

1978 February 15

[A. LOIZOU, J.]

BARING SHIPPING CO.,

*Plaintiffs,*

v.

THE SHIP "EUROTRADER",

*Defendant.*

(Admiralty Action No. 315/77).

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*Admiralty—Practice—Arrest and sale of vessel in execution of judgment—Cargo on board—Order for sale of vessel only—Marshal's advice to cargo owners to discharge cargo—No response by owners—Court may direct marshal to discharge and sell cargo and reimburse himself from the proceeds of sale—Any balance of his expenses to be paid, in priority to any other claim, out of proceeds of sale of ship.*

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On October 12, 1977 the plaintiffs obtained judgment, by consent, against the defendant ship, for the equivalent in Cyprus Pounds of 600,000 U.S. Dollars, in satisfaction of their claim arising out of a mortgage. On October 14, 1977 the Court made an order of arrest, appraisal and sale of the defendant ship in execution of the above judgment. On November 9, 1977, upon directions from the Court, the Marshal advised and invited all consignees of cargo on board the defendant ship to take action for its removal and discharge. All cargo owners responded to the Marshal's advice except the owners of a cargo of foodstuffs, consisting of 2800 tons, who took no steps within the time allowed. The Marshal then applied for an order authorising him to discharge the said cargo and any expenses pertaining to the discharge to be regarded as Marshal's expenses.

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*Held, granting the application, (1) where the Marshal has custody of a vessel and there is an order to sell only the vessel the cargo—owners will be advised by the Marshal to have the cargo discharged within reasonable time; and if the cargo*

owners do not take steps within the time allowed the Marshal may, with the leave of the Court, discharge and sell the cargo reimbursing himself from the proceeds.

(2) As the owners of the cargo in question have not responded to the Marshal's advice for the discharge of their cargo, the Marshal is hereby directed to discharge, survey, store, appraise and sell the said cargo. If the expenses to be incurred by the Marshal, by acting in pursuance to this direction are not fully covered by the proceeds of sale of the cargo in question, such expenses to be considered as Marshal's expenses and be paid, in priority to any other claim, out of the proceeds of the sale of the ship. And if this is found not to be possible, then such costs should be borne by the plaintiffs judgment-creditors in this action, at whose instance the appraisalment and sale of the ship is effected (pp. 98-99 *post*).

*Application granted.*

Cases referred to:

- Selina Stanford* (Sh. Gaz. December 8, 1908);
- The Unity* (Sh. Gaz. 1909);
- Carl Hendric* ((1903) F.O. 468).

**Application.**

Application by the Marshal of this Court for: (a) an order authorizing the applicant to discharge a cargo consisting of about 2,800 tons of foodstuffs on board the ship "Eurotrader" and regard any expenses pertaining to the said discharge as Marshal's expenses (2) directions for securing any as aforesaid or other Marshal's expenses and (3) directions as to the manner of dealing with the aforesaid cargo.

- P. Ioannides* for T. Papadopoulos, for the Marshali
- E. Lemonaris*, for respondent No. 1
- L. Papaphilippou*, for respondent No. 2.
- C. Velaris*, for respondent No. 3.

*Cur. adv. vult.*

A. LOIZOU, J. gave the following ruling. By this application the Marshal of this Court applies for:

- "(1) An order of the Court authorising the above applicant to discharge a cargo consisting of about 2,800 of foodstuffs now on board the ship "EUROTRADER" and

regard any expenses pertaining to the said discharge as Marshal's expenses.

- (2) Directions for securing any as aforesaid or other Marshal's expenses.
- 5 (3) Directions as to the manner of dealing with the aforesaid cargo on board the defendant ship.
- (4) Any other order or direction as the Court may deem fit."

