

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter lane, London EC4A 1NL

Date: 19/06/2013

Before :

MR. JUSTICE TEARE

Between :

- | | | |
|-----|--------------------------------------------------|-------------------------|
| (1) | BANK OF SCOTLAND PLC | <u>Claimant</u> |
| | -and- | |
| | THE OWNERS OF THE M/V "UNION GOLD" | <u>Defendant</u> |
| (2) | BANK OF SCOTLAND PLC | <u>Claimant</u> |
| | -and- | |
| | THE OWNERS OF THE M/V "UNION SILVER" | <u>Defendant</u> |
| (3) | BANK OF SCOTLAND PLC | <u>Claimant</u> |
| | -and- | |
| | THE OWNERS OF THE M/V "UNION
EMERALD" | <u>Defendant</u> |
| (4) | BANK OF SCOTLAND PLC | <u>Claimant</u> |
| | - and - | |
| | THE OWNERS OF THE M/V "UNION PLUTO" | <u>Defendant</u> |

Sandra Healy (instructed by **Stephenson Harwood**) for the **Claimant**

Hearing dates: 6 June 2013

Judgment

Mr. Justice Teare:

1. On 6 June 2013 I acceded to an application by the Bank of Scotland PLC (“the Bank”) that four vessels be sold *pendente lite*, that is, before judgment. An application was also made for an order that the Admiralty Marshal, instead of appraising and selling the vessels to the highest bidder in accordance with his usual practice, should sell the vessels at a certain price to a certain buyer. I refused to make such an order in relation to three of the vessels but granted it in relation to one vessel. The application raised an issue of principle and I therefore said that I would give my reasons for my decision at a later time. These are my reasons.

Sales by the Admiralty Marshal

2. A claimant *in rem* who has obtained judgment against a vessel may seek an order that the vessel be sold so that his claim may be satisfied from the proceeds of sale. A claimant may also seek such an order before obtaining judgment if the circumstances require it; see the *Myrto* [1977] 2 Lloyd’s Rep.243. It is often the case that, in addition to the claimant *in rem* who has obtained the order for sale, there are other claimants *in rem* against the vessel. When the vessel is sold by the Marshal the purchaser acquires title to the vessel free of all encumbrances and liens and so existing rights *in rem* against the vessel are transferred to the proceeds of sale. The Marshal must therefore sell the vessel for the best possible price. If the proceeds of sale are not sufficient to enable all claims *in rem* to be satisfied then the proceeds will be distributed in accordance with an established order of priorities.
3. When an order for sale is made the Marshal must appraise the vessel, that is, have the vessel valued. He does this by seeking the advice of an experienced ship broker. Once appraised the sale of the vessel is advertised and offers to buy are invited. The Marshal will then sell to the highest bidder. However, he cannot sell the vessel for less than the appraised value without the leave of the court; see the *Halcyon The Great* (No.2) [1975] 1 Lloyd’s Rep. 525.
4. It is in the interests of the claimants *in rem* and of the defendant shipowner that the vessel is sold for the best possible price. The Marshal’s method of sale - appraisal, advertisement and invitations to bid - is designed to achieve just that. The Marshal is an officer of the court whose role is essential to the administration of justice in the Admiralty Court. He acts impartially. He does not act for any of the claimants *in rem* or for the defendant shipowner.
5. The title which a sale by the Marshal confers on the purchaser, free of liens and encumbrances, is recognised not only by the courts of this country but by the courts of all other countries. Similarly, the courts of this country will recognise sales by competent courts of admiralty in other jurisdictions; see the *Acrux* [1962] 1 Lloyd’s rep. 405 and the *Cerro Colorado* [1993] 1 Lloyd’s Rep. 58. It is therefore important that the reputation of the Admiralty Court for impartiality is not tarnished; see the *Halcyon The Great* (No.2) 1975 1 Lloyd’s Rep.525.
6. Any interference with the performance by the Marshal of his duty to sell the vessel, and therefore with the administration of justice, is capable of being a contempt of court; see the *Ruth Kayser* (1925) 23 Lloyd’s List Rep. 95, the *Jarvis Brake* [1976] 2 Lloyd’s Rep. 320 and the *Cerro Colorado* [1993] 1 Lloyd’s Rep. 58.

