Bankruptcy, Maritime Liens and Priorities; The Saga of the Offi Gloria

By

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BANKRUPTCY, MARITIME LIENS AND PRIORITIES: THE SAGA OF THE "OFFI GLORIA"

Introduction

Little did Offiong Glover know when she married her husband, Robert Glover, that he would in due time give her name to an ancient (24 year old) rat-infested, over-mortgaged, debt-ridden vessel. Or that the commercial disaster which befell it would require a disparate group of New Zealanders to explore areas of law and shipping practice of which they were previously in happy ignorance. Or that such disasters would cause distress and financial loss to so many. Or, finally, that the vessel's fate would become notorious to the extent that it was chronicled even in cartoons.

For without even considering the law, the short, unhappy career of the "Offi Gloria" provided sufficient incident to keep a modest soap opera going for several weeks - a sort of "Lyttelton Waters".

Although the issues we want to talk about are strictly legal - maritime, liens, the international effect of Chapter XI of the US Bankruptcy Code, the problems of selling a laden vessel, priorities, issues of security and the like - we do not want to overlook the human costs of commercial disaster for ordinary people. In this case, the vessel was detained under arrest in New Zealand for upwards of six months. The Master was a Polish pilot, fulfilling a professional obligation to serve offshore periodically, and the crew a varied group of mainly Asian extraction. All bore their fate with stoicism and dignity, to the extent that they declined gifts of food from the people of Christchurch.

Cast

Robert Glover	An American of Nigerian origin, living in Houston
Prescott Shipping Co Limited	The Cyprus company controlled by Mr Glover, which owned the vessel
Prescott Corporation	A United States company also controlled by Mr Glover
ABC Shipbrokers (Chartering S & P and Shipping Agents) Ltd	A Greek company, controlled by Mr John Soumas, which managed the vessel on behalf of Prescott
United Bank for Africa	A Bank based in Nigeria but also having a branch in the Cayman Islands controlled from New York, which had a bank mortgage over the vessel

Burwill Pacific Limited	Subcharterer and former owner of coal cargo.
Korea Ferrous Metal Export and Import Corporation Limited	Owner of the coal cargo
Unitor	Suppliers of certain equipment carried on the vessel
Isbrandtsen Marine Inc	Bunker suppliers based in Greenwich, Connecticut

History

On 9 January 1992, ABC issued Admiralty proceedings in rem against the vessel. The claim was for US$375,650. That sum represented an alleged balance due to ABC for disbursements and expenses incurred by it in its capacity as manager of the vessel. ABC also obtained a warrant for the arrest of the vessel; and it was duly arrested.

At the time of arrest, the vessel had arrived at the port of Lyttelton, near Christchurch, to load a cargo of coal. It was in ballast. Amazingly, for reasons never satisfactorily explained, the vessel nevertheless loaded its cargo. Presumably the shippers believed that the arrest would soon be lifted. Moreover the vessel was also bunkered shortly after the arrest.

Under the sale contract property in the coal passed on loading. As a result, foreign cargo owners became involved. As luck would have it, they were North Korean. (The voyage charterers were from Hong Kong). The coal was liable to spontaneous combustion.

Not surprisingly, the vessel was mortgaged. The mortgagee, United Bank for Africa (Cayman Islands Branch) had advanced US$6 million to Mr Glover and his companies. So far as can be ascertained, this 24 year old vessel was the only security for the advance. After the arrest, the Bank took some time to decide whether or not to support Mr Glover. Ultimately, it decided to cut its losses and call up the mortgage. By that time Mr Broadmore had unfortunately been retained by Mr Glover, leaving Mr Taylor free to accept the Bank's rather more attractive instructions.

Other affected parties included bunker suppliers and the owners of equipment hired to the vessel; and the shadowy figure of Mr Effiom Bassey, whose presence on board was unexplained by any function he appeared to perform.

On the face of it, this was a straightforward workout of a mortgage in default. What made it so difficult, time consuming and complicated were the following:

- A complete breakdown in relationships between Mr Glover and ABC's principal, Mr Soumas, preventing them from reaching agreement on any issue.

