

The "Makassar Caraka Jaya Niaga III-39"
[2012] SGHC 175

Case Number : Admiralty in Rem No 175 of 2009 (SUM 699/2011)
Decision Date : 29 August 2012
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Leong Kah Wah and Dedi Affandi (Rajah & Tann LLP) for the plaintiff; Prem Gurbani and Tan Hui Tsing (Gurbani & Co) for the second intervener, Kim Tiong Entepries Pte Ltd. Leonard Chia (Asia Ascent Law Corporation) for the third intervener, Megastar Shipping Pte Ltd
Parties : The "Makassar Caraka Jaya Niaga III-39"

Admiralty and shipping – sheriff's expenses

29 August 2012

Judgment reserved.

Judith Prakash J:

Introduction

1 On 19 February 2011, Megastar Shipping Pte Ltd ("Megastar") applied by summons (SUM 699/2011) in this admiralty action for the following orders:

- (a) For liberty to intervene in these proceedings and to enter an appearance as intervener;
- (b) For an order that the sum of US\$497,081.23 being expenses incurred by Megastar between 16 May 2009 and 30 July 2010 for the preservation and maintenance of the vessel "Makassar Caraka Jaya Niaga III-39" ("the Vessel") rank as Sheriff's expenses;
- (c) For the costs of the application.

2 I first heard the summons on 8 March 2011 at which time I granted leave to Megastar to intervene in the proceedings. I then gave directions for the filing of affidavits in relation to the second prayer on the summons. The affidavits were duly filed and substantive arguments on the application were heard in August 2011 and in February 2012. I now give my decision on the application.

3 At this point, I should state that at about the same time as it started this action, ANL Singapore Pte Ltd ("the plaintiff"), had commenced similar admiralty proceedings in Admiralty in Rem No 181 of 2009 against the ship or vessel "Pontianak Caraka Jaya Niaga III-34" ("*MV Pontianak*") which was a sister ship of the Vessel. *MV Pontianak* was arrested shortly after the writ was issued and Megastar issued a summons to intervene in those proceedings and for similar relief in respect of expenses incurred on behalf of *MV Pontianak* as asked for in these proceedings.

4 I heard Megastar's applications in respect of the Vessel and in respect of *MV Pontianak* at the same time as all parties agreed that the relevant facts and legal issues were the same. It was only the figures that changed. The judgment that follows deals, however, only with the claim in respect of the Vessel.

Background

5 The following facts are largely undisputed. By way of an agency agreement dated 28 October 2008 between PT Djakarta Lloyd (Persero) ("DJL"), an Indonesian company, and Megastar, a Singapore company, Megastar agreed to provide agency services in Singapore to DJL in respect of vessels which were owned, operated, chartered and/or otherwise managed by DJL. Pursuant to this agreement, Megastar acted as the agent of the Vessel when it called at Singapore.

6 On 16 May 2009, during a visit to Singapore, the Vessel was arrested at the instance of ANL Singapore Pte Ltd, the plaintiff in this action who claimed amounts allegedly due under a slot charter-party. The owners of the Vessel did not enter an appearance and, on 27 August 2009, the plaintiff applied for judgment and for an order for the sale of the Vessel.

7 On 11 September 2009, DJL intervened in the action and, some two weeks later, it applied for the arrest of the Vessel to be set aside. As a result, the application for the sale of the Vessel had to be held in abeyance. DJL's setting aside application was successful initially, the arrest being set aside on 15 January 2010. The plaintiff appealed and its appeal was dismissed by Tan Lee Meng J ("the Judge") on 18 May 2010. The plaintiff then applied for further arguments.

8 On 30 July 2010, Megastar ceased to be the agent of the Vessel and Sinoda Shipping Agency Pte Ltd ("Sinoda") was appointed as Sheriff's agent for the Vessel while it remained under arrest.