Sales by a mortgagee of a vessel

7. A mortgagee of a vessel will usually have a power of sale. He may exercise such power in accordance with the terms of the mortgage. He is free to do so so long as there is no court order for the sale of the vessel. Such a sale, even if the vessel is under arrest, will not be a contempt of court (because there is no court order for a sale). However, any such sale would not confer a title free of liens and encumbrances and the vessel, if under arrest, will remain under arrest. Any person with a maritime lien against the vessel can enforce the lien against the vessel notwithstanding the change in ownership. Similarly, any claimant with a statutory right of action *in rem* who has issued his claim form *in rem* before the sale can enforce his statutory right *in rem* notwithstanding the change in ownership; see the *Monica S* [1968] P. 741. It was no doubt for this reason that the Bank in the present case did not sell the vessels pursuant to its own power of sale but preferred to have the vessels sold by the Marshal. The Bank was, I assume, unwilling to give a warranty that the vessels were free of liens and encumbrances and wished to secure the higher price that the Marshal could achieve by being able to confer a title free of liens and encumbrances.
8. However, the Bank is not content that the Marshal sell the vessels in accordance with his usual practice but wishes the Marshal to sell the vessels to buyers found by the Bank and at prices which the Bank considers are not below the market value of the vessels. One of those purchasers was the builder of two of the vessels, another was a client of the Bank and yet another was a company controlled by the managing director of the defendant shipowner. The question of principle raised by the Bank's application is whether it is, or can be, appropriate to depart from the usual order of sale made by the Admiralty Court.

The facts of the present case

9. Union Transport Group PLC is the owner of a fleet of four small cargo ships, each of which is registered in the Isle of Man. UNION EMERALD, UNION SILVER and UNION GOLD were built in 2008. UNION EMERALD was of 2,967 gross tonnage and UNION SILVER and UNION GOLD were of 1,767 gross tonnage. UNION PLUTO was the smallest at 1,530 gross tonnage and was much older than the other vessels, having been built in 1984. The Bank provided finance to Union Transport for the construction and purchase of the three vessels built in 2008. The loans for each vessel, of the order of €4.8m., were secured by mortgages on the vessels. The aggregate indebtedness, together with the indebtedness under a loan in respect of another vessel, UNION BRONZE, was also secured on UNION PLUTO.
10. From late 2011 Union Transport was in default. In March 2013 notices accelerating the loans were served and the loans were declared payable on demand. Demands for payment were made on 23 April 2013. On 24 May 2013 claim forms *in rem* were issued against each vessel and each vessel was arrested. On 25 April 2013 Union Transport was put into administration by the Bank pursuant to the terms of a debenture agreement between the Bank and Union Transport.
11. The Bank's case is that approximately €4.5m. is outstanding in relation to each of UNION EMERALD, UNION SILVER and UNION GOLD and is secured by mortgages on those vessels. The aggregate debt, almost €13.5m., is also secured by a mortgage on UNION PLUTO (the smallest and oldest of the vessels).