- The determination of Mr Soumas to exploit his position beyond what was sustainable either legally or practically, no matter what the implications for other parties;

- The equal, if not greater determination of Mr Glover to retain control of the vessel at any cost - except, of course, a money cost;

- His dramatic petition for protection under Chapter XI of the US Bankruptcy Code;

- The valuable but potentially dangerous cargo on board, owned by consignees who presented obvious difficulties in communication, legal understanding and financial transfers;

- The polyglot nature of the crew;

- The conflict of laws questions presented by interveners' claims for liens over the vessel or its equipment.

We want to approach these issues as follows. Mr Broadmore will deal with some initial issues arising from the ABC/Glover dispute: the right to arrest for disbursements, the posting of security, and the Court's power to release the vessel on any terms. He will also deal with the effect of Chapter XI in New Zealand. Mr Taylor will deal with responsibility for the costs of discharge of cargo and the priority of the various claims against the vessel.

Arrest for Disbursements

We do not now speak of lien or priorities: that is a topic for later debate by Mr Taylor, because ABC claimed that the disbursements outlaid by it gave rise to a maritime lien.

A review of the legal position shows that an Admiralty claim for disbursements must meet some basic criteria. There are two quite short points worth noting:

- There is no right of claim or arrest in Admiralty in respect of debts incurred but not paid by the claimant.

- Before an action in rem is commenced or a vessel is arrested for disbursements, the claimants must render a proper account. Obviously enough, the disbursements must be payable in terms of any contract between the claimant and the vessel owner.

Security

The New Zealand Admiralty Rules provide for security to be posted in a variety of ways:

- Cash deposit with the Court;

. Bail bond by the owner and two sureties;

. Bail bond by an insurance company carrying on business in New Zealand.

(see rule 20)

In practice, security is almost never given in this way. Neither of us has encountered such security in practice. Where claims are covered by insurance, it is usual for the insurer - generally the P & I Club - to give security in the form of a Club Letter.

On one celebrated occasion, cargo claimants challenged the financial strength and/or integrity of the owners of a vessel, the partners of P & I Services (including the distinguished Mr Mackay), and the Britannia P & I Club; and refused to release a vessel on the strength of a Club Letter. Application was made to the Court to release the vessel, founded on the general discretion granted to the Court by Rule 17(5) to release a vessel under arrest on any terms. The application succeeded: see **The Pacific Charger** (unreported, High Court, Wellington, AD No 135/81, judgment 27.7.81 (Savage J). An appeal to the Court of Appeal was dismissed.

In the case of the "Offi Gloria", the Club was not involved - the ABC claim was for a simple debt. Bank guarantees were tentatively arranged, but Mr Glover was unable to provide primary security to enable a New Zealand bank to offer a guarantee on the basis of a back to back guarantee from an approved foreign bank.

Release Without Security

In relation to the "Offi Gloria", the question of release under r 17(5) came up in March and April 1992; and the Court was persuaded to order the vessel's release without any security at all, but on terms which Mr Glover was unable to fulfil.

The question of release was first raised by the charterers. They alleged that ABC and the Bank were estopped by acquiescence from arresting the ship to the prejudice of the charterers. They further alleged that the arrest constituted an unlawful interference in the contract between themselves and the owner. Both arguments arose out of the payment of freight by the charterers to the owners immediately after completion of loading, presumably in ignorance of the arrest.

As to estoppel, the Judge traversed the classic "probanda" in **Wilmott v Barber** (1880) 15 Ch D 96 and concluded that the Bank did not, at any material time, have a right inconsistent with the charterers' rights so as to give rise to an estoppel by silence. The position was that at the time the cargo was loaded the Bank had taken no step to enforce its security - that happened some time later, when the Bank joined in ABC's action as a second plaintiff. All that had happened at the time the cargo was loaded was that the Bank's mortgage was in default, as it had been for some months. Thus the Bank had not unfairly remained silent about its position while the charterers acted to their detriment.