9 The further arguments were heard by the Judge on 19 October 2010 and the plaintiff succeeded in persuading the Judge to change the earlier decision and to allow the appeal. This meant that the arrest was not set aside. The plaintiff was then able to proceed with its application for a judicial sale of the Vessel. This application was granted on 12 January 2011.

10 At about the end of January 2011, Sinoda repatriated the original crew of the Vessel. This crew had been serving on the Vessel at the time of arrest and had continued to work on board throughout the arrest. It was replaced by a skeleton crew provided by Sinoda.

11 In March 2011, the Vessel was sold at a price of \$1,810,000. The proceeds of sale were inadequate to cover all the claims against the Vessel. Megastar claimed that it had expended some US\$497,081.23 for the maintenance and preservation of the Vessel whilst it was under arrest and should be reimbursed that amount. If Megastar's expenditure was admitted as part of the Sheriff's expenses, then what would be left for the plaintiff and the other claimants against the Vessel would be very little. Accordingly, Megastar's application was resisted by the plaintiff and by the second intervener, Kim Tiong Enterprises Pte Ltd ("KTE") who associated itself with the plaintiff's arguments.

Basis of Megastar's application

12 Megastar stated that during the period from 16 May 2009 to 30 June 2009 it had incurred expenditure for the Vessel under the following categories:

- (a) Crew transport expenses.
- (b) Crew's medical expenses.
- (c) Bunker supplies to and for the Vessel.
- (d) Water supplies to and for the Vessel.

- (e) Launch services for the Vessel.
- (f) Crew's wages.
- (g) Megastar's fees for services provided in attending to the Sheriff during arrest.

13 Megastar produced a letter dated 30 June 2009 from DJL directing it to look to the Sheriff for reimbursement of all expenses incurred for the maintenance and preservation of the Vessel during the period of her arrest. Megastar did not, however, contact the Sheriff at this time. It was only on 17 May 2010 (more than ten months later) that Megastar's solicitors wrote to the Sheriff stating that Megastar had, with the Sheriff's knowledge and consent, expended sums during the period of the arrest of the Vessel and *MV Pontianak* which were in the nature of Sheriff's expenses. The letter asked for urgent confirmation that expenses were approved as Sheriff's expenses. The Sheriff's reply stated that Megastar had to intervene in the two admiralty actions and obtain court orders in order to be able to treat its expenses as Sheriff's expenses.

14 Megastar's position is that all the expenses it incurred were necessary expenses to keep the Vessel and the crew safe during the period of the arrest and would have been incurred by the Sheriff in any event. Megastar therefore argues that its claim is well founded and that the objections of the plaintiff and KTE were not reasonable.

15 It should be noted that during the first hearing in August last year, various factual queries were raised by the plaintiff in relation to Megastar's application. As a result, Megastar asked for leave to file a further affidavit. Subsequently, both Megastar and the plaintiff filed further affidavits and these were before me at the second hearing of the application.

Basis of the plaintiff's objections

16 Initially it appeared that the plaintiff was only questioning the quantum of Megastar's claim. At the first hearing of the application, however, it became plain that the plaintiff also objected in principle to the claim.

17 The plaintiff's grounds for opposing Megastar's application are:

- (a) Megastar's conduct was wholly inconsistent with that of a Sheriff's agent. It was, in essence, acting as the shipowner's agent during the relevant period of the arrest.
- (b) The equities of the case must be scrutinised since the proceeds from the Vessel would be seriously depleted if Megastar's application is allowed. The equities of this case do not favour Megastar because there is little evidence that the shipowners were insolvent or had abandoned the Vessel. Moreover, Megastar had kept silent about its potential claims until a very late stage.
- (c) In any event, Megastar's claim should be reduced because its expenses were not necessary, reasonable or proper expenses to be incurred by the Sheriff in carrying out his duties.
- (d) Megastar's claim was questionable because:
 - (i) it appeared from the documents disclosed that part of Megastar's claim relating to crew wages and disbursements were cash advances in the nature and form of loans from Megastar to DJL;

- (ii) there was evidence that DJL or another third party was putting Megastar in funds to bear the expenses; and
- (iii) Megastar had been reimbursing a third party for crew wage expenses.