10 The facts material to the present application as they appear from the affidavit sworn by the Marshal as well as from the relevant records of the proceedings are as follows:

The plaintiffs' claim against the defendant ship is the equivalent in Cyprus Pounds of U.S. dollars 600,000 with interest at 8 5/8 per cent per annum from 8.2.77-8.8.77 and at 11 5/8 per cent per annum from 8.8.77 until payment arising out of a mortgage. On the 10th October the plaintiffs' petition was filed and on the 12th October, 1977 the defendants filed their answer admitting the existence of the said mortgage, under a mortgage agreement dated 28.6.77 executed in Athens and duly registered at the Cyprus Registry. On the same day, counsel for the parties, appeared before this Court and by consent, judgment was entered as per claim (A) with costs. Subsequently, the plaintiffs applied for an order "directing the Marshal to seize or attach, or arrest, appraise and sell the defendant ship in execution of the judgment given in the action" and on the 14th October, 1977-an order to that effect was given.

On the 15th October, 1977, upon the application of M.A. Al Kharafi Industries and Establishment of Kuwait, plaintiffs in Admiralty Action No. 330/77 the Court ordered the defendants in the said action and/or those in charge of the said ship to deliver immediately to the said plaintiffs that part of the cargo on board the said ship consisting of 2,722,043 kilos of asphalt in 13,060 drums claimed to be theirs by virtue of a bill of lading dated the 28th March, 1977, having themselves undertaken to bear the expenses for such unloading.

On the 9th November, 1977 upon directions from this Court the Marshal informed by telegram all consignees of the cargo on board the ship inviting them to take action for its removal and discharge. This, in my view, was the proper course to be

followed, as the arrested vessel had cargo on board and an order was made for her sale only; in such cases, as pointed out in the British Shipping Laws, Admiralty Practice, para. 389, "the Marshal will advise the cargo owners to have the cargo discharged and will give them reasonable time for this to be done", and the authority for this proposition given is *Selina Stanford*, Sh. Gaz. December 8, 1908. All cargo owners responded to the Marshal's advice, except the owners of the said cargo of foodstuffs who took no steps within the time allowed. Hence, the Marshal's application to this Court for directions. (Admiralty Practice (*supra*), para. 389).

The Marshal then informed this Court that the berthing of the vessel had been arranged for the 16th of December and that her discharge would be carried out by Cyprian Seaways Agencies Ltd. who had come to a private agreement with the owners of the asphalt, the largest commodity on board the ship. As there was, however, the cargo of canned foodstuffs which might deteriorate and no one would undertake its discharge in view of the expenses involved and the risk that the proceeds from its sale might not cover the expenses for its discharge and storage, he sought directions as to what to do with the said canned foodstuffs and/or any other cargo that had remained on board. The Court directed that a survey by experts should be carried out as to the condition of the said cargo.

On the 16th December, 1977 the defendant ship was berthed and by the 23rd December, 1977, 6, 359 drums of asphalt, 500 tons of timber and 58 tons of general cargo had been discharged. For reasons connected with the safety of the ship the further discharge of the cargo was stopped, the ship taken again outside the port, still having on board, 6, 701 drums of asphalt, 2,800 tons of foodstuffs and a few tons of general cargo.

There existed, therefore, for the Marshal a serious problem as to how he could effectively carry out the execution of the order for the sale of the vessel. There were no persons ready to undertake the unloading of the said foodstuffs unless payment of their expenses and services rendered were made or secured by the Marshal in his capacity as such.

The Cyprian Seaways Agencies Ltd., shipping agents of Limassol offered to undertake the discharge of the said goods without immediate payment to them, and on condition that their payment or so much thereof as will not be covered by the  
5 sale of the said cargo would be deemed as Marshal's expenses and be paid to them out of the proceeds of the sale of the said ship in priority to other claims.

The application of the Marshal was served on the three respondents who were the only persons that have showed  
10 interest in the matter and have filed, intervened or entered an appearance in proceedings before this Court. In the meantime the Cyprian Seaways Agencies Ltd. submitted to the Marshal their terms in writing which are to be found in *Exhibit 'A'*.