If the Bank was not estopped, then it did not matter whether or not ABC was estopped, as the Bank was entitled to maintain its arrest independently of ABC.

The Judge also discussed other factual issues affecting the Bank's position, and concluded that as a matter of practical reality the Bank was under no duty to warn the charterers that it could be detrimental to their interests to load the vessel.

As to unlawful interfence with the charter party the Judge relied heavily on the decision of Brandon J in **The "Myrto"** [1977] 2 Lloyd's Rep 242. In that case, Brandon J spelt out the circumstances in which arrest by a mortgagee would and would not constitute unlawful interference. In particular, a mortgagee could exercise its rights where:

- the nature or circumstances of the contract alleged to be interfered with would impair the security.

- the owner was unable or unwilling to complete the voyage.

The second point obviously applied here: the owner was clearly impecunious; it could not arrange security for ABC's claim.

As a result, the Judge made an order for appraisal and sale before judgment (see first interlocutory judgment of Holland J, 26 March 1992.)

Then Mr Glover played a masterstroke - or perhaps a last card. He had his company, Prescott Shipping Corporation, apply for protection under Chapter XI of the United States Federal Bankruptcy Code. He also applied in respect of the registered owner Prescott Shipping Co Limited, on the basis that its affairs were completely intermingled with those of Prescott Corporation. We will return to this below. But it meant that, at risk of being in contempt in the United States, the Bank could not proceed with sale.

Having temporarily neutralised the Bank, Mr Glover applied for release of the vessel. This application found favour, not because of any sympathy the Judge might have had for Mr Glover, but because of the grevious effect of the continuing arrest in a number of ways:

- The crew had been stranded in a foreign port for over three months with over US$100,000 in wages due to them.

- The cargo was subject to spontaneous combustion.

- The vessel had become infested with rats.

- The cargo owners had paid for the coal, and for its carriage to North Korea, but had not been able to obtain delivery of it.

- On the face it , ABC would be prejudiced by a release; but it seemed unlikely that it had a maritime lien, so that it would rank behind the Bank's mortgage and gain nothing in the end.

In his second interlocutory judgment of 14 April 1992, Holland J therefore ordered the release of the vessel conditional upon Mr Glover paying the crew wages up to date, paying for fumigation to rid the vessel of rats, and paying sundry costs and disbursements.

The next move came from ABC. It appealed. But by the time the appeal came to be heard in early May, it was apparent that Mr Glover would be unable to meet the conditions in the judgment of 14 April, and the appeal became unnecessary. Appraisement and sale could therefore proceed.

We learnt some lessons from this part of the saga. A vessel could be released without security even though the arrest might be perfectly regular, if the effect on third parties was serious enough to outweigh the plaintiff's rights. We also were reminded that an arrest can sometimes amount to unlawful interference with third party contractual rights.

The Chapter XI Gamble

On 8 April 1992, Mr Glover petitioned the US Bankruptcy Court in Houston for protection under Chapter XI of the US Bankruptcy Code in respect of Prescott Shipping Co Limited and Prescott Corporation. He controlled both companies, the former was the registered owner of the ship. He stated that the affairs of the two companies were so intertwined that they should be treated as if they were one. As is well known, Chapter XI is designed to give breathing space to companies in financial difficulty so as to enable them to reorganise their affairs and pay their creditors in an orderly manner. An important corollary of the Chapter XI procedure is the "automatic stay" which arises on filing the petition. The stay prevents creditors from commencing or continuing process against the company or its property. It was this stay which hog-tied the Bank at a critical moment in the New Zealand litigation.

Although the Bank entity making the loan to Mr Glover was the Cayman Islands branch, the affairs of that branch were managed in New York. The bank and its officers were therefore subject to the jurisdiction of the US Bankruptcy Court, and in particular were subject to its contempt jurisdiction. The bank was therefore very nervous about taking any step in connection with the New Zealand proceedings which might be construed as a breach of the automatic stay. So long as the stay remained in force, the bank therefore felt constrained not to oppose the application for release to be heard on 14 April.