The law

18 Generally speaking, a ship's agent who incurs expense to provision, maintain and preserve a vessel has a contractual claim against the owners of the vessel and an admiralty claim against the *res* itself which can be enforced by arrest. Once the vessel is arrested, however, the agent's claim enjoys no special priority and ranks *pari passu* with those of other statutory lienees. This applies whether the services provided to the vessel took place while the vessel was trading or after it was arrested. However, if the services are provided to a vessel under arrest at the behest of the sheriff, or pursuant to an order of court authorising the same, the costs of such services will rank as sheriff's expenses and will enjoy priority above all other claims against the ship.

19 Even if the Sheriff has not given prior authorisation for the expenditure to be incurred, he may adopt those expenses as Sheriff's expenses thereby conferring priority on them. In *The Aquarius III* [2002] 2 SLR(R) 347 ("*The Aquarius III*"), the interveners, the crew of the vessel, applied for an order that the crew's post-arrest wages and disbursements be treated as Sheriff's expenses. The court allowed the application, holding that the Sheriff's agents had adopted the crew (at [50]):

[They] knew the requirement of the relevant regulation [of minimum manning of an arrested vessel], as must the Sheriff. They were content to let the interveners stay on board to meet the requirement ...

I was of the view that the interveners had effectively been adopted by ... the agent of the sheriff, to meet the requirements, and it did not lie in the mouth of [the sheriff's agent] to suggest otherwise.

20 In certain situations, the court will allow certain expenses incurred in respect of an arrested vessel to rank as Sheriff's expenses, even though the Sheriff has not approved or adopted them and no court order authorised the expenditure before it was made. In *The Nagasaki Spirit* [1994] 2 SLR(R) 165 ("*The Nagasaki Spirit*"), it was held that although it was good practice to obtain the Sheriff's or the court's approval before incurring an item of expenditure which may be considered as Sheriff's expenses, whether in fact that expenditure could be considered and classified as Sheriff's expenses depended on the circumstances and the expediency appertaining to such expenditure and not on whether prior sanction was obtained before the expenditure was incurred. Further, the court adopted the principle stated in *Keppel Corp Ltd v Chemical Bank* [1994] 1 SLR(R) 54 ("*Keppel Corp*") that the court had a wide discretion in balancing the equities in a proper case and the category of "Sheriff's expenses" was not a closed category, but could be enlarged where, in the opinion of the court, the expense incurred would necessarily be incurred by the Sheriff in carrying out his duties in connection with the arrest, detention, appraisalment and sale and for the preservation and good management of the *res*.

Discussion

Adoption of expenses by the Sheriff

21 In the present case, there was no evidence that the Sheriff had adopted or approved the expenses incurred by Megastar. Megastar's staff asserted that they had had oral approval from the

Sheriff for certain expenditure but this was hearsay. There was no document which evidenced such approval. Whilst on some occasions Megastar had copied its correspondence to the immigration authority on obtaining permission for the crew to come ashore to the Sheriff, the Sheriff had always indicated that it had no objection to the crew coming ashore provided that all costs thereof were borne by the crew themselves. Thus, what documentation there is of the dealings between the Sheriff and Megastar indicates that the Sheriff had not agreed that the particular expenses the correspondence related to should be part of Sheriff's expenses. When Megastar's solicitors sent its documentation to the Sheriff in respect of expenses incurred for the Vessel and *MV Pontianak* and asked for confirmation that the same would form part of the Sheriff's expenses, the Sheriff quickly responded that a court order would be required for this to happen.

Necessary and proper expenses?

