Neutral Citation Number: [2018] EWHC 2790 (Comm)

Case No. CL-2018-000440

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 16 October 2018

Before:

MR JUSTICE ANDREW BAKER

B E T W E E N :

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(1) TMF TRUSTEE LIMITED (2) TMF GLOBAL SERVICES (UK) LIMITED (3) BURLINGTON LOAN MANAGEMENT DAC (4) BANK OF AMERICA, N.A.	Claimants
- and -	
(1) FIRE NAVIGATION INC (2) HURRICANE NAVIGATION INC (3) OD INVESTMENT LTD (4) OXYGEN MARITIME MANAGEMENT INC (5) IGOR VIATCHESLAVOVICH KOZIN	Defendants

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Mr C. HOLROYD (instructed by Reed Smith LLP) appeared on behalf of the Claimants.

Mr M. COBURN QC and Mr S. SNOOK (instructed by HFW LLP) appeared on behalf of the Defendants.

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J U D G M E N T

MR JUSTICE ANDREW BAKER:

1 These proceedings arise out of the financing of the first defendant's ownership of a vessel known as "Megacore Honami" and the second defendant's ownership of the vessel "Megacore Philomena". Megacore Philomena was arrested at the instance of the first claimant in Los Angeles and has been sold there, *pendente lite*, for US$19 million.

2 The question before me has been what is to happen to Megacore Honami by way of interim measure pending final determination of the claimants' claims and any cross-claims the defendants may make. Under the financing transactions, the first claimant is security trustee, mortgagee and assignee, entitled to take possession of Megacore Honami if, as the claimants assert, the borrowers are in default.

3 That question comes before the court under an application notice issued by the first claimant dated 20 September 2018 seeking interim relief on various jurisdictional bases, but the substance of which was relief requiring that possession of Megacore Honami be surrendered up to the first claimant so that it would be free to take the vessel into Singapore, as I shall explain further in a moment.

4 This is my judgment after full argument *inter partes* last week as to the appropriate interim position. The immediate context of that argument was an order I made *ex parte* on Saturday, 22 September 2018, requiring that possession of Megacore Honami be surrendered to the first claimant and a further order I made on Tuesday, 25 September 2018. On 22 September, the vessel was at or near Tanjung Balai Karimun, Indonesia. The first claimant took possession of her pursuant to my *ex parte* order, although there are issues between the parties that will not affect the outcome today about how and when that finally occurred.

5 My further order required that, in the first claimant's possession, the vessel was not to be removed from Tanjung Balai Karimun unless it be to outside port limits at Singapore. As I understand it, pursuant to that order, the vessel, as I deliver this judgment, is indeed now outside port limits at Singapore. That further order allowed the first claimant to begin work assessing and servicing the vessel as might be required, but prevented her from being arrested under a *writ in rem* that the claimants had issued in Singapore, so that if on the *inter partes* argument the court were not persuaded that giving possession to the first claimant was the proper interim relief, the *ex parte* order could be discharged or set aside and the *status quo ante* that order could be restored. Thus my further order was designed solely to hold the ring in the specific circumstances of the present case pending the return date and full *inter partes* argument. It will therefore now be discharged come what may.

6 The claimants have been clear throughout that, if in possession and free to do so, the first claimant would sail the vessel to Singapore to arrest her there and to seek from the Singapore Court an order for a sale *pendente lite* with the proceeds of sale to be held pending final determination of the merits here. The application to this court for an order requiring possession of the vessel to be given to the first claimant has required the first defendant and its managers, the fourth defendant, to explain what the vessel was doing and what they would intend to do with the vessel if the first defendant were allowed to stay in possession.

7 On evidence that the first defendant has, for the most part, not challenged, it is in my judgment clear that, since April this year, if not earlier, following the arrest of the sister ship

in California, Megacore Honami has had, essentially, a renegade existence, unable to trade or, therefore, generate income, for the most part drifting aimlessly, seeking to conceal her location and generally 'on the run' from the inevitable and, on the face of things, lawful desire on the part of the claimants, and it may possibly be other creditors, to place her under arrest to secure potential claims. The one significant respect in which the claimants' evidence in that regard has been challenged is the suggestion that the vessel has sought to conceal her location by improperly switching off her AIS signal. The evidence as to that from the vessel's then master, engaged by or on behalf of the first defendant, is however of demonstrably very doubtful credibility.

