The “Sea Urchin”
[2014] SGHC 24

Case Number	: Admiralty in Rem No 355 of 2013 (SUM No 6520 of 2013)
Decision Date	: 07 February 2014
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Winston Kwek, Joseph Tang and Lim Ruo Lin (Rajah & Tann LLP) for the plaintiff; Lawrence Teh (Rodyk & Davidson LLP) for the defendant; Kelly Yap (Oon & Bazul LLP) for the interveners; K Muralitherapany and Edward Koh (Joseph Tan Jude Benny LLP) for Swissmarine; Wendy Tan and Kang Yixian (Stamford Law Corporation) for Pacific Bulk; Jacqueline Lee for the Sheriff, Supreme Court, Singapore.
Parties	: The "Sea Urchin"

Admiralty and Shipping – Practice and Procedure of Action in Rem – Judicial Sale of Vessel

Admiralty and Shipping – Practice and Procedure of Action in Rem – Sheriff’s Duties and Responsibilities

Admiralty and Shipping – Practice and Procedure of Action in Rem – Sherriff’s expenses in arrest of vessel – Whether cost of discharging cargo falls upon the Sheriff or the cargo interests

7 February 2014

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Alpha Bank S.A. (“the Bank”), applied as mortgagees on 20 December 2013 *vide* Summons No 6520 of 2013 (“SUM 6520”) for the vessel, *Sea Urchin*, of the port of Limassol, Cyprus (“the Vessel”) to be sold *pendente lite* to a named buyer and at a stated price (*ie*, prayer 2 of SUM 6520). As an alternative to a direct judicial sale, the Bank’s fall-back application was for the Vessel to be sold *pendente lite* by the Sheriff in the usual way by public auction or private treaty (*ie*, prayer 2a of SUM 6520).

2 In this case, the Bank arrested the Vessel fully laden with a cargo of soya beans in bulk. At the time of the arrest, the Vessel was in Singapore for bunkers en route to Qingdao, China where the cargo was to be discharged and delivered to receivers. The purpose of the direct sale *pendente lite* was for the Vessel under new ownership to carry and discharge the cargo in Qingdao. The question to be decided is whether the facts of this case constitute special circumstances to warrant a direct judicial sale to a named buyer at a specified price (see *The Turtle Bay* [2013] 4 SLR 615 (“*The Turtle Bay*”) at [29]).

Chronology of proceedings leading to the application for a direct sale

3 The Vessel, a bulk carrier fully laden with a cargo of soya beans, was arrested by the Bank on 30 October 2013 after the defendant shipowner, Keel Marine Company Limited (“the Defendant”), a

company incorporated under the laws of Cyprus, defaulted on a loan agreement that was secured by a first priority mortgage of the Vessel. The Defendant entered an appearance to the Bank's *in rem* action on 31 October 2013. On 18 November 2013, the Defendant applied *vide* Summons No 5874 of 2013 to, *inter alia*, (a) set aside the warrant of arrest; and (b) stay the action in favour of the Greek courts, including a temporary release of the Vessel to enable her to continue her voyage to China and to discharge the cargo on board. By the time the Bank's application in SUM 6520 was listed for hearing on 6 January 2014, the Defendant had reached a private arrangement with the Bank. Mr Lawrence Teh for the Defendant thus informed the court that the Defendant was not opposing the Bank's application for a direct sale. Before this court, the Defendant was no longer challenging the propriety of the Bank's claim or the arrest.

4 There were three other interested parties supporting the Bank's application for a direct sale. It was made known at the outset by counsel representing those interests that their support did not extend to prayer 2a in SUM 6520. Mr Kelly Yap ("Mr Yap") represented the intervener, Qingdao Bohi Agricultural Development Co Ltd ("the Intervener"), which was granted leave to intervene in these proceedings on 6 January 2014, and entered an appearance on 17 January 2014.

5 Ms Wendy Tan ("Ms Tan") represented Pacific Bulk Shipping (Cayman) Ltd ("Pacific Bulk") which trip-chartered the Vessel from Swissmarine Services S.A. ("Swissmarine"), the time charterers of the Vessel. Pacific Bulk in turn sub-chartered the Vessel to the Intervener. The Intervener is asserting rights of ownership to the cargo of soya beans. Pacific Bulk claims ownership of the bunkers on board. Swissmarine was represented by Mr K Muralitherapany ("Mr Murali"). Mr Edmund Koh stood in for Mr Murali at the adjourned hearing on 27 January 2014. For convenience, Pacific Bulk and Swissmarine are collectively referred to as "the Charterers".