22 Since there was no prior approval of Megastar's expenditure by either the Sheriff or the court, in reaching a decision as to whether to allow the application, I have to consider two factors. The first is whether the expenses qualify as (*Keppel Corp* at [26]):

... a necessary and proper expense to be incurred to be incurred by the sheriff in carrying out his duties in connection with the arrest, detention, appraisalment and sale and for the preservation and good management of the *res*.

23 As noted above, Megastar put forward seven categories of expenditure. As far as these categories are concerned, the following are arguably necessary and proper expenses which the Sheriff would incur when carrying out his duties in connection with the arrested vessel, to wit, crew wages, crew medical expenses, bunker supplies and water supplies. In *The Aquarius III* the court held that post arrest wages and disbursements could constitute Sheriff's expenses to the extent that the crew is necessary for maintaining the vessel. Whilst these categories represent necessary and proper expenses in theory, the actual expenses incurred may be subject to rejection or reduction depending on the circumstances. The plaintiff made various arguments on the quantum of wages and cost of supplies claimed by Megastar and these would need to be considered if the claims are allowed in principle.

24 The plaintiff objected in principle to the following categories of expenses being considered necessary and proper Sheriff's expenses: crew transport expenses, launch services for the Vessel and Megastar's fees for services provided in attending to the Vessel (including crew sign on/sign off/shore leave charges).

25 In support of its stand, the plaintiff produced evidence from Mr Herbert Michael Johns ("Mr Johns") who was the manager of the Hub and Tankers Operations Department at Sinoda, the ship's agent appointed for the Vessel by the Sheriff after Megastar stepped down. According to Mr Johns, the duty of the Sheriff's agent in respect of a vessel under arrest is to act reasonably to protect the Sheriff's interest in the vessel and to preserve the value of the vessel. Generally, the bulk of the cost and expenses in maintaining an arrested vessel comprises bunkers and fresh water supplies for the vessel as well as ship's stores and provision of supplies. The crew wages are paid by the shipowner and the agent does not advance payment of such wages unless it is put in funds by the shipowner or has received authorisation from the Sheriff.

26 Mr Johns' opinion was that the expenses claimed by Megastar in relation to the provision of crew transport and charges for launch services for the purposes of crew shore leave were unreasonable as such expenses ought to be for the relevant crew member's own account and not for the shipowners' account or for the Sheriff. The amount claimed to renew the Vessel's trading

certificates was not reasonable as this was only necessary to maintain the class of the Vessel which is not something which the Sheriff is concerned about while the Vessel is under arrest. Mr Johns considered that Megastar's claim for fees for services provided in attending to the Sheriff during the arrest had been overstated. While some charges were within market range, others were unreasonable as they were essentially a double claim and the surcharge of \$150 per application levied by Megastar for obtaining the Sheriff's approval for crew shore leave was unreasonable and excessive.

27 Megastar's response was that the launch services were required to supply the Vessel and to allow the crew to take shore leave. The master had indicated that he needed to grant the crew members frequent shore leave in order to placate them and mitigate their protests against what they felt was a situation akin to imprisonment. The period that the Vessel spent under arrest was unusually long and the shore leave granted to the crew was the only way the master could have managed the deep unhappiness and frustration that the crew was facing. In any event, the frequency of shore leave granted to the crew averaged two days per fortnight over a period of 14.5 months and this was not excessive. Attached to one of Mr Chua's affidavits was a statement signed by the master on 24 June 2011 in which he said, *inter alia*, that he had needed to give the crew enough freedom so that they did not have the feel of a "floating prison" because there was grave danger of mutiny/abandonment by the crew if they had not been given frequent shore leave and provided with transport to shore on the ship's account.

28 In respect of Megastar's fees, it justified its administration fee as being a per application charge and reflecting additional work which resulted from the arrest. As for the charges for the crew shore leave applications, Mr Chua admitted that Megastar's agency agreement did not provide for this. However, he said that when shore leave applications were made, Megastar had to perform the same work as was required when crew signed on or off. This involved formal applications to the Immigration & Checkpoints Authority. As Megastar expended time and effort in obtaining permission for the crew to come ashore and it is entitled to charge for the same.