It appears, however, from statements made by counsel when  
15 opportunity was afforded to the parties to be heard on this application for directions, that there is a great likelihood that better terms may be secured from other firms engaged in stevedoring and related thereto trades. For what it is worth, it may be mentioned here that an affidavit was filed on behalf  
20 of the ship owners to the effect that a telex was received by them from a certain Parktex Ltd. of London informing them that they are interested in having a survey of the foodstuffs on board the "EUROTRADER" with a view to making an offer to buy them. All respondents agreed that the discharge of  
25 this cargo should be made at the earliest opportunity as a prerequisite to the sale of the ship and that such costs should be a charge on the proceeds of the sale of the cargo in question. There is, however, a divergence of opinion as to who should bear the balance, if any, of such costs.

30 The respondents-plaintiffs in Action No. 315/77 the second mortgagees of the ship felt that such balance should not be a charge on the proceeds of the sale of the ship.

As far as, however, respondent M. Al Kharafi, plaintiff in  
35 Action No. 330/77, is concerned, there is no objection to such balance being made a part of the Marshal's expenses in priority to the other claims, though he himself is the only other claimant against the ship and the proceeds of its sale, subject to a reservation of their rights.

40 In my view, and there appears to be authority for this proposition, if cargo interests do not take delivery of their cargo

within the time specified in a direction to the Marshal, the Marshal should discharge and sell the cargo reimbursing himself from the proceeds of sale of the cargo. (See the *Unity* (1909) Sh. Gaz.). However, though this eventuality does not seem to be possible to pursue in this case, yet, it may be useful to mention that where the Marshal has custody of a vessel and there is an order to sell only the vessel, the cargo owners will be given reasonable opportunity to discharge their cargo thereafter and they could be ordered to pay the costs of detention of the vessel. (*Carl Hendric* (1903) F.O. 468). 5 10

It remains, however, to consider by whom such expenses or any balance thereof if not covered by the proceeds of the sale of the cargo should be borne? I have considered the possibility of ordering the plaintiffs-creditors at whose instance the order for appraisement and sale was issued, to give to the Marshal security to that effect, but as in this case they happen to be the only persons entitled to such proceeds so far, apart from respondents 3 who do not object, subject to a reservation of their rights under pending proceedings, to these costs being paid, if necessary, out of the proceeds of the sale as Marshal's expenses, I need not decide now this possibility; suffice it to say that it will meet adequately the situation if the expenses for the discharge, storage, survey, appraisement and sale of the cargo are not fully covered by the proceeds of their sale, are made Marshal's expenses payable in priority to any other claim out of the proceeds of the sale of the ship. It was proper for the Marshal to ask for directions for the recovery of the expenses of any action he was instructed to take and I have dealt with the points raised at some length as such sales of cargo are indeed very rare. (*Admiralty Practice (supra)*, para. 389, page 173). 15 20 25 30

For all the above reasons the following directions to the Marshal are given:

- (a) That the cargo on board the defendant ship—other than the cargo of respondent 3 for which an order has already been made in Admiralty Action No. 330/77 and which should be complied with, irrespective of this direction—be discharged, surveyed, stored, appraised and sold by the Marshal. 35
- (b) That the costs incurred by the Marshal under para. (a) 40

hereinabove, be paid, in the first place, out of the proceeds of the sale of the said cargo.

- 5 (c) That any amount incurred and not covered as per para. (b) hereof, to be considered as Marshal's expenses and be paid out of the proceeds of the sale of the ship, and if, for any reason whatsoever this is found in the future not to be possible, then such costs should be borne by plaintiffs judgment-creditors in this action at whose instance the appraisalment and sale of the ship is effected, and be deducted in any event, from any amount they shall have to receive out of the proceeds of the sale.
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- 15 (d) With regard to the discharge, storage, and sale of the cargo hereinabove ordered, the Marshal should secure the lowest and most favourable terms and if any problem arises in relation thereto and as to the choice of the persons to undertake same, the Marshal may apply to this Court for further directions.
- 20 (e) The sale of the said cargo to be effected by public auction or private treaty, but in the latter case, before any final decision is taken by the Marshal, notice to be given of the situation to the parties to the present proceedings and to this Court, and an application be made by him for further directions from, or for the sanction of, this Court.
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*Application granted.*