12. In addition to the Bank there are other creditors of Union Transport with claims *in rem* against the vessels. The largest of such claims is a claim by A&P Tees Limited for £211,405 in respect of repair work on UNION PLUTO. Other claims *in rem* are in respect of bunkers supplied to the vessels by various bunker companies, one of whom entered cautions against the release of the vessels on 5 June 2013. There do not appear to be any claims by the crews of the vessels.
13. The Bank is anxious to realise its security in respect of the loans made to Union Transport. It has received an offer to purchase UNION GOLD and UNION SILVER at a total price of €4.7m. from Damen Shipyards, the builder of those vessels. It has also received an offer to purchase UNION EMERALD for €2.7m. from an existing client of Lloyds Banking Group of which the Bank is a part. Finally, it has received an offer to purchase UNION PLUTO for €329,000 from Angel Shipping Limited, an entity controlled by Captain Lyons, the managing director of Union Transport.
14. The Bank has taken steps to have the vessels valued. The broker who normally acts for the Marshal, C.W.Kellock and Co., informed the Bank that it had little experience of valuing small cargo vessels and advised the Bank to consult another broker, Booth Shipping. The Bank has obtained valuations from Booth Shipping and from other brokers.
15. UNION GOLD has been valued by Booth Shipping as at 26 February 2013 at €2.2m., by Intershitra S&P as at 11 April 2013 at €1.7m. and by Anglo Dutch as at 3 June 2013 at €2m. (but at €1.5m. for a court sale by public auction). UNION SILVER has been valued by Booth Shipping as at 26 February 2013 at €2.3m., by Intershitra S&P as at 11 April 2013 at €1.8m. and by Anglo Dutch as at 3 June 2013 at €2m. (but at €1.5m. for a court sale by public auction). Thus the offer to buy both vessels for €4.7m exceeds the highest valuations for both. UNION EMERALD has been valued by Booth Shipping as at 26 February 2013 at €2.5m., by Intershitra S&P as at 11 April 2013 at €2.6m. and by Anglo Dutch as at 3 June 2013 at €3.25m. (but at €2.75m. for a court sale by public auction). Thus the offer to buy the vessel for €2.7m. is within the range of valuations, though (arguably) at the lower end of that range. UNION PLUTO has been valued by Intershitra S&P as at 11 April 2013 at €315,000 and by SCC Ship Brokers as at 3 June 2013 at €300,000 (but at 20-25% less if sold by the Admiralty Court). Thus the offer to buy the vessel for €329,000 is in excess of those valuations. The Bank has also valued the bunkers on board each vessel. They are of modest value and make no real difference to the above analysis save that in the case of UNION PLUTO the bunkers are valued at about €21,371 which would make the offer of €329,000 equivalent to about €307,000, that is, below the highest valuation.

Discussion

16. The court's first concern with the proposed order is that it does not provide for the appraisal of the vessel by the Marshal. The appraisal is usually conducted by the Marshal with advice from his broker. In the present case the Bank has obtained a number of valuations, placed them before the court and invited the court to confirm that the proposed sale is not below the market value of the vessel.
17. The appraisal of a vessel is not a simple task, especially when, as here, there are, according to some of the valuations, few, if any, comparable sales. Moreover, the fact

that the sale is by the Marshal has to be considered. On the one hand it is suggested that the sale is “forced” which circumstance might depress the price. On the other hand the Marshal can give a title free of liens and encumbrances which circumstance might, to some extent, compensate for the “forced” nature of the sale. These are matters which the Marshal, in the usual case, will be able to discuss with his broker in confidence. The court does not have that advantage. In the present case it is not clear that the brokers who have provided valuations and have made a discount for a “forced sale” have taken into account the ability of the Marshal to give a title free of liens and encumbrances. This may well be a matter of particular significance with regard to the proposed sale of the UNION EMERALD. Whilst the court can reach a decision on questions of valuation if sufficient evidence is placed before it the office of the Admiralty Marshal has considerable experience in this matter and it is more appropriate that the Marshal, rather than the court, should appraise vessels.

18. When the vessel is appraised it is sensible to keep the appraised value confidential. If it were known to bidders it is likely to affect the price they are willing to pay. Thus the Marshal’s appraisal is generally not known to potential bidders. Yet, by contrast, the effect of seeking an appraisal from the court is that the appraisal is made known to potential buyers. This is a further reason why it is more appropriate that the Marshal rather than the court should appraise vessels.
19. The court’s further concern with the order sought by the Bank is that the proposed order does not allow for the Marshal to advertise the sale and invite offers to buy the vessel. That method of sale is designed to enable the vessel to be sold at the best possible price. Instead, the court is invited to approve a sale to a buyer found by the bank. Were the court to approve such a sale there would be a risk that the vessel would not be sold at the best possible price. The desirability of ensuring that all potential bidders are informed of a sale by the Admiralty Court was emphasised in the *APJ Shalin* [1991] 2 Lloyd’s Rep. 62 where there was an application for an order that the defendant shipowner be at “liberty to effect a private sale subject to the supervision of the Admiralty Marshal”. Sheen J. refused to accede to the application. He considered that “private negotiations could adversely affect the market, because they could have the result that potential bids would be withheld.” Similarly, in the *Halcyon the Great (No.2)* [1975] 1 Lloyd’s Rep 525 there was a request that further marketing of the vessel for sale should be restricted in duration because the vessel was expensive to keep and “that the longer any further sale takes the heavier the charges against the fund will be.” Brandon J. did not accede to that request. He said “it seems to me important that there should be no doubt in anybody’s mind that when this ship is re-offered for sale she is re-offered freely to the whole world and not just for the purpose of enabling any particular person who has in mind to make a particular bid to do so. If there is some particular person who has in mind to make a particular bid, he will be free to compete with all other bidders.....”
20. The concerns which I have expressed strongly suggest that it is wrong in principle for the court to depart from the usual order that the Marshal sell a vessel by appraisal, advertisement and inviting bids to purchase the vessel. It was submitted on behalf of the Bank that the court should accede to an application that the Marshal sell to a named buyer at a named price where there was evidence that the price is at or about the market value of the vessel. However, the buyer has been found by the Bank and the market has not been tested by advertisement and invitations to bid. The difficulty