6 The Charterers had not intervened but through their counsel undertook to do so on 27 January 2014.

The Turtle Bay

7 As prayer 2 is for a direct judicial sale, I begin with *The Turtle Bay* where it was observed that a direct judicial sale at a pre-determined price to a named person is generally not the accepted way to sell a vessel under arrest. A direct judicial sale represents a departure from the normal order that the Sheriff sells a vessel under arrest by appraisement, advertisement, and inviting bids to purchase the vessel: see O 70 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court"). More often than not, an application for a court-sanctioned private sale is advanced for the applicant's own purpose and benefit and is *prima facie* unfair (*The Turtle Bay* at [23]). In *The Turtle Bay* I referred to *Bank of Scotland plc v The Owners of the MV Union Gold and others* [2013] EWHC 1696 (Admlty) ("*The Union Gold*") where Teare J held at [20] that as a matter of general principle the court should not order a sale to a buyer found by the arresting party at a pre-determined price.

8 Basically, an admiralty judicial sale confers on the purchaser clean title of the vessel by transferring existing maritime claims of all *in rem* claimants against the vessel to the sale proceeds of the vessel. I explained in *The Turtle Bay* at [15] that "this concomitant transfer of maritime claims (and priority) from the vessel to the proceeds of sale in court is the *raison d'etre* of the principle that a judicial sale is for the protection and benefit of all persons interested in the *res*; it is not only for the interest of the arresting party alone". At [17]–[18], I went on to explain the procedural safeguards in the sale process in the following manner:

> 17 To protect the interests of all persons with *in rem* claims against the vessel including the defendant shipowner, the court has to have entire control over the sale process thereby

safeguarding the propriety and integrity of the sale process and, ultimately, instilling confidence and standing of the judicial sale from this jurisdiction. To this end, there are comprehensive procedures in O 70 for a court-ordered judicial sale to be carried out by the Sheriff pursuant to a commission for appraisement to ascertain the value of the vessel, by the placement of advertisements and invitation to submit bids for the purchase of the vessel.

18 Once the Sheriff is commissioned to appraise and sell the vessel, he is under a duty to first appraise the vessel to ascertain the value. The Sheriff would be assisted by professional and experienced appraisers who as court-appointed appraisers have to act faithfully and impartially. The amount of the appraised value is kept confidential so as not to affect the price at which bids are received. Ordinarily, the Sheriff would accept the highest bid price unless it is below the appraised value. When the court is asked to exercise its discretion to approve a judicial sale where the highest bid price is below the appraised value, the Sheriff hands over the confidential appraisement report of the court-appointed appraiser in a sealed envelope for the court's consideration. At no point in time would the amount of the appraisal be revealed to the public. In doing so, the integrity of the judicial sale process is preserved.

9 With regard to the importance of placing advertisements, I further held at [20] that:

20 The placing of advertisements not only publicise the sale to a wider audience interested in bidding for the vessel to obtain the best possible bid price, but they also serve to notify the sale to all others interested in the vessel so that they can come forward and establish their maritime claims. These interested parties include other claimants that may not have issued *in rem* writs or filed caveats against release but have an interest in the vessel and sale.

10 In *The Turtle Bay*, I concluded that a direct sale may be allowed in special circumstances. The applicant for a direct sale must identify the existence of "powerful special features" or 'special circumstances" before the court will be prepared to order a direct sale to a named buyer at a pre-determined price (*The Turtle Bay* at [29]). Needless to say, such an application for a direct sale will be scrutinised carefully.

Arguments advanced for a direct sale *pendente lite*

11 I begin with the Bank's arguments for a direct sale of the Vessel *pendente lite* to a named buyer at a specified price. As stated, the purpose of the direct sale *pendente lite* was for the Vessel under new ownership to carry the cargo to China.