However, the Bank applied in Houston to lift the stay so as to permit it to continue with the sale in New Zealand. The hearing in Houston concluded about an hour before the application for release was due to be heard in New Zealand. The Bank expected to get the stay lifted, and prepared accordingly. Mr Broadmore received fax advice of the outcome as he left for court. Mr Taylor heard the news by phone at the same time. The Bank's application had been adjourned. The stay therefore remained in force for the New Zealand hearing, and the Bank had to suffer in silence.

Both of us recognised the possibility that we could arrange a telephone link between the two judges. Both of us kept that thought to ourselves. Now that technology makes such links possible, it may be worth considering them.

As we have said earlier, Holland J felt able to order the release of the vessel without having to consider the effect of Chapter XI on the situation. But we think that the extraterritorial reach of Chapter XI merits brief discussion.

Dicey and Morris declare by Rule 178 that the authority of a liquidator appointed under the law of the place of incorporation is recognised in England. Where England goes, New Zealand goes. Moreover, s135 of the Insolvency Act 1967 (NZ), gives our courts a discretion to act in aid of or be auxiliary to foreign courts exercising bankruptcy jurisdiction.

These broad principles provide some support for the view that the vessel should have been released from control of the New Zealand court so as to allow its movement and ultimate fate to be decided by the US Bankruptcy Court.

Such a course seems logical where those having the greatest interest in the matter are themselves based in the United States - in this case, Mr Glover, the Bank, and Isbrandtsen - and where none of the protagonists are based in New Zealand.

However the probable outcome in New Zealand had the question been argued is, we think, that the Court would have excluded Chapter XI from consideration.

Briefly, the argument is as follows. **Galbraith v Grimshaw** [1910] AC 508 establishes that the Court will enforce the in rem effects of a foreign bankruptcy order, but not mere in personam effects. However, a petition under Chapter XI does not have in rem effects as the petitioning debtor continues in possession. (The theory that the debtor became a "new entity" by virtue of the petition, first advanced in some cases in Hong Kong, was rejected by the United States Supreme Court in **National Labour Relations Board v Bildisco** (1984) 465 US 513). Therefore the New Zealand proceedings can continue without regard to the Chapter XI proceedings. In relation to Mareva injunctions, this result has been recognised: see **Felixstowe Dock & Railway Co v U.S. Lines** [1989] QB 360, although discretionary elements relevant to the exercise of the Mareva jurisdiction had a bearing on the outcome of that case.

The argument can also be put on the basis that a claimant in rem against a vessel is treated analogously to a secured creditor: **The "Monica S"** [1967] 2 Lloyd's Rep 113; and that secured creditors may pursue remedies under their securities despite winding up. We note briefly and incidentally that the Court has power to wind up foreign companies with assets in New Zealand even though not registered in New Zealand: **Re Suidair International Airways Limited** [1951] Ch 165, **Re Matheson Bros Limited** [1984] 2 Ch 255.

Discharge Costs

As we have already seen one of the primary complicating factors in respect of the arrest of the "Offi Gloria" was the fact that she had been loaded with coal after arrest. The Court ordered that the vessel could be sold by the mortgagee as Intervener and Second Plaintiff in the proceeding. Although consideration was given to the question of selling the vessel with the coal on board it was decided that the coal should be discharged before sale.

There was a dispute between the parties outlined in affidavit evidence as to the extent of knowledge of the mortgagee at the time the vessel was arrested. The mortgagee asserted that it did not consent to the loading of the vessel but that at the time the loading occurred it was still endeavouring to establish whether the vessel had been arrested and also whether any bond or security had been given.