8 As regards the first defendant's intentions, they are admittedly to lay the vessel up for an extended period in flagrant breach of covenant under the financing transactions and to do so at a location where, on the evidence, it will be very difficult to cause her to be arrested. It is of course true, regrettably for all concerned, that if subjected to a judicial sale in Singapore, the vessel may fetch something less than a normal willing seller/willing buyer market price. If the first defendant had sensible commercial intentions for the trading or sale of the vessel on ordinary markets, the balance of fairness to be struck might perhaps be more difficult to judge. As it is, however, the first defendant has no such intentions, but rather would intend, if restored to possession, to take steps that, in my judgment, would be calculated only to make matters economically worse for both sides to this overall dispute.

9 Overwhelmingly, therefore, the balance in this case in my view *prima facie* favours the first claimant having possession of the vessel and being free in the interests of all concerned to seek to realise best available value for her pending final determination of the claimant's money claims and any cross-claims that may be raised. It is said that requiring possession to be surrendered to the first claimant is, by nature, mandatory relief and will be effectively irrevocable, so that a high degree of assurance should be required that the claimants' claims will succeed before relief be granted. The true test though is, of course, whether, taking account of the mandatory nature of the relief and the degree of assurance the court feels as to the claimants' prospects on the merits, the grant or refusal of the relief sought carries with it the greater risk of injustice.

10 Here, as I say, the balance is clear and overwhelming. To refuse the relief sought is to risk grave injustice to the claimants if, ultimately, they prevail on the merits. To grant the relief sought does no injustice to the first defendant at all, unless it be called injustice that the defendant will no longer be free to cut off its nose to spite its face, to the economic disadvantage of all concerned. In any event, in light of the first defendant's now revealed intentions, the court can see that it is overwhelmingly likely that either the claimants are correct now that the first defendant is in default under the financing transactions and the first claimant is entitled to possession, or, if possession were now restored to the first defendant, that would become the case in very short order.

11 Furthermore, although Mr Coburn QC for the first defendant developed a number of interesting submissions as to whether a loan to value notification in September 2017 asserting the existence of a security value shortfall of about $1.85 million was effective to entitle the claimant to accelerate the loan as they purported to in October 2017, in my judgment the further contention that if indeed the loan was not then accelerated there was no default at maturity at the end of December 2017 is thin to the point of being speculative. The contention is that the claimants prevented the first defendant, and indeed the second defendant, from selling the two vessels in late 2017, causing them then to fail to repay the loan at maturity. As it seems to me, on the evidence presently available, there is no serious

room for argument that the claimants acted otherwise than reasonably in the interests of securing repayment of the financing and the first defendant has not shown any seriously arguable case that consent for sales of the vessels it says had been contracted, without reference to the claimants, was unreasonably withheld. As a result, in my judgment, the court does have, if required, a high degree of assurance that, as things stand, the claimants' claims will succeed on the merits.

12 The first defendant submits, however, that relief should nonetheless be refused, and that the *ex parte* order should be discharged and possession be restored to the first defendant because either: (1) irrespective of considerations specific to the urgent *ex parte* application, the claimants do not come to court with clean hands; or (2) there was a failure fairly to present the matter to the court on the *ex parte* application.

13 I take the 'clean hands', or rather 'unclean hands', allegation first. That involved, firstly, a complaint as to two aspects of the picture of the case provided to the court on the *ex parte* application on 22 September. The essential factual context for that application, an *inter partes* application notice having been issued and provided to those representing the defendants just two days before, was the vessel's seeming dash towards Indonesian waters, as the court now knows, although the claimants would not have known at the time, for the purpose then of being laid up and seeking there to hide from the legal processes the claimants would wish to pursue.

14 As two specific aspects of the factual account given in relation to that in support of the *ex parte* application, the court was informed, upon the basis of information communicated to Mr Weller of Reed Smith, a solicitor whose witness statements supported the application, that the vessel had been, at least at one stage, pursued by a Singapore Navy vessel and had declined to stop when ordered or requested by the Navy vessel to do so, and that the Indonesian Marine Police had, at one stage, become involved, but had at all events failed to gain access to the vessel and it may be had been actively prevented from boarding.

