

What constitute good reasons for an order to sell a vessel *pendente lite*?

16 June 2021 | Contributed by Shearn Delamore & Co

Shipping & Transport, Malaysia

- 🔍 Facts
- 🔍 Applicable legal principles
- 🔍 Plaintiff's argument
- 🔍 Defendant's argument
- 🔍 Decision
- 🔍 Comment

This article examines the basis for an order for a sale *pendente lite* of a vessel that was arrested by a sheriff in *in rem* admiralty proceedings as security for the plaintiff's claim.(1)

Facts

On 19 November 2017 the defendant's vessel, Shi Pu 1, collided with the plaintiff's bulk vessel, Winning Loyalty. The high court sheriff arrested Shi Pu 1 in the waters off the Malacca Port premised on the plaintiff's writ against the defendant for loss and damages arising from the collision. The plaintiff's claim was for approximately RM1,716,660. The defendant could not provide any alternative security for the claim apart from its vessel.

The plaintiff filed an application for an order that the vessel and all consumables on board be appraised and sold *pendente lite* and that the proceeds of the sale – minus the sheriff's commission, costs and expenses – be paid into the court as security for the plaintiff, pending the trial's outcome.

The plaintiff's grounds in support of the application were twofold:

- The defendant had failed to provide any alternative security to obtain the vessel's release.
- The vessel would continue to deteriorate physically, resulting in the diminishment of its value as security for the plaintiff's claim.

Applicable legal principles

Pursuant to Order 29(4)(1) of the Rules of Court 2012, read together with Order 70(20) therein, the high courts have inherent jurisdiction to order the appraisal and sale *pendente lite* of a vessel arrested by a high court sheriff as security for a plaintiff's claim.

It is trite law that the court will not make an order for sale *pendente lite* without good reason.

The decision in *The 'Myrto'* ([1978] 1 Lloyd's Rep 11 (CA)) was a landmark verdict for determining when a sale *pendente lite* is appropriate. That decision states that the court should not make an order for the appraisal and sale of a vessel *pendente lite* without good reason. Specifically, Justice Brandon observed as follows:

On the assumption that the action will remain contested and proceeded to trial, such trial would, unless expedited, be unlikely to come on for about 1 1/2 years. Even if the trial was expedited, I doubt if it would come on in much less than seven months, that is to say some time after the long vacation this year... It follows that the continuing costs of maintenance which have to be considered are costs over a period of at least seven months, during which some costs of maintenance will also have to be incurred if physical deterioration of the ship is to be avoided.

I accept that the Court should not make an order for the appraisal 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 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 exists or not.

I do not accept, however, the contention put forward for the owners, that the circumstance that, unless a sale is ordered 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 the opinion that it can and often will do so.

It would, in my view, be unreasonable to keep the ship under arrest at great expense for seven months or more, with the result that, if the bank succeeded in their claim, the amount of their recovery would be reduced by the costs incurred.

In *SSK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 2)* ([2017] 8 MLJ 466), after considering *The 'Myrto'* decision, the court observed that the factors to be considered in establishing whether there is a good reason for a sale *pendente lite* are:

- the length of the trial;
- the daily costs of maintaining the arrest, including:
 - berth charges;
 - crew wages;
 - the supply of oil bunkers;
 - the supply of water;
 - the supply of food and other necessities; and
 - insurance; and
- the maintenance costs incurred to avoid physical deterioration of the vessel.

Consequently, the plaintiff's security for its claim would be diminished.

Plaintiff's argument

The plaintiff submitted that there were good reasons for the court to make an order for the appraisal and sale of the vessel *pendente lite* as no security had been offered by the defendant as the shipowner. Further, the plaintiff submitted that the costs and expenses of maintaining and preserving the vessel under arrest were increasingly diminishing its value as security for the plaintiff's claim. The plaintiff further contended that the cost of maintaining the vessel was likely to constitute a significant amount in relation to its worth and any potential recovery.

Defendant's argument

In its defence, the defendant made the following submissions:

- There was no delay as the defendant was waiting for its insurers to provide alternative security to release the vessel.
- Relying on *UAB Garant v The ship 'Aleksandr Ksenefontov'* ((2008) 746 LMLN 1), the defendant argued that the plaintiff's application for a sale *pendente lite* was premature because a full investigation into the plaintiff's claims had to be made before the order for sale could be given, especially since the statement of claim had not yet been filed.