The sub charterer and the owners of the coal had argued that the mortgagee either knew that the vessel was arrested and had therefore impliedly consented or that it had acquiesced in that it had failed to make proper and diligent inquiries as to whether the vessel was under arrest. Notwithstanding those submissions the Court ordered sale of the vessel. Holland J stated:

> "In my opinion it places an unrealistic and unjustifiable burden on the Bank to require the Bank to advise the charterer in these circumstances that the ship has been arrested by a third party in respect of a debt claimed by that third party. There is no evidence of any decision by the Bank to enforce its security at that stage.
>
> It follows accordingly that I am not persuaded that there was anything unconscionable in the conduct of the Bank and no estoppel arises to prevent the Bank exercising its security to the detriment of the charterers."

Eventually, following the Chapter XI Bankruptcy, the conditional order for release of the vessel, a further hearing rejecting the First Plaintiff's application for stay of the order releasing the vessel pending an appeal and appeal by the First Plaintiff of that decision it became clear that the owners could not meet with the conditions relating to release of the vessel and sale was therefore to proceed pursuant to the original order for sale made by Holland J. The question then became who should pay the costs of the discharge of the vessel.

The question of discharge was a difficult one. Although the Port of Lyttleton had good facilities for loading of the vessel unloading was likely to be a much more difficult and more expensive task. The question of who bore the costs of discharge was therefore an important issue for all of the parties.

There are conflicting views as to who should bear the costs of discharge of a vessel when it is to be sold following arrest. The conflicting views are found in American and English authorities.

The argument in favour of the view that the costs of discharge be met from the proceeds of sale as part of the costs of the arrest is that discharge of the cargo is for the benefit of all of the claimants to the vessel in that it is intended so as to obtain the best price for the vessel. This is the view that has found favour in the United States of America where the general practice is that the costs of discharging the cargo are part of the administrative costs in conducting the appraisement and sale and therefore constitute a prior charge on the proceeds of sale.

In addition there was a further argument that where the person likely to benefit from the sale was the mortgagee of the vessel it was not contrary to principle for the mortgagee to effectively bear the costs of discharge because, having taken security over property which it knew would be used for carriage of cargo, the mortgagee must take the vessel as it finds it, laden or unladen, and that if the vessel is laden and if costs are incurred in discharging the cargo then there is no warrant for putting those costs on an innocent third party.

Although there is not a great deal of authority in English jurisdictions on who should bear the costs of discharge the issue had arisen in the decisions of Sheen J in **The Jogoo** [1981] Lloyd's Rep 513 and in **"The Myrto" (No 2)** [1984] 2 Lloyd's Rep 341.

In **"The Myrto" (No 2)** the Plaintiff Bank had lent approximately $1,650,000 to the shipowners to enable them to buy the "**Myrto**". The ship owners executed a first mortgage over the vessel in favour of the Bank as security for the loan. Subsequently a further loan of $300,000 was made by the Bank and this was secured by a second mortgage on the vessel.

The vessel had been ordered to be appraised and sold and the cargo released to the cargo owners who furnished the Admiralty Marshal with a guarantee. To enable the Admiralty Marshal to effect a discharge of the cargo the Bank had advanced the necessary funds to the Marshal and now sought to recover from the defendants.

The issue for decision by the Court was whether the costs of discharging the cargo were to be borne by each of the cargo owners in proportion to their interest or whether the costs formed part of the expenses of the Admiralty Marshal and thus became a first charge on the proceeds of sale of the ship.

Sheen J, following his earlier approach in **The Jogoo**, stated at page 351:

> "The presence of cargo aboard a ship probably has an adverse effect on the sale of the ship but the detriment is suffered only by those parties who are adversely affected by the dimunition of the proceeds of sale. If the price which could be obtained for a ship, whether she is laden or unladen, is insufficient to satisfy the claims of a mortgagee, then only the mortgagee is adversely affected by the presence of the cargo. A mortgagee will not derive any benefit from discharging the cargo unless the price which can be obtained from the ship is increased by an amount which exceeds the costs of discharging the cargo. On the other hand, the

owners of that cargo derive a financial benefit, which is probably equal to the full cost of discharging the cargo."

