluments and costs for maintenance and/or any other expenses to be incurred as from the 1st September, 1978 till the determination of his contract and/or repatriation.
- D. Repatriation expenses.
- E. Damages for wrongful dismissal and/or otherwise."

10 In an affidavit, which was filed in support of the application for the appraisalment and sale pendente lite of the ship, and is dated September 2, 1978, counsel for the plaintiff stated that acting on behalf of members of the crew of the defendant ship, including the plaintiff, he had filed the present action and Admiralty Actions Nos. 311/78-344/78 and 353/78, claiming on  
15 their behalf wages, damages and repatriation expenses which amount to more than 170,000 U.S.A. dollars, and that there were pending, also, other claims against the same vessel exceeding 65,000 U.S.A. dollars. During the hearing of the application for the sale of the ship it has been stated by counsel  
20 for the plaintiff that the total of the claims now pending against the ship is about 375,000 U.S.A. dollars; and, actually, there have been, also, filed in this action, till now, seven caveats by other claimants.

25 It is stated, also, in the aforesaid affidavit of counsel for the plaintiff that the daily expenses entailed by the continuing arrest of the ship amount to between C£ 200 and C£ 250 per month.

In a report filed by the Marshal, and dated September 26, 1978, the following are stated regarding the defendant ship:-

30 "I would like to point out the following facts regarding this vessel.

35 She is at present at anchor in Limassol roads and due to the fact that there is no fuel on board the crew cannot remain on board as they cannot have drinking and washing water and no means to cook their meals also their refrigerators cannot operate.

The result of all above is that the vessel is anchored without anyone on board.

The vessel is an old one (built in 1949) and the Chief Engineer went on board yesterday in order to pump her bilges. 5

Sounding of the bilges showed 2 1/2 to 3 feet of water. He used for the last his auxiliary engines due to the fuel shortage.

The vessel is loaded with cement loaded in July at Constantza and the long stay of such cargo in the holds is problematic as it alters the properties of cement. Also since no pumping of bilges can be effected when the water will raise more than 3 feet it will contaminate the cargo with sea water. This may happen in the next 10 to 15 days. 10 15

Finally the most serious aspect of the matter is that the weather is changing and should there be a strong wind blowing nothing can prevent the vessel from dragging her anchor and either coming into contact with another vessel or going aground." 20

On September 28, 1978, when the hearing of the application for an order for the sale of the ship pendente lite was due to commence, counsel appearing for the defendant applied for an adjournment and for an extension of time within which to file an opposition to such application, because till then he had not yet received instructions from the owners of the ship regarding substantial aspects of the case. 25

In view of the urgency of the matter, and as from the material placed before the Court it appeared that the owners of the ship, who are in Greece, had been given ample notice and had adequate time within which to give all necessary instructions to counsel appearing for them in this action, and yet they had failed to do so, I refused to adjourn the hearing of the application for an order for the sale of the ship, but I allowed counsel for the defendant to address me on the merits of such application, even though he had not filed an opposition in writing. The hearing of the application was concluded on September 30, 1978, and I shall now give my decision as regards its outcome. 30 35

The relevant provisions of the Rules of our Supreme Court 40

in its Admiralty Jurisdiction are rules 74 to 77; rule 74 reads as follows:-

5 "74. 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 sell any such property either with or without appraisalment, or to remove or inspect and report on any such property or to discharge any cargo under arrest on board ship."

10 As pointed out by A. Loizou J. in *Almyr Maritime S.A. v. The Cargo on Board the Ship "Almyrta"*, (1975) 1 C.L.R. 116, 118, our rules 74 to 77 correspond to, *inter alia*, the old Order 50, rule 2, now Order 29, rule 4, as well as to the old Order 51, rules 14 to 16, now Order 75, rules 12 and 23, of the Rules of the Supreme Court in England.

15 In Halsbury's Laws of England, 4th ed., vol. 1, p. 278, para. 434, there are stated the following:-

20 "Where property under the arrest of the Court is deteriorating or for good reason should be sold before judgment, the Judge may, on motion, order the property to be forthwith appraised and sold, and the proceeds brought into Court. All claims against the property are thereupon transferred to the fund in Court, which will be paid out only after the claims and their respective priorities have been adjudicated. The order may deal with the same ancillary matters, and the subsequent procedure is the same, as the case of sale after judgment."