12 The application was premised on several factors that were advanced by the Bank, the Intervener, and the Charterers. First, there was a named buyer of the Vessel, Okeanos Shipping Inc. ("Okeanos"), a company incorporated in the Marshall Islands, whose offer price of US$17.5m was US$1.5m more that the value of the Vessel, which the Bank claimed to be US$16m. In addition, Okeanos, a subsidiary company of a customer of the Bank, was willing to purchase the Vessel and carry the cargo to China for delivery to the Intervener. In that connection, the Intervener and the Charterers had entered into an undated agreement with Okeanos. When queried on when that agreement was concluded, Mr Murali informed the court that Swissmarine had signed the undated agreement on 20 December 2013. It was also pointed out that Okeanos was prepared to sign on the existing crew members under new ownership for the voyage to China.

13 Other factors strenuously emphasised by Mr Yap acting for the Intervener were that the cargo was worth US$40m and that it was slowly but surely losing commercial value with each day of delay. Mr Yap also relied on a report of Mr Eric Mullen, the Regional Director of Dr J Burgoyne & Partners

(International) Ltd, a practice of consultant scientists and engineers specialising in forensic investigations of fires, explosions, engineering failures and other incidents, to show that the cargo on board had started to deteriorate. [note: 1] It was also pointed out by the Intervener and the Charterers that a direct judicial sale to the named buyer was the best option for a variety of reasons. First, the cargo could not be landed in Singapore as there were no storage facilities available for such a huge quantity of cargo, even on a temporary basis. Second, whilst it was not impossible to tranship the cargo, there had been difficulties finding a suitable transhipment vessel in December 2013, resulting in the inability to meet the schedule given by the terminal (presumably Jurong Port) for the transhipment vessel and the Vessel to berth alongside for transhipment. [note: 2] Further delays occasioned by transhipping the cargo would adversely affect the condition of the cargo and, hence, its value. Third, the costs of transhipment were estimated to be US$700,000. [note: 3] Finally, the costs of discharge, estimated to be in the region of S$2.28m [note: 4], would be high and this expenditure would eat into the sale proceeds of the Vessel, thereby reducing the pool of sale proceeds available to potential *in rem* creditors. [note: 5] In summary, it was submitted that all these factors collectively constituted special circumstances warranting a sale *pendente lite* of the Vessel to the named buyer at the stated price of US$17.5m.

14 Mr Winston Kwek ("Mr Kwek") acting for the Bank relied on the Canadian case of *Bank of Scotland v "Nel" (The)* (1997) 140 FTR 271 ("*The Nel*") in support of its application for a direct sale. Mr Yap and Mr Murali also relied on *The Nel* and *The Union Gold* (see [7] above). These cases were discussed in my earlier decision of *The Turtle Bay*.

Discussion on the alleged special circumstances

Value of the Vessel and the pre-determined price

15 In this application, the Bank submitted that Okeanos had offered to buy the Vessel at US$17.5m which was US$1.5m above her market value of US$16m. The Bank produced the valuation certificate of a Greek shipbroker known as Golden Destiny. Relying on Golden Destiny's valuation certificate, Mr Kwek, Mr Yap, Mr Murali and Ms Tan collectively emphasised that the direct sale to Okeanos would be above the valuation of US$16m. On the other hand, Assistant Registrar Ms Jacqueline Lee ("AR Lee") acting on behalf of the Sheriff contended that Golden Destiny's valuation certificate addressed to the Bank was so qualified that it had little or no evidential value.

16 I agree with AR Lee that the valuation certificate issued by Golden Destiny was unsatisfactory and that the absence of a satisfactory valuation undermined the Bank's application. Significantly, Golden Destiny expressly stated in its valuation certificate that the value of US$16m was specifically for 10 December 2013 and that it was not expressing an opinion on the Vessel's value for any other date. It is helpful to set out the relevant parts of Golden Destiny's valuation certificate:

> Having examined the particulars given and on the assumption that the vessel is without any latent defects or any class recommendations, we would estimate the market value of [the Vessel], basis prompt charter free delivery, between willing Buyers and willing Sellers, for cash payment on normal sale terms to be: **About U.S.$16,000,000 (Sixteen Million United States Dollars).**
>
> *The figure mentioned above [US$16m] relates solely to our opinion of the market value as at* ***10th December 2013*** *and should not be taken to apply at any other date. Further, we can give no assurance that such value will be maintained at any subsequent date or is realizable in actual transactions.*

We should make clear that we have not made a physical inspection of the Vessel, nor we have inspected the Vessel's classification records, but we have assumed for the purposes of this Valuation, that the Vessel is in good and seaworthy condition with her class fully maintained free of recommendations, with reasonably good survey status and that she conforms in all respects with the requirements of her Registry.