29 In my judgment, launch services provided by Megastar could only constitute a necessary and proper expense in connection with the arrest when such services were used to provide the crew with provisions and medical treatment and to supply the Vessel with materials necessary for her maintenance. Insofar as launch services were used to transport the crew, the Sheriff had indicated from the beginning that these were to be borne by the crew themselves and there is no reason to make them part of Sheriff's expenses. Insofar as Megastar charged for its services in relation to the crew's shore leave, I do not consider such charges as being necessary and proper expenses incurred in relation to the arrest. All expenses relating to the crew's leave would be of a personal nature. Although Megastar suggested that the master needed to grant the crew shore leave, there was no contemporaneous evidence that the crew would have mutinied or their health would have been adversely affected if such leave had not been given. The master's statement was made about a year after Megastar had ceased to be agent of the Vessel and about six months after the original crew had been repatriated. There was no evidence either that Sinoda had been forced to give the original crew frequent shore leave during the period that Sinoda was the agent of the Vessel and before the crew was repatriated. In all the circumstances, I consider that the plaintiff's objection to the categories of expenses enumerated in [24] is well founded in principle and these expenses should not be allowed in any event.

The equities of the case

30 In respect of those expenses that would otherwise be accepted in principle as being necessary and proper expenses to be incurred during the arrest of the Vessel, before I can approve the same I have to have regard to the equities of the particular case. This was decided by the Court of Appeal in

31 In *The Eastern Lotus*, agents of a vessel arrested her for failure to pay their disbursements. The vessel's mortgagees had subsequently applied to pay the wages of the crew, *inter alia*, and for the same to rank as Sheriff's expenses. The order was granted but damage claimants subsequently intervened in the action and objected to the payment to the mortgagees. The Court of Appeal held (at [7]) that a court in the exercise of its admiralty jurisdiction, is entitled, in spite of the general order of priorities, to have regard to the equities in any particular case before it. The court went on to find that in *The Eastern Lotus* itself, the equities were in the mortgagees' favour for a number of reasons:

- (a) The owners of the vessel were insolvent.
- (b) The mortgagees had made full disclosure of all the facts within their knowledge. They were entitled to protect their property and did not make the payment as a volunteer but after consultation with the Sheriff and pursuant to an order of court.
- (c) On the other hand, the damage claimants had merely denied that they had been sluggish or deliberately lying low with a view to inducing someone else to expending money to his detriment.

The court therefore held (at [8]) that it would be an injustice if the mortgagees were deprived of the payment that they had made, acting on the earlier order of court.

32 Megastar contended that in this case too the equities were in its favour. Mr Chua maintained that contrary to the allegations of the plaintiff, Megastar did not act unilaterally in incurring expenses for the Vessel. Megastar was the agent of the Vessel at the time of her arrest and the Sheriff was fully aware of this. He averred that in respect of payment of the Vessel's disbursements, the Sheriff had maintained to Megastar that as agent, such expenses would have to continue to be paid for by Megastar as long as it was the agent on record. Further, Megastar had dealt with DJL as owners of the Vessel and was kept regularly informed by DJL of the latter's efforts to discharge the arrest which culminated in the order of court dated 15 January 2010 setting aside the arrest of the Vessel.

33 Mr Chua was at pains to emphasise that Megastar had been the Singapore agent for DJL's fleet of more than ten vessels for ten years and it would have been highly unprofessional for Megastar to abandon its responsibility as agent just because two of its vessels in the fleet had been arrested. The subsequent prolongation of the proceedings by the plaintiff was beyond Megastar's control. DJL changed its management shortly after the appeal against the order of 15 January 2010. It became difficult for Megastar to obtain clear instructions from DJL when it became increasing clear that the plaintiff would pursue its claim that DJL was the owner of the Vessel. During this period, Megastar had continued to maintain the Vessel on the basis that the arrest had been set aside and on a reasonable assumption that it was very possible in the very near future that the Vessel would have to be in a condition to resume trading at short notice. Disbursement of crew wages would have to be incurred to ensure the continued services of the crew on board. Any discontinuation of the crew wages would put the Vessel at risk and give rise to potential crew morale and discipline problems.