- The value of the security represented by the vessel would not be progressively reduced by the continuing cost of maintaining it under arrest because the cost of maintenance was not substantial and would not cause the value of the security to be progressively diminished. In this respect, the defendant relied on the decision in *The United States of America v The owners of the vessels, 'Jade Phoenix' and 'Golden Phoenix'* ([1988] 2 CLJ 536).
- The vessel was in a commendable state and its rate of depreciation in value was minimal. The defendant cited the judgment in *Bank of Scotland Plc v The Owners of the M/V Union Gold and other cases* ([2013] All ER (D) 217 (Jun) and [2013] EWHC 1696 (Admlty)) to illustrate its contention that an order for sale should be granted only when the vessel is aging.
- The vessel was the defendant's main source of income and an order for sale would result in it being unable to return to its original position once the vessel was sold. The sale of the vessel *pendente lite* would be prejudicial to the defendant's rights and interests therein.

Decision

Defendant's failure to provide alternative security

Mr Justice Atan Mustaffa of the Admiralty High Court opined that:

- the plaintiff was entitled to security for its claim against the defendant according to its reasonably arguable best case, together with the interest and costs;(2)
- a shipowner's reluctance to put up security for its vessel is strong grounds for making an application for the appraisal and sale of the vessel *pendente lite*;(3)
- where a defendant has failed to offer any suitable security for a vessel's release, that would be a proper case with good reason and fair grounds for an order for sale *pendente lite* to be granted;(4) and
- on the facts of the present case, the defendant had repeatedly admitted that it was financially impecunious.

Plaintiff's application was not premature

Mustaffa ruled that there was no principle in law and practice that an application for sale *pendente lite* can be made only after the statement of claim has been filed. The court held that it was unacceptable for the defendant to contend that the statement of claim had to be examined first to quantify the security as the defendant could have applied to the court for the determination of the quantum and form of security. The defendant did not apply to the court for such a determination.

Diminution in vessel's value

The judge found that:

- the costs and expenses of maintaining and preserving the vessel under arrest were increasingly diminishing its value as security for the plaintiff's claim;
- in this respect, the cost of maintaining the vessel was likely to constitute a significant amount in relation to the vessel's worth and any potential recovery;
- the vessel had already become a wasting asset and had already diminished in value; and

any undue delay in having the vessel sold would result in the further accrual of costs and the further deterioration of the vessel, causing substantial hardship to the plaintiff due to its security being severely diminished.(5)

Vessel's deterioration

The judge observed the fact that:

- the vessel was lying stationary and exposed to the elements, which was a particular risk given that it was active monsoon season;
- the vessel posed a risk to environmental safety in the busy Malacca harbour; and

it was impossible for the high court sheriff to prevent the vessel's deterioration due to ordinary wear and tear which occurred with the passage of time and the unpredictability of the elements.

Vessel's value compared to plaintiff's claim

The court ruled that the defendant had failed to provide any evidence to support its estimation that the vessel would fetch a higher value compared with the amount of the plaintiff's claim. The court also considered that there was

evidence to demonstrate that the vessel was not being properly maintained and that its value would depreciate further during the arrest. At the same time, the court accepted that the sheriff's costs were increasing and the defendant would not be able to bear the costs.

Prejudice to defendant not a consideration

The court opined that there was no principle in law that a court should consider prejudice to a shipowner if an order for sale is granted. The court reasoned that it could be equally said that prejudice might be suffered by the plaintiff if the order for sale was not granted as the security provided by the vessel might not meet the plaintiff's claim and other costs if judgment was granted after trial.

Comment

The court allowed the plaintiff's application for the sale of the vessel *pendente lite* as good reasons for doing so existed – namely, the defendant's failure to provide alternative security, the diminution in the vessel's value that meant that it was a wasting asset and the vessel's deterioration.

For further information on this topic please contact Rajasingam Gothandapani at Shearn Delamore & Co by telephone (+60 3 2027 2911) or email (rajasingam@shearndelamore.com). The Shearn Delamore & Co website can be accessed at www.shearndelamore.com.

Endnote

- (1) *The owners and/or the demised charterers of the ship or vessel 'Winning Loyalty' v The owners and/or the demised charterers of the property or ship or vessel 'Shi Pu 1' (previously known as 'Jing Hui 2')* [2020] 11 MLJ 603.
- (2) *The 'Suhaili 5201' Sing Koon Seng Shipbuilding & Engineering Pte Ltd v The 'Suhaili 5201' (owners and other persons interested in)* [1988] 1 MLJ 210.
- (3) *The Gulf Venture* [1985] 1 Lloyd's Rep 131.
- (4) *SSK B&T Pte Ltd v The owners of the ship or vessel 'Silver Moon' of Port Klang (No 2)* [2017] 8 MLJ 466.
- (5) *Timberail Sdn Bhd v The owner and/or other persons interested in the vessel 'San Yang 2'* [1998] 6 MLJ 434 and *Kingstar Shipping Ltd v The owners of the ship or vessel 'Sino Glory' (ex 'Glory Singapura') (St Vincent and the Grenadines Flag)* [1997] MLJU 86; [1997] 3 CLJ 731).

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



Rajasingam Gothandapani