We believe that the above valuation is reasonably accurate, but all statements made above are statements of opinion and are not to be taken as representations of fact. Any person who is contemplating entering a transaction, or other legal process relative to this Vessel or her value, should satisfy himself, by inspection of the Vessel or any other appropriate means, as to the correctness of the statements and assumptions which the valuation contains. Any variation from the above factors could substantially affect the value.

This Valuation has been provided in good faith solely for the private use of the person who commissioned it, and is not for publication and/or circulation. …

[emphasis in original in bold; emphasis added in italics]

17 Mr Yap in his written submissions also mentioned that the court had an independent valuation of the Vessel. This submission is misguided. Throughout the proceedings, the parties had relied on US$16m as the value of the Vessel. This figure came from Mr Kwek's affidavit and was purportedly supported by Golden Destiny's certification. There was no other independent valuation disclosed to the court. Mr Kwek had applied for an order to appraise the Vessel but this was soon after the court had indicated on 6 January 2014 that it was going to adjourn SUM 6520. As far as this court was concerned, the appointment of Insight Marine Services Pte Ltd ("Insight") was made in connection with prayer 3 of SUM 6520 and was being sought early in the event the Bank's application for a direct sale was not allowed, and the sale was to be made by public auction or private treaty pursuant to O 70 of the Rules of Court. It is well known to maritime law practitioners that the Sheriff only consults the appraiser's valuation after all sealed bids have been received following an order to advertise and sell the vessel. Until then, the appraiser's valuation, which is received by the Sheriff in a sealed envelope, would not be opened. As was the case here, Insight's valuation which the Sheriff received was in a sealed envelope was unopened. As I previously held in *The Turtle Bay* at [18], the amount of the appraisal would not be revealed to the public in order to preserve the integrity of the judicial sale process.

18 The evidential gap arising from Golden Destiny's valuation certificate as stated in [16] above effectively undermined the Bank's application for a sale *pendente lite*. Evidence of the expenses of maintaining a vessel under arrest and the value of the vessel must be present before the court. In the absence of such evidence, the court cannot decide if the vessel under arrest is or is likely to be a wasting asset if it is not sold before judgment is obtained against the shipowner. Mr Kwek identified ongoing expenses such as the crew wages of the 21 Filipino crew at US$13,673.75 per week, port charges and guard charges incurred for the period of 30 October 2013 to 20 December 2013 amounting to S$144,070.60 and S$25,680 respectively, and the usual port charges of S$4,477.87 and security guard charges of S$513.60 which are being incurred daily. However, the evidence before the court remains incomplete without a proper valuation of the Vessel.

19 In addition, I agree with AR Lee that there was nothing in writing from Okeanos stating its willingness or readiness to purchase the Vessel at US$17.5m and on the Sheriff's terms and conditions. The affidavit in support of the direct sale which was deposed by Mr Kwek stated that Okeanos would "apply to purchase the Vessel" directly from the Sheriff. [note: 6] In another

paragraph, Mr Kwek deposed that Okeanos had offered to purchase the Vessel at a price of US$17.5m. [note: 7] There was no indication at all as to whom the offer was made, which is an important consideration seeing that SUM 6520 was the Bank's application for an order that Okeanos buys the Vessel in a direct judicial sale from the Sheriff at US$17.5m. Evidentially speaking, the purported buyer's offer itself and the terms of the offer were uncertain. It was not clear whether there was a buyer ready and willing to commit to a purchase of the Vessel on the usual Sheriff's terms and conditions.

20 I also note that the inspiration to find a buyer prepared to carry the cargo to China started from a conversation Mr Kwek had with the representative of Swissmarine's P&I Club. Okeanos is the subsidiary of a customer of the Bank. There was no evidence and it was not the Bank's case that it had casted the net wider in search of more interested parties to attract the best price for the Vessel (see [8]–[9]).