15 In each respect, the submission made by Mr Coburn QC is that the court can now see, whatever else it concludes, that it was provided with a badly or clearly incorrect account of what had actually happened. In my judgment, however, in neither case is that made out. To the contrary, as it seems to me, the voluminous evidence that has been generated since the granting of the *ex parte* order has demonstrated no more than that there will be a dispute between the parties as to exactly what did happen.

16 In the case of the involvement of the Singapore Navy, this much is clear, namely that the vessel was indeed pursued or convoyed by a Singapore Navy vessel. There is then evidence that the Navy's interest may have been a report of the possible presence on board Megacore Honami of one or more stowaways. Both sides of the litigation before me disavow any involvement in having so informed the Navy. The issue, to the extent there is a remaining issue between the parties as to what actually happened, therefore boils down to whether, as the claimants continue to maintain, and as was the contemporaneous information conveyed by agents engaged by them in the location, at sea, in launches in the vicinity of the vessel and the Singapore Navy, there had been, at least at one stage, a radio request to the vessel to stop, with which the vessel did not comply. Even if, were that detail to have to be resolved in due course and it were found that in that respect the claimant was at the time misinformed, as it seems to me that comes nowhere near a successful complaint that the claimant came to court *ex parte* or comes to court now with unclean hands.

17 To the extent in particular in that regard that Mr Coburn QC made submissions that the court can and should at this stage doubt the credibility of Mr Weller's primary informant, Mr Mangos of IMC, in my judgment that submission is not made out. The court has, in short, no reason to doubt, as indeed he has confirmed, that he received, on the evening of Friday 21 September (London time), reports from those in launches seeking to observe the vessel and act in the claimants' interests, that they overheard the Navy vessel asking Megacore Honami to halt. If, in those circumstances, those on the ground, or, rather, on the water, misheard or misunderstood what they had heard and thus ultimately caused inaccurate information to be conveyed through to the court, as I say that comes nowhere near a complaint of unclean hands on the part of the applicant for relief.

18 As regards the Indonesian Marine Police, it is fair to say that the dispute between the parties is rather more stark and wholesale. On the defendants' side, principally through evidence from the then master engaged by or on behalf of the first defendant, but supported, Mr Coburn QC submitted, by other evidence that has been obtained, the case is that there was no dramatic incident on the Saturday morning (London time) such as was reported to the court by Mr Weller's statement evidence and, indeed, the Indonesian Marine Police were never, at any stage, in the vicinity of the vessel.

19 Again, the court is not in a position today, on the evidence presently available, to resolve whether that is correct or whether the information contemporaneously reported through the chain of communication culminating in Mr Mangos and Mr Weller that I have described was incorrect, but what can be said is that it certainly appears not to be correct to claim, as did the master, that the Indonesian Marine Police were never in the vicinity of the vessel, there being photographic proof, on the face of things, that that is certainly not correct. I shall come back to that in a moment. It is also true, whilst I am not in a position to make any final determination on any of these issues, that there is, at the very least, real room to doubt the credibility of the then master in the accounts that he has given and to be concerned that the content of apparently corroborative evidence provided by many other members of the crew was, at the time, being directed by a superintendent that the first defendant had managed to place on board as part of the vessel's attempt to escape into Indonesia. I mention that only to be clear that this is a case in which it seems to me I am unable to place significant weight on the fact, as Mr Coburn QC emphasised, that now a number of different witnesses all on the face of things make similar statements to the effect that the Indonesian Marine Police did not get involved. There is also in the first defendant's favour some evidence of communication made after the fact with a relatively senior officer of the Indonesian Marine Police who has reported himself not to be aware of any such involvement.

20 So, in all those circumstances, whilst I cannot resolve the dispute, all that has been disclosed to the court under cover of the allegation of unclean hands is that there is, it now seems, a significant dispute between the parties as to the degree to which the Indonesian Marine Police did or did not take any interest in the vessel and, in particular, as to whether there was any direct attempt on the part of the Marine Police to get access to the vessel on the Saturday morning (London time) of the *ex parte* application. But none of that, again, even should it transpire in due course that the claimant did not have accurate information about those events, comes anywhere near a complaint that it has come to the court with unclean hands.