34 Having considered all the circumstances of this case, it appears to me that the facts here are not analogous to *The Eastern Lotus* and, for various reasons which I discuss below, the equities are not with Megastar. I find Mr Chua's statement that after January 2010 Megastar maintained the Vessel "on the basis that the arrest had been set aside and on the reasonable assumption that it was very possible in the near future that the Vessel would have to be in a condition to resume trading at

short notice" to be particularly significant. It reminds me of the context that when the Vessel was arrested, Megastar was DJL's agent and when DJL decided to contest the arrest, Megastar must have been fully apprised of its decision and of its confidence that it would succeed in the application. The circumstances of the case indicate that Megastar was acting as DJL's agent throughout and it was only when it found it difficult to get instructions from DJL that it gave up its appointment as agent of the Vessel. In acting in relation to the Vessel during the period it was under arrest, it appears to me that Megastar was confident of eventually recovering its expenses from DJL (after all it acted as agent for ten vessels not simply the two that had been arrested by the plaintiff). It also probably thought that the chances of the arrest being set aside were very good in which case there would be no possibility, let alone need, to recover its expenditure as Sheriff's expenses. Initially its confidence was justified and that is why it continued to maintain the ship even though the arrest was prolonged by the plaintiff's appeal.

35 There was evidence to indicate that some of Megastar's claims relating to crew wages were cash advances from Megastar to DJL to enable DJL to pay the crew wages. Some payments were made to a company called Great Ocean Financial Services Pte Ltd and these were not properly explained.

36 Secondly, in November 2009, Megastar received a sum of US\$50,600 from DJL and, according to handwritten notes on the face of the remittance advice (which was dated 5 November 2009), of this, US\$14,500 was for expenses relating to the Vessel and sums of US\$16,100 and US\$20,000 were, respectively, for expenses relating to the *MV Pontianak* and another DJL vessel called the *MV Jatiwangi*. On the same day, US\$14,500 was paid by Megastar to the master of the Vessel on behalf of DJL and this sum was then disbursed to the crew. The sum of US\$16,100 was likewise paid to the master of *MV Pontianak* for the wages of the crew of that vessel. It appears from this remittance advice that Megastar was put in funds by DJL for some of the expenses it incurred in respect of the Vessel and *MV Pontianak*.

37 Megastar tried to explain away the handwriting on the remittance advice. It alleged that the writing was a mistake by its staff and that the remittance was made entirely for the *MV Jatiwangi* and was not intended for the vessels under arrest. The plaintiff submitted that this explanation was self-serving and inconsistent with the contemporaneous documents. There is much force in the plaintiff's submission. The breakdown of the sum of US\$50,600 as written on the remittance advice corresponds exactly with the amounts in the payment voucher and petty cash voucher both dated 5 November 2009 which supported the payment to the master of the Vessel. It appears from Megastar's claim that for the month of October 2009, it paid US\$14,500 as crew wages for the Vessel and US\$16,100 as crew wages for the *MV Pontianak*. The breakdown of the amount received from DJL on 5 November 2009 reflected these payments.

38 Although Megastar did produce some documents relating to payments/advances made on behalf of *MV Jatiwangi*, those documents were inconsistent with earlier vouchers produced by Megastar. Whilst I accept that Megastar did make payments on behalf of *MV Jatiwangi*, I find it difficult to accept that in November 2009 when DJL must have been hopeful of successfully setting aside the arrest, the amount that it remitted to Megastar was intended only for *MV Jatiwangi* and not for the two vessels under arrest as well. It was Mr Chua's assertion that the handwriting on the voucher was a mistake. The person who actually made that inscription did not testify.