The Nel

21 The Bank, the Intervener and the Charterers relied on *The Nel* to persuade the court to depart from the normal course of commissioning the Sheriff to appraise and sell the vessel because of the existence of "powerful special features" or "special circumstances" (see *The Turtle Bay* at [29]). In *The Nel*, the arrested vessel had a cargo of sulphur on board that was shipped from Vancouver on a voyage to Tunisa. The mortgagee had US$12m secured on the vessel. The cost of off-loading the sulphur on board at Vancouver was estimated to be US$1.3m. As an alternative, the mortgagee sought to privately sell the vessel for US$5m to a buyer who was willing to carry the cargo to its destination. The mortgagee obtained valuations of US$4m and US$3.75m for the vessel.

22 What was extraordinary in *The Nel* was the cargo of sulphur. When sulphur comes into contact with moisture, a chemical reaction is triggered resulting in the potentially devastating (and dangerous) effect of corroding the steel of a vessel. On the facts, the court found that there was a real likelihood of the vessel being corroded (*The Nel* at [10]):

> 10 … In addition to the sulphur being aboard the vessel for some six weeks here at Vancouver with, as I have said, warmer than usual temperatures, she still had to complete her voyage. A usual voyage from Vancouver to Tunisia, not taking into account delays at the Panama Canal and delays in discharge at Tunisia, would take about 26 days assuming a speed of 15 knots. Taking into account that most of the voyage from Vancouver, through the Panama Canal and to Tunisia would take place in sub-tropical and tropical climates, the concern of a corrosive reaction, between steel plate and wet sulphur, was a real and valid concern. …

23 The court in *The Nel* observed that should there be corrosion the vessel's seaworthiness would be affected, thus making it difficult to sell at a good price (at [15]). In that case, there was evidence that the vessel "could well, within weeks and certainly within months, become unsaleable except as scrap or at a minimal speculative price" (*The Nel* at [16]). The consequence of that was the likelihood of a smaller pool of sale proceeds available for distribution to *in rem* creditors. In light of the very special circumstances, the court granted the sale *pendente lite* to a buyer who was prepared to carry the cargo to its destination.

24 The other point in *The Nel* related to the high costs of discharging the cargo. This same feature was raised by the Intervener and the Charterers. Mr Yap submitted that the cost of discharging the cargo in this case would be substantial, thereby reducing the sale proceeds available to *in rem* creditors. Mr Kwek relied on *The Nel* at [21] which stated as follows:

> … To deny a sale at this point would result in substantial expenses to remove cargo and/or the certainty, in the future, of a substantially lower sale price of a ship suspect of sulphur corrosion damage. *In either event* the proceeds available to *in rem* creditors would be smaller. This result is contrary to the objective of any court ordered sale, that of obtaining the best fair price for the ship in order to protect creditors. Thus the approval of the private sale of the "*Nel*" by way of an order and a commission for sale. [emphasis added]

25 It appears that in granting the application, Prothonotary Hargrave J in *The Nel* considered the costs of discharging the cargo from the arrested vessel as part of the Sheriff's expenses to be paid out of the proceeds of the sale of the vessel. I will go on to show that — in the present case at least — this proposition appears to be inaccurate in that the costs of discharging the cargo is not part of Sheriff's expenses and as such the high costs of discharge is not a relevant factor to allow a direct sale.

26 Interestingly, Prothonotary Hargrave J in a subsequent decision of *Royal Bank of Scotland plc. v. Kimisis III (The)* [1999] F.C.J. No. 300 ("*Kimisis III*"), held in *obiter dicta* that the Canadian position as to whether such expenses should fall upon the cargo interests or the Sheriff was actually still open to debate:

> 13 While the affidavit of Mr. Leo Murphy does perhaps raise a question as to whether the Plaintiff is taking any undue advantage by indicating to a potential purchaser of the Kimisis III that it was not possible to arrange a sale of the vessel with cargo aboard and that it was not interested in such a transaction, there may well be another side to the proposal of Curzon Maritime Ltd. to purchase the Kimisis III and carry Noga's cargo to its destination. It would be best for all concerned if that possibility were dealt with further, certainly by the Plaintiff and perhaps also by Noga, if it is able to develop further material given more time. *However, I do not need to make a finding, at this point, as to whether the cost of discharging cargo should fall upon the cargo owner, the general rule under English law, or whether the cost of discharge of cargo should be a Marshall's expense in getting the ship ready for sale, the American approach, or whether equitable considerations, as suggested by Mr. Justice Cons in The Mingren Development, ought to apply.* [emphasis added]