21 I said I would return to the photographic evidence. Entirely unrelated, in my judgment, to any complaint of unclean hands or, for that matter, and I shall come on to it, the suggestion

that there was not full and frank disclosure on the *ex parte* application, I did observe during the argument that in one of the places where, in his sixth witness statement, Mr Weller placed reliance upon the existence of that photograph, he did so in a way that, taken at face value, made it seem he was claiming it to be direct photographic evidence of the incident he had described in his *ex parte* evidence as having occurred on the Saturday morning, 22 September. I indicated during argument that that, on any view, did not seem to be correct, not least because I was told by Mr Holroyd, on instructions, that the information now available to Mr Weller, although it may be not when he signed his sixth statement, was that the photograph in question was taken on 24 September, not on 22 September.

22 I indicated that, whatever the outcome, I would expect a clarification or correction by way of further statement. I am pleased to note that, in fact, such a statement (by way of Mr Weller's seventh statement) has already been signed and provided, and that, therefore, has clarified and, to the extent necessary apologised for, that particular reference to the photograph.

23 So much for the allegation of unclean hands by reference to the way in which the application was presented *ex parte*.

24 More generally, Mr Coburn QC submitted that the claimants or those instructed to act on their behalf, in seeking to secure their interests, have proceeded in the wider dispute to pursue the claimants' claims in an aggressive and underhand manner such as should cause the court to refuse any degree of discretionary or equitable relief. That is said to include the following elements.

25 Firstly, it is said that there has been the suborning of an employee of the shipowner's manager's office to leak confidential information to those acting for the claimants in their recovery efforts, specifically Mr Mangos of IMC. It seems to me that there is no basis in the evidence upon which the court could find that that has occurred.

26 Secondly, it is suggested that the claimants engaged in misleading and intimidating the master in a first attempt they made to secure possession of Megacore Honami in August 2018. In that respect it has been acknowledged that a use of language on the part of Mr Mangos when speaking to the master may have been legally imprecise, as between issuance of writs and issuance of arrest warrants, but the substance of his evidence is clear, namely that he did not suggest to the master that the vessel was in any sense already under arrest, as opposed to it being the intention to place the ship under arrest when she got to Singapore.

27 That dispute therefore comes down to whether the master, in August 2018, was in some way misled by Mr Mangos into thinking that he (Mr Mangos) was a representative of the first defendant, the ship owner, providing orders to the master to take the vessel to Singapore. Again, Mr Mangos' evidence is perfectly clear that he explained at all times to the master who he represented and that what he was seeking to do was obtain, as a matter of request, the master's cooperation if he, the master, was happy to give it, and ensuring that the Master understood that he should check with his owners if he felt he needed to.

28 Again, I am not in a position to reach any final conclusion on the evidence as it stands as to who is correct as to any of that, but I am certainly not in a position to find that Mr Mangos has behaved in any way improperly in his communications with the master. If those communications were confusing, or in fact created any degree of confusion on the part of

the master, I am not in a position to find, and do not find, that that was Mr Mangos' intention or aim.

29 Thirdly, the submission was that, having obtained the *ex parte* order, the claimants' representatives proceeded to act as if they were entitled, as it is put, to commandeer the ship's crew and insist or demand that they proceed to Singapore, now acting as crew for the mortgagee in possession, and behaved oppressively towards those crew members by lodging, through Indonesian lawyers, some species of criminal complaint as to the crew's behaviour. On that topic, again, issue is very much joined on the evidence before me as to precisely what was or was not said, although it is accepted that indeed there has been a criminal complaint made by Indonesian lawyers acting on behalf of the claimants. As regards what was or was not said between the parties' different representatives, the difference boils down to this, namely whether those acting on behalf of the claimants indeed sought to or purported to insist that they were entitled to have the existing crew continue with the vessel, at least as far as Singapore, or whether, rather, as is their evidence, there was a request, it may even be a request firmly expressed as being sensible in everybody's interest in the circumstances, that they be allowed to do so, but recognising that that was ultimately the first defendant owner's call. I say the request, I can imagine, may well have been expressed in firm terms as being something that was very much in everybody's interests, not least because, as was confirmed to me during the argument and as I would have imagined, given the geography, when the first defendant in fact, as it was entitled to do, insisted that its crew disembark in Indonesia and a replacement crew engaged by or on behalf of the mortgagee in possession take over, in practice the disembarking crew then immediately had to travel to Singapore to make their way to their respective homes and the incoming crew all had to come via Singapore to get to the vessel in Indonesia.