39 In support of its allegation that it was not funded by DJL, Megastar had argued that DJL was in a "poor financial condition that they cannot fund their own crew and office staff let alone their creditors". This assertion was at odds with DJL's ability to actively resist the arrest of the Vessel and the *MV Pontianak* up to October 2010 when the setting aside order was reversed.

40 There was also another transaction that raised questions. The documents indicated that between May 2009 and September 2009 the crew of the Vessel and of the *MV Pontianak* were paid their wages by a company called Bintang Mas Shipping Pte Ltd ("BMS"). Subsequently, Megastar paid BMS the sum of US\$84,900 in reimbursement of those payments. It was Megastar's position that BMS had paid the crew wages at Megastar's request. In this connection, Megastar produced various letters to BMS wherein it had asked BMS to disburse cash for crew wages to the Vessel and *MV Pontianak* and also to supply bunkers to both vessels. These letters contained an undertaking by Megastar to reimburse BMS in due course. Megastar also produced invoices from BMS to itself for the amounts disbursed in cash to the masters of the vessels.

41 The plaintiff did not accept those documents as evidencing loans from BMS to Megastar. It pointed out that on the face of the payment vouchers which BMS prepared in support of the various payments, it appeared that BMS had made the payments on DJL's behalf rather than on Megastar's behalf. The payment vouchers issued by BMS typically read, "Being payment on behalf of P.T. Djakarta Lloyd for Cash Advance of Makassa – MAY '09". This wording suggested that DJL would be the party liable to BMS and not Megastar.

42 The documents are not consistent with each other. No doubt Megastar's letters to BMS indicate a liability assumed by Megastar but BMS's vouchers show a different picture. It is not easy to determine the exact relationship between DJL, Megastar and BMS in relation to these payments. It is also odd that Megastar should borrow money to pay the crew of the Vessel if it was not acting for DJL. It is one thing for Megastar to advance its own funds which are in hand to the crew in the belief that it can recover the same as Sheriff's expenses when the Vessel is sold but it is quite another for Megastar to incur a liability to a third party which it does not have to do. If Megastar had no money it need not have paid the crew. The crew at all times would have been entitled to make their own claims against the Vessel for payment and these claims would have enjoyed priority. Megastar's action in incurring liability to pay the crew claim indicates to me that it was confident of reimbursement from DJL. That confidence was justified to some extent as shown by the remittance in November 2009.

43 Megastar also claimed reimbursement of payments made to BMS in respect of payments for bunkers and fresh water supplied to the Vessel amounting to some US\$171,602.07. Megastar did not explain why BMS made these payments apart from the fact that Megastar asked them to do so. I agree with the plaintiff's submission that these expenses must have been incurred pursuant to some private arrangement between BMS, DJL and Megastar. Alternatively, Megastar being short of funds, must have asked BMS to pay for these items first in the full confidence that it would be able to recover the money from DJL.

44 The plaintiff also pointed out certain evidence which appeared to indicate that payments which Megastar claimed had been made to the crew had in fact been in the nature and form of loans to DJL. Megastar's position was that it disbursed the crew wages directly to the master of the Vessel from November 2009 onwards. Some US\$99,657.50 was disbursed in this way. When the master received these sums, however, he signed on a receipt prepared by Megastar and affixed DJL's stamp alongside his signature. He then paid the crew members their respective wages and they each acknowledged receipt of the same on a standard form monthly crew salary list which bore DJL's letterhead at the top and DJL's stamp at the bottom. The plaintiff argued that the amounts advanced as crew wages were, accordingly, loans to DJL to enable them to pay the crew wages.