with acceding to the Bank's submission is that it may give the impression that the Marshal is acting for a particular claimant *in rem* rather than as an officer of the court who must have regard to the interests of all claimants *in rem* and of the defendant shipowner. This concern is reflected in the *APJ Shalin* and in the *Halcyon the Great*. In the former Sheen J. expressed the concern that private sales "would be open to abuse" and in the latter Brandon J. said that "it is important that the reputation of the Admiralty Court for impartiality in these matters should not be tarnished in any way." I have therefore concluded that, as a general principle, an order should not be made that the Marshal sell to a buyer found by the arresting party notwithstanding that the proposed price appears to be at or about the market value of the vessel.

21. It was for this reason that I refused the Bank's application that UNION GOLD, UNION SILVER and UNION EMERALD be sold to named buyers at named prices.
22. However, there were special circumstances pertaining to the proposed sale of UNION PLUTO which, it was accepted by counsel for the Bank, did not apply to the other three vessels. There was evidence that unless a prompt sale was made, indeed, a sale by 7 June 2013, a long term contract which provided business for the vessel (and other vessels) was at risk of being lost. If it were lost then the jobs of 21 persons, including both crew (14) and shore based personnel (7), would be lost. These matters required the court to consider whether, notwithstanding the general principle to which I have referred, there were exceptional circumstances which justified a departure from the principle to which I have referred.
23. The vessel was built in 1984. She is therefore an elderly vessel. By contrast the other three vessels were built in 2008 (and were slightly bigger than UNION PLUTO). Her age no doubt explains why she has been valued at only €315,000 whilst the other vessels have been valued at over €2m.
24. I accept that such an elderly vessel is unlikely to attract many buyers. The proposed buyer of UNION PLUTO is Angel Shipping Limited, a company controlled by Captain Lyons, the former managing director of Union Transport. The reason why Angel Shipping Limited has offered to buy UNION PLUTO appears to be that the buyer is in a position whereby he is able to retain and operate the long term contract which provides business for her (and other vessels). If that contract is lost it is unlikely that Angel Shipping Limited would be willing to buy the vessel.
25. The Bank's claim against UNION PLUTO is approximately €13.5m. There are other claimants *in rem* against UNION PLUTO (a ship repairer and bunker suppliers). None of these of other claims would have a higher priority than the Bank. It is therefore unrealistic to suppose that any claimant *in rem* other than the Bank is likely to benefit from the proceeds of sale of the vessel. However, these matters do not distinguish the proposed sale of UNION PLUTO from the proposed sale of the other vessels.
26. What does distinguish UNION PLUTO from the other vessels is the circumstance that the proposed buyer has a particular reason to buy this vessel and that unless a sale takes place immediately there is a risk that that reason will disappear. That risk is illustrated by the threat to the jobs of the crew and shore-based personnel. An elderly and very small commercial vessel is unlikely to attract other buyers at a price near to that which Angel Shipping is willing to pay. These matters persuaded me that, exceptionally, it was appropriate to permit the Marshal to sell the vessel to Angel

Shipping Limited at the price of €329,000 without an appraisal by the Admiralty Marshal. Given the need for an exceptionally prompt sale of UNION PLUTO and the insistence by the court on a conventional and regular sale of the other three vessels by the Admiralty Marshal, following appraisal, advertisement and invitations to bid, there is no real risk that the court's reputation for impartiality will be tarnished by permitting the Marshal to sell UNION PLUTO to a named buyer at a named price.