30 The lodging of a complaint to the criminal authorities in Indonesia in respect of the behaviour of the crew in and about the claimants' potential allegations that access to the vessel was not provided as promptly as it should, and complaints that have subsequently arisen as to the removal of documents from the vessel, may be a step further than in many a case those acting for parties in the position of the claimants would choose to take, but I am not in any position to find, and do not find, that anything has been done in that regard that is improper or otherwise than justified by the honest understanding of those filing the report as to what they believe had happened as a matter of fact.

31 In all those circumstances, in my judgment, the allegations as to unclean hands are not made out and do not provide a basis for the refusal of the relief originally sought by the application notice and, in the event, granted *ex parte*, but capable, at the moment of being reversed if necessary.

32 That then brings me to the allegations of failure fairly to present the application to the court *ex parte*, that is to say the allegations that there was not full and frank disclosure. That involves also a number of separate complaints. The first is a complaint that the court had insufficiently drawn to its attention potential arguments on behalf of the defendant as to the merits in two respects.

33 Firstly, it is said that the court did not have its attention properly drawn to the possible arguments by the defendants, to which I adverted in passing at the outset, that the original loan to value notification and resulting purported acceleration notice were or may have been ineffective. In fact, however, the claimants' evidence in support of the *ex parte* application did draw to the court's attention that it was thought there may be a complaint or argument

by the defendants to that effect. What it did not do, Mr Coburn QC is right to say, is develop that argument or explain the possible basis of that argument in anything like that detail which he went through in outlining to the court the way in which that case might now be put, at all events if he were arguing it. That, however, in my judgment, is hardly a surprise, and does not give rise to a valid complaint that the claimant came to court *ex parte* without fully and frankly disclosing that which it was in a position to disclose.

34 As a result of the arrest of the Megacore Philomena in Los Angeles and the initial vigorous interlocutory litigation in the court there, the defendants had appeared to articulate what it is they would say on the merits as to why they were not simply loan defaulters as the claimants say that they are, and that was drawn to the court's attention. That did not include the basis upon which Mr Coburn QC now says there may be arguments as to the ineffectiveness or invalidity of the loan to value and acceleration notices since those points, as now developed by him, were not points articulated on the defendants' behalf in California. It is therefore neither surprising nor a matter of any criticism of the claimants that they did not anticipate those points for themselves so as to volunteer them to the court, they not being points on the face of things that the defendants themselves had identified prior to the *inter partes* stage of argument in this court.

35 Secondly, there is a complaint that, in the context of the possible argument that the defendants did not default at maturity because they were prevented from effecting sales, the court, it is said, did not have its attention sufficiently drawn to the fact that the defendants were asserting, and had back in late 2017 asserted, not just some generalised complaint that they were prevented from trying to sell the vessels, but a specific complaint that they had concluded, albeit without reference to the claimants, binding MOAs for the sale of the vessels. In my judgment, that level of detail, firstly, was apparent from the primary immediate correspondence between the parties around the loan to value notification which the claimant relied upon and exhibited and, secondly, is in truth only an aspect of detail of the possible defence which the claimants fairly drew to the court's attention, namely that it was being said that the claimants had prevented the vessels from being sold so as to prevent, as alleged, the defendants from being able to discharge their liabilities.

36 The other complaints in relation to a failure to give a full or fair account of matters are the following:

> (i) There is a complaint that, although a suggestion was made that the borrowers, apart from any other question of default, may have been in default as regards interest payments said to have been payable and unpaid at the end of October and November 2017, neither the witness statements in support of the *ex parte* application nor the skeleton argument that was provided to the court explained in any satisfactory way on what basis it was thought that there may have been specific failures to pay interest in relation to those two months. As it happens, since I dealt with the *ex parte* application, I am in a position to say that that particular aspect of the possible claims by the claimants on the merits did not feature at all in the court's consideration of the application *ex parte*. It seems to me that, though that is a subjective statement as to this particular judge's reaction to or assessment of the application, it is also a reflection of the objectively peripheral nature of that aspect of the application as presented. In any event, the very lack of detail or support for the suggestion that interest payments may have been due but were missed was evident in both the statements and the skeleton and, in my judgment, there is not, in relation to

that aspect of the complaint, any failure fully or frankly to provide the court with the material information.