27 Since then, the Federal Court of Canada in *Cameco Corp. v. "MCP Altona" (The)* (2013) 225 A.C.W.S. (3d) 292 ("*MCP Altona*") held that the costs of discharge fall on the cargo owner and was not a Marshal's expense. Sean Harrington J reviewed a number of decisions including the English cases (which adopt the position that such costs are to be borne by cargo interests), American cases (which adopt the position that such costs are to be paid out of the proceeds of sale), and the previous Federal Court of Canada decision of *Kimisis III*, before arriving at the following conclusion (at [44]):

> 44 I am more persuaded by the English and Hong Kong authorities and hold that the cost of discharging the cargo of uranium and cleaning the ship, assuming the contract was frustrated due to a breach of contract on the part of the carrier, forms part of Cameco's cargo claim, and is not to be equated with marshal's expenses. This is not to say that in this particular case the exercise of equitable discretion might not give Cameco priority over the mortgage.

28 As alluded to in *Kimisis III* and *MCP Altona*, English law places the burden of such costs on the cargo interests for the following reasons observed by Sheen J in *The Jogoo* [1981] 1 WLR 1376 ("*The Jogoo*") at 1380:

> At the forefront of Mr. Mance's submissions on behalf of the mortgagees he invited me to consider the contractual relationship between the cargo-owners and the ship-owners. The cargo

was carried in *Jogoo* under a contract of carriage, one of the terms of which was that freight was pre-paid at Mombasa. When freight is paid in advance the cargo-owners accept the commercial risk that the voyage will not be completed for whatever reason. If the contract is frustrated the cargo-owners bear the loss because the Law Reform (Frustrated Contracts) Act 1943 does not apply to contracts for the carriage of goods by sea: see section 2 (5)(*a*). The ship-owners repudiated the contract of carriage by failing to pay their creditors or put up security in order to obtain the release from arrest of their vessel, with the result that the cargo-owners now have claims for damages against them. The cargo-owners have a right to remove their cargo from the ship, or they may abandon it.

29 For similar reasons, the Supreme Court of Hong Kong adopted the English position in *Dharamdas & Co. (Nigeria) Ltd. and another v. The Owners of the Ship or Vessel "Mingren Development" and Panasia Realty & Finance Ltd* [1979] HKCU 19 ("*Mingren Development*"). I find it useful to recite the following passage by Cons J:

> It seems to me that the English position derives from the old common law doctrine of frustration. American courts have approached from a different direction. They appear to look at it this way, that from the moment of its arrest a ship is a common fund administered by the court for the common benefit of all those interested in the fund and that any expenses incurred in the administration of that fund should be borne by the fund itself as an "expense of justice". These may include wharf dues: *The Poznan* [1927] AMC 723 or the cost of discharging cargo to make a vessel more easily disposed of by sale: *The Emilia* [1963] AMC 1447. However this approach has not been without its critics: *Gilmore and Black Admiralty Law*, 2nd edition, p. 603. Obviously there is no perfect solution. Financial disaster, like any other disaster at sea, is likely to cause suffering to the innocent. The argument that the suffering should fall primarily upon the mortgagee I find largely emotional. It is true that he may sometimes have a free choice of when and where he arrest the ship and may thus be able to lessen the impact on others. But so sometimes do other claimants. And no one can, as a general rule, be blamed for exercising his rights at such time as he thinks most propitious to himself. If he takes undue advantage in any particular circumstance the court may take that into account against him when exercising its discretion. The present position is of long standing. As I see it the position was confirmed in 1943 when contracts for the carriage of goods by sea were deliberately excluded from the operation of the Law Reform (Frustrated Contracts) Act. I am not persuaded that the American approach is so much more just or that conditions now are so different from those in 1943 that I should take it on myself to make a general change.