30 In Atkin's Court Forms, 2nd ed., vol. 3, it is pointed out (at p. 40) that -

35 "An order for appraisalment and sale is normally made after judgment where the vessel is under arrest, but in rare cases, where a sale would be to the advantage of all parties, it may be made whilst the action is pending".

40 Also, in Admiralty Practice, vol. 1, in the British Shipping Laws series, pp. 121-122, paras. 275, 276, it is stated, *inter alia*, that "Interlocutory orders for appraisalment and sale pendente lite of a ship or other property under arrest are exceptional but have occasionally to be made", and that "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."

In the *Almyr Maritime S.A.* case, *supra*, A. Loizou J. said 5  
(at pp. 119-120):-

"In cases as the present one, the paramount consideration is to preserve the goods or their equivalent in money, for the benefit of the person or persons who are ultimately to be found to be entitled to them, rather than to preserve 10  
the goods themselves but completely perished."

In *The Westport*, [1965] 2 All E.R. 167, Hewson J. said:-

"I have been told by the Admiralty marshal that in the recent past the defendants have been trying to arrange a private sale of their ship, but negotiations have proved 15  
unsuccessful. In the circumstances, as the expenses of arrest are continuing, the defendants move the Court to order appraisalment and sale of their ship in the interests of all parties. I am informed that there are two other claimants against the ship, one for wages and one for a 20  
mortgage, who are aware of these proceedings, and also that there are three caveats entered against the release. I have further been told that the total claims against this ship may not exceed the fund when the ship is sold. If 25  
that is so, of course, the balance will be held for the defendants. It seems to me that in the circumstances of this case it is proper that the Court, at the instigation of the defendants, should order appraisalment and sale and, in those circumstances, I so order."

In *The "Myrto"*, [1977] 2 Lloyd's Rep. 243, Brandon J. 30  
said (at pp. 259-260):-

"Referring to the power of a Court to sell property under arrest, Mr. Justice Blackburn, giving the opinion of himself and four other Judges on a question put to them by the House of Lords in *Castrique v. Imrie*, [1869] L.R. 4. H.L. 35  
414, said at p. 428:

It is not essential that there should be an actual adjudication on the status of the thing Our Courts of Admiralty, when property is attached and in their hands, on a proper case being shown that it is perish- 40

able, order that it shall be sold and the proceeds paid  
 into Court to abide the result of the litigation. It  
 is almost essential to justice that such a power should  
 exist in every case where property, at all events perish-  
 5 able property, is detained.

The figure (1) appears as a suffix to the word 'order' in  
 this passage, and there is a footnote which reads: '(1)  
 For the benefit of all parties concerned.'

The power of the Court in this respect derived from its  
 10 inherent jurisdiction appears to be supplemented, and/or  
 its exercise regulated, by R.S.C., 0.29, r.4.

.....  
 The question whether an order for the appraisalment  
 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  
 15 case it has been a common practice 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  
 20 maintaining the arrest, to the disadvantage of all those  
 interested in 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,  
 25 they almost invariably obtain the release of 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  
 30 right to make an order for appraisalment and sale of a  
 ship pendente lite in a defended case.

.....  
 I accept that the Court should not make an order for  
 the appraisalment and sale of a ship pendente lite except  
 for good reason, and this whether the action is defended  
 or not, I accept further that, where the action is defended  
 35 and the defendants oppose the making of such an order,  
 the Court should examine more critically than it would  
 normally do in a default action the question whether  
 good reason for the making of an order exists or not.