45 It would appear from the monthly crew salary lists that there was a particular acknowledgement procedure that was followed whenever the master made payment to the crew. This procedure reflected the fact that the crew had been employed by DJL and that the latter was responsible for

their wages. Whilst this does not mean in itself that the payments made to the crew were advances by Megastar to DJL, the fact that it followed the pre-arrest procedure is some indication that it was still acting as DJL's agent and was not following an independent course with the sole purpose of preserving or maintaining the Vessel while it was under arrest.

46 The various facts that I have averted to above provide some support for the plaintiff's submission that Megastar's expenses were incurred wholly on account of DJL and in Megastar's position as DJL's agent.

47 Megastar did not accept that position. It relied on the letter purportedly dated 30 June 2009 from DJL directing it to look to the Sheriff for its expenses and disbursements. There are doubts about the authenticity of that letter. If indeed it had been sent to Megastar in June 2009, Megastar would surely have taken early action to obtain the Sheriff's approval for its various expenses especially since the arrest was protracted by DJL's conduct in trying to set aside the warrant. Yet it did nothing. It would appear that Megastar was anticipating that the Vessel would be released from arrest and therefore, as Mr Chua said, had incurred the expenses in order to ensure that she was operationally ready in all ways to continue trading immediately upon release. I agree with the plaintiff that the circumstances indicate that Megastar was relying only on DJL's credit and was incurring expenses on the latter's account.

48 For its own protection also, Megastar could have notified either the plaintiff or the Sheriff that there were crew claims for salary which had to be settled in order not to endanger the Vessel. It did not do so. I note Mr Johns' evidence that typically during an arrest crew wages are paid by the shipowners. If the shipowners abandon the ship, the crew can make its own claim against the vessel. In this case, since neither the crew nor Megastar made a claim for wages to the plaintiff or the Sheriff, there was no reason for them or anyone else to think that the shipowners, *ie*, DJL had abandoned their responsibilities.

49 Overall the equities of the situation are not in Megastar's favour. Unlike the case of *The Eastern Lotus*, there is no evidence that DJL is insolvent (although it was quite deeply indebted to Megastar) and that in the long run Megastar would be left without redress. Secondly, Megastar did not take the first possible opportunity to apprise the Sheriff and the court of what it was doing and that it would be looking into the Vessel for reimbursement. Although it was purportedly told as long ago as 30 June 2009 to look to the Vessel, it kept this direction to itself and, even after the Sheriff told it that it needed to obtain a court order, it waited more than nine months to make the relevant application.

50 In *The Nagasaki Spirit* and *The Aquarius III*, the court held that the equities were in favour of the party incurring the expense because first, the owners had abandoned the vessel and, second, the expense was necessary to preserve and maintain the vessel. In this case, there is no evidence that DJL had abandoned the Vessel or *MV Pontianak* prior to Megastar ceasing to act as agent. On the contrary, DJL was actively attempting to set aside both arrests and in the meantime, it was remitting money to Megastar for both the Vessel and the *MV Pontianak*. In addition, it had given Megastar instructions to ensure that the Vessel was operationally ready to continue trading. This must have been the reason why Megastar did not lay off any crew members but continued to pay the full complement. On the evidence, maintaining the full complement of the crew was not a necessary measure for the preservation of the Vessel as a vessel under arrest may be maintained with a skeleton crew. Megastar claimed to be ignorant of the fact that the port authorities permit a skeleton crew for vessels under arrest and asserted that it had had to maintain a full crew on board at all times to comply with the port regulations. That claim is difficult to believe. Certainly Megastar's conduct resulted in the crew wage claim and the claim for supplies and water being higher than they

would otherwise have been.

Conclusion

51 In view of the conclusion I have come to on the equities of the situation, there is no need for me to consider the quantum of those expenses that in principle qualify as Sheriff's expenses. If I had had to do so I would have reduced them to reflect the fact that the vessels were overstaffed while under arrest and Megastar did not act prudently by reducing the crew to a skeleton crew.

52 For the reasons given above, I dismiss Megastar's application with costs. I will see the parties for the purpose of fixing the costs payable by Megastar.

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