30 In the present case, the Vessel, and not its cargo, was under arrest. The intervener who asserts rights over the cargo would have to off-load the cargo at its expense, and not at the Sheriff's expense. This would be the position unless the equities of the case justify treating the costs of discharge as Sheriff's expenses (see *The "Nagasaki Spirit"* [1994] 2 SLR(R) 165 at [30]).

31 It bears mentioning that courts in *The Jogoo* and *Mingren Development* appeared to be largely persuaded by their respective Law Reform (Frustrated Contracts) Act which expressly excluded contracts for carriage of goods by sea. I note parenthetically that the position in Singapore under the Frustrated Contracts Act (Cap 115, 1985 Rev Ed) ("the Act") is no different, as s 3(5)(*a*) expressly provides that the Act does not apply to "any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea". However, since this point was not argued by any of the counsel, and is likely to arise on another occasion, I will say no more in this decision.

32 For now, the assertion that the costs of discharging the cargo would eat into the eventual sale

proceeds as argued by counsel is irrelevant to the determination of whether to grant a direct sale *pendente lite* for the reasons stated above.

Other factors

33 Mr Yap also referred to the impossibility of landing the cargo in Singapore and that transhipping the cargo would be slow and costly. The issues of scheduling and timing of the transhipment vessel (assuming one was available) and deterioration of the cargo were raised. He therefore contended that the Bank's application for direct judicial sale would be in the best interests of everyone concerned.

34 In many cases of arrest of cargo-laden vessels, the voyage is typically abandoned when the owner of the arrested vessel does not or is unable financially to put up security to lift the arrest. Cargo interests would have to step forward to recover possession of the cargo from the owner of the vessel. In this case, as stated above at [30], it is the Vessel that was under arrest and not its cargo. The alleged "special circumstances" are in reality a typical consequence of an arrest of a cargo-laden vessel. Just as the costs of discharge of cargo do not fall automatically under Sheriff's expenses, transhipment expenses for the same reasons stated above should not be treated as Sheriff's expenses to be paid out from the sale proceeds. In the final analysis, such costs are, in principle, claims for breach of the contract of carriage against the vessel owners and/or the charterers.

35 The facts in *The Union Gold* are also different from the facts of the present case. In *The Union Gold*, Teare J sanctioned the direct sale of "an elderly vessel" built in 1984 which was "unlikely to attract many buyers" (at [24]). The vessel in question was valued at only €315,000. The court there found it compelling that the proposed buyer in that case offered to buy the vessel because it was in a position whereby he was able to retain and operate a long term contract which provides business for her (and other vessels). If that contract was lost, the proposed buyer would not be willing to buy the vessel. The court also took into consideration the fact that the jobs of 21 crew members would be lost. In those unique circumstances, the court came to the conclusion that the vessel would probably fetch a higher price through a direct private sale than it would through a public auction. In the present case, while Okeanos has offered to employ the crew members of the Vessel, that by itself does not constitute a "special circumstance". Unlike *The Union Gold*, the present case by no means concerns a very old vessel. The Vessel was built in 2001. The Defendant's forecast to the Bank in June 2013 stated that the Vessel was capable of trading until December 2017. There was no urgency to recoup whatever value remaining in the Vessel.

Conclusion

36 For the reasons stated, prayer 2 of the Bank's application for the direct sale of the Vessel *pendente lite* was dismissed. Without satisfactory evidence as to her value, the Bank's assertion that the value of the security represented by the Vessel would be progressively reduced by the costs of maintaining her under arrest was not made out. I therefore did not grant prayer 2a for a sale *pendente lite*.

[note: 1] Eric Mullen's affidavit filed on 24 January 2014 at para 21.

[note: 2] Christopher Nicholas Connelly's affidavit filed on 21 January 2014 at para 14.

[note: 3] Christopher Nicholas Connelly's affidavit filed on 21 January 2014 at para 15.

[note: 4] Zhao Hui's affidavit filed on 27 January 2014 at para 29.

[note: 5] Zhao Hui's affidavit filed on 27 January 2014 at para 36.

[note: 6] Winston Kwek Choon Lin's affidavit filed on 20 December 2013 at para 9.

[note: 7] Winston Kwek Choon Lin's affidavit filed on 20 December 2013 at para 10.