I do not accept, however, the contention put forward for the owners, that the circumstance that, unless a sale is ordered, heavy and continuing costs of maintaining the arrest will be incurred over a long period, with consequent substantial diminution in the value of the plaintiffs' security for their claim, cannot, as a matter of law, constitute a good reason for ordering a sale. On the contrary, I am of opinion that it can and often will do so. 5

This view seems to me to accord with the terms of R.S.C., 0.29, r. 4, which authorizes an interim sale of property not only because it is of a perishable nature, or likely to deteriorate if kept, but for 'any other good reason'." 10

A factor which I have to take into account in deciding whether or not to order, in the present case, the sale of the defendant ship pendente lite is the fact that it is loaded with cargo which is not itself under arrest. 15

In Admiralty Practice, *supra*, it is stated (at pp. 172-173), para. 389, 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. If no steps have been taken within the time allowed the marshal will apply to the Court for directions." 20

When *The "Myrto"* case, *supra*, was taken to the Court of Appeal, where the order made by Brandon J. was partly modified ([1978] 1 Lloyd's Rep. 11), Lord Denning M.R. stated the following (at p. 14) in relation to the cargo stored on board of an arrested vessel the sale of which had been ordered pendente lite:- 25 30

"It seems to me that, between those two extremes, we should take an intermediate course. There is much to be said for the cargo-owners. They have done nothing wrong. These goods have been loaded onto this ship under the eyes of the mortgagees—who knew, or ought to have known, what was going on. If the mortgagees now want the ship to be sold, they ought to remove the cargo from the ship and pay the costs of discharging it. That is one view. On the other hand there is this to be said for the mortgagees: they are entitled to have the ship sold 35 40

without any cargo in it: and it is for the cargo-owners to discharge it so that the ship can be sold: so, the costs of discharging the cargo ought to fall on the cargo-owners. It appeared to the Judge—as it appears to us—that it is impossible to resolve the rights and wrongs of these con-  
5 tending parties at the present. So we suggest that there be an intermediate course. This cargo should be unloaded at the earliest possible moment so that costs should be stopped from running up. The cargo-owners should get possession of their goods as soon as possible. We are  
10 told that there are tins of bitumen, machinery, electric cable, and all sorts of valuable commodities waiting to be taken to their proper destination. So the Judge was quite right to order that they should be unloaded at once. But, in order to meet the controversy about payment, we  
15 suggest that the Admiralty Marshal should deliver the parcels of goods to those claimants who call for them, the cargo-owners, on a reasonable proof of title. But on taking delivery, those cargo-owners ought to give an  
20 undertaking to pay such sum, if any, as may ultimately be found to be payable by them in point of law in respect of the costs of discharging the cargo, that is, such sum as they ought justly to be liable for, according to the pro-  
25 portion properly attributable to them. It should not be an 'open ended' undertaking. There should be a sum limited in the undertaking so that a bond or guarantee can be given for that amount. The figure should be such  
30 sum as the Admiralty Marshal states to be an appropriate figure for which the bond should be given—in respect of the goods of each claimant in respect of his proportion. If dissatisfied with the figure stated by the Marshal an  
35 application can be made to the Registrar for him to review it or state such other figure as he determines. On such a bond being given, it seems to me that the goods should be delivered to any particular claimant who shows reasonable  
40 proof of title. As for those claimants or cargo-owners who do not come in and claim their goods then after a reasonable length of time, 56 days is suggested, the only sensible thing is for that unclaimed cargo to be sold and the proceeds of it come into the general fund available for meeting the various liabilities."

In view of the fact that the defendant ship in the present

case is loaded with cement and there exist all the risks which are mentioned in the report of the Marshal dated September 26, 1978, I am of the opinion, in the light of the above passage from the judgment of Lord Denning, that the Marshal should take steps to have the cargo on board of the defendant ship unloaded, and in case the person or persons entitled to the cargo do not claim it, and take all necessary steps in relation to it, within a reasonable time, which in the present case I think that it should not exceed two months, then the Marshal will have to proceed to sell the cargo and the proceeds of its sale will be available for meeting the various liabilities which in law should be satisfied out of them (see, in this respect, *Baring Shipping Co. v. The ship "Eurotrader "* (1978) 1 C.L.R. 93).

Another aspect of this case which I have to consider is that which relates to the crew of the defendant ship: As already stated the members of the crew, one of whom is the present plaintiff, have filed a number of actions claiming their wages, damages and repatriation expenses and all such actions are still pending.