(ii) There is reliance, again, on the defendants' versions of what happened in August 2018, when an initial attempt was made, without the assistance of the court being sought, to obtain possession of the vessel, and on what precisely had happened (as the defendants now claim) on the evening (London time) of 21 September and morning (London time) of 22 September as regards, in particular, the Singapore Navy and the Indonesian Marine Police. Essentially, for the reasons I have already given in saying that I did not find those to be well-founded complaints that the claimants came to court with unclean hands, in my judgment there is in none of those matters a well-founded complaint that the court was given inaccurate information, as against the information that upon due enquiry the claimants were or should have been in a position to give.

37 So, for all those reasons, in my judgment neither the complaint that the first claimant comes to court now, or came to court on the *ex parte* application, with unclean hands, nor the complaints that it failed to make full and frank disclosure of material matters to the court in the *ex parte* application, is made out. There is therefore no reason not to confirm the appropriateness of the interim solution arrived at through the *ex parte* application and to discharge the further order I made holding the fort pending this return date.

38 That brings me finally, as to substance, to a closing footnote in Mr Coburn QC's skeleton argument in which he invited the court, if the interim solution arrived at *ex parte* was to be confirmed, to make certain further stipulations. Three of the four suggestions, it seems to me, are without doubt inappropriate and not matters that a court would require of the claimants as in any sense the price of the obviously sensible interim solution that will be maintained. Those three are the suggestion that the claimants should be required to undertake not to seek security for costs of counterclaims in due course, that they should indeed provide security for those counterclaims, and that they should undertake to procure that the vessel, if sold, will fetch not less than US$17.6 million.

39 The other added stipulation sought by Mr Coburn QC though was that the undertaking in damages provided hitherto only by the first claimant should be extended to all the claimants on the basis of potential concern as to the ability of the first claimant, as a specific entity, to make good on that undertaking. In relation to that, my instinctive response, as I indicated in argument, had been to be unclear in what circumstances the defendants might potentially be exposed at all, given that, on the face of things, the sale price of US$19 million achieved for Megacore Philomena was safely held with the court in California and the expectation would be that whatever net proceeds are realised on the sale of Megacore Honami, if authorised in due course by the Singapore court, will likewise be held secure there pending final determination of the merits here or, alternatively, if a sale is not ordered in the meantime, the vessel herself will be secure in the Singapore Admiralty Marshal's custody.

40 That instinctive disinclination either to require the fortification of the undertaking from the first claimant only or, so as to achieve the same level of security for the defendants to invite the extension of that undertaking so that it is given by all of the claimants, was somewhat shaken by an indication I received at the end of the argument that, at all events in the Californian proceedings, it may be that an application has been made for the release to the first claimant (or it may be one of the other claimants) of the remaining net proceeds of sale prior to and irrespective of any determination of the merits of the claimants' claims. If I

have understood correctly that that is what is happening in California and if there is any prospect that the same might be sought in Singapore, then I would be at least provisionally concerned that notwithstanding what I have already indicated as to the prospects on the merits, as best the court can assess them at this stage, the defendants nonetheless have in good faith complaints which they wish to make which could sound at least in monetary cross-claims for which they might be left inadequately secured or completely unsecured. I will therefore invite further consideration of that aspect when I conclude this judgment.

41 In similar vein, I mentioned in argument that I would be concerned to ensure that the first claimant indeed did take the vessel into Singapore, where, in orderly fashion, she could be brought under judicial control for the benefit of all concerned, and I shall discuss with counsel whether, and if so how, that should be reflected in either undertakings or terms of the order I make now in this court.

42 Subject to those two final wrinkles, the result and my order today is that the order of 25 September must be discharged and the first defendant's application to set aside or discharge the order of 22 September must be dismissed. Since the first claimant is now in possession pursuant to that earlier order, I apprehend that no further order on the application in relation to possession of the vessel is now required but, again, I will hear counsel as to the precise form of the order that should now be made.