In Admiralty Practice, *supra* (p. 170), para. 387, it is stated that:-

"It is imperative that the crew should be paid off and leave the vessel before the sale is commenced and if a plaintiff has no funds for the purpose he should ask the Court for an order that the marshal pay their repatriation expenses and make an advance on their wages".

In *The "General Serret"*, [1925] 23 Ll. L. Rep. 14, an order was made for the repatriation by the Marshal of the crew of a ship which was to be sold by him on the strength of the Court order, and the Marshal was, also, authorized to make to the members of the crew small advances in respect of their wages.

Having taken into consideration all relevant aspects of this case and, in particular, the situation in which the defendant ship and its cargo are exposed to grave risks, as such situation is described in the report of the Marshal dated September 26, 1978, the fact that it emerges from the material before me that the value of the ship is not sufficient to satisfy the claims made against her and such value may be diminished considerably if the ship continues to be under arrest in the circumstances

described in the said report of the Marshal, and that the expenses entailed by the ship's continued arrest will continue to mount to the prejudice of all those who have claims against such ship, I have decided that I should grant the application of the plaintiff  
5 for an order for the sale of the ship pendente lite, because I am of the opinion that such a course is the better one for the protection of the interests not only of the plaintiff, and of all the others who have claims against the defendant ship, but, also, of the owners of the ship, too.

10 In the light of all the foregoing I have decided to make the following order:-

1. The Marshal shall proceed to sell the defendant ship by public auction for the highest price that can be obtained for it, but not less than the appraised value of 200,000  
15 U.S.A. dollars, unless the Court, on his application, allows it to be sold for less, or by private treaty.

2. Immediately upon the completion of the sale the Marshal shall pay into Court the gross proceeds of such sale and shall furnish to the Registrar a statement signed  
20 by him regarding the amount of the fees, costs, charges or expenses payable to him or incurred by him in carrying out this order of the Court and such statement shall be accompanied by any vouchers necessary to show the amount of the money expended by him.

3. The sale shall be advertised twice in two local newspapers, one of them published in the English language, and notice of the sale shall be given directly, in writing, to all caveators, as well as to any person appearing, in any  
25 document in the possession of the Marshal or which may be placed in his possession by such person, to be entitled to the cargo on board the ship or to any part thereof.  
30

4. (a) The Marshal shall, as soon as reasonably practicable, make arrangements for discharging the said cargo, storing it ashore where necessary after discharge, and putting it at the disposal of those persons having title  
35 to possession thereof upon reasonable proof of such title. On taking possession of the cargo, or of any part thereof, any person doing so shall give an undertaking to the Marshal to pay such sum, if any, as may ultimately be

found to be payable by him, in point of law, according to the proportion properly attributable to him, in respect of the costs to be incurred by the Marshal in relation to the cargo. The Marshal shall fix the appropriate, in his opinion, figure for which the said undertaking is to be given by means of a bond or guarantee to his satisfaction. If any person, called upon to give such undertaking, is dissatisfied with such figure, an application may be made to the Court to review it. 5

(b) If any cargo discharged as above is not claimed within two months from today, then it shall be sold by the Marshal and the proceeds of it shall be paid into Court to be available for meeting the various liabilities which, in law, should be satisfied out of such proceeds. 10

5. The crew shall leave the vessel before the sale is commenced and the Marshal is hereby authorized to make proper arrangements to pay them their repatriation expenses and to make to each one of them a reasonable, in his opinion, agreed advance on wages that may appear to be lawful to him; in case of failure to reach agreement with any one of them in this respect the Marshal should seek the directions of the Court. Any expenses to be incurred, as above, by the Marshal shall be met, in the first instance, out of the proceeds of the sale of the ship which, as already ordered, are to be paid into Court. 15 20 25

6. Any party to these proceedings, any caveator, any person asserting title to the cargo, or to part thereof, any member of the crew, as well as the Marshal and any other person affected by this Order, shall be at liberty to apply to this Court for any further order or directions as the justice of the case may require. 30

7. The question of the costs of the application for the appraisalment and sale of the defendant ship is reserved to be decided at the end of the proceedings.

*Application granted.* 35