His Lordship in that case went on to state that the owners of the cargo had a claim against the ship owners for damages for breach of contract and that although that claim was an unsecured claim part of the loss resulting from the breach was the cost of discharging the cargo. He noted that:

> "If that cost were to be treated as part of the Admiralty Marshal's expenses then that part of the claim for damages would acquire priority over other claims to which it would otherwise not be entitled and for which I could see no justification..."

In New Zealand there was no pre-existing authority as to who should pay the costs of discharge in these circumstances. The Court, however, rejected the approach taken in the American cases and expressly adopted the conclusions of Sheen J in the **"Jogoo"** and the **"Myrto" (No 2).**

In his written decision giving the reasons for his decision that the cargo owners should pay the costs of discharge Holland J referred to his order that if the cargo owners did not agree to discharge the cargo or undertake to pay the costs then the cargo would be deemed to abandoned. In giving his written reasons he indicated that in stating that the cargo would be deemed to abandoned he went too far.

He stated that in those circumstances it might have been preferable to have directed the Bank, as a condition of the order for sale, to discharge the cargo at its initial expense leaving the question of ownership of the cargo or its proceeds of sale for later determination. He stated, however, that if he was in error the cargo interests' remedy was appeal.

Sale of the Vessel

The Court having made its decision on the question of who should pay the discharge costs then dealt with an application by the sub charterer and the owner of the cargo for an order varying the earlier order for appraisement and sale to the effect that there be a direction that the Registrar sell the vessel subject to the present contract for carriage of the cargo on it. Having decided that the cargo interests should pay the costs of discharge His Honour held that it followed that he would not make an order that the vessel be sold subject to the contract of carriage.

His Honour had earlier held when he first made the order for appraisement and sale in March that the action of the Bank in enforcing its security by seeking arrest of the ship and appraisal and sale did not constitute unlawful interference by the Bank with the contractual rights of the charterers in relation to the ship. Holland J had held that to allow the vessel to sail would impair the mortgagee's security and that, because of the financially precarious position of the owner, it was not a situation where the owner was willing and able to carry out the contract and it was therefore only the Bank's interference which was preventing the contract being carried out.

The Court therefore held that the sale should proceed and that the vessel should be discharged before sale. Holland J also ordered that the vessel be sailed from the Port of Lyttleton to the Port of Timaru where arrangements had been made for less expensive discharge of the coal from the vessel. He also made various other directions relating to the sale of the vessel.

The order was conditional on the mortgagee paying to the Registrar a sum of money sufficient to pay the Master and crew their wages and holiday pay due as assessed by an independent Chartered Accountant on the basis that any further claims by the Master and crew should be reserved for further determination when priorities were determined after sale of the vessel. It was also a requirement that the Master and crew surrender to the Registrar their passports to be retained until the vessel had berthed at Timaru. It was also ordered that a sufficient sum be paid by the mortgagee as security to enable the Registrar to pay the Master and crew on a day to day basis from the date on which their wages were paid up to until the date of their discharge at Timaru and a further sum to cover the costs of their repatriation.

The Court ordered that the vessel was to be sold by tender through appointed ship brokers and that unless the cargo interests gave an undertaking before 29 May to pay the costs of the discharge their interests in the cargo would be deemed to be abandoned.

It is worth noting that in making an order that the reasonable expenses and disbursements of the Registrar be deducted from the proceeds of sale Holland J expressly required that Fast Agencies, who were originally agents for the ship but had continued to act for the Registrar in respect of the ship, be paid. The Judge stated that he was anxious that Fast Agencies in particular be repaid as soon as practicable because the Master, the crew and the Registrar were all indebted to Fast Agencies for the facilities that had been made available by that firm while the vessel was under arrest.

Another interesting aspect of the orders was that the wages and holiday pay claimed by Mr Effiom Bassey were not to be included in the calculation of payments due to the crew. Mr Bassey was alleged to be the owner's representative on the vessel and his inclusion as being part of the crew for the purposes of payment was objected to by the mortgagee of the vessel. The order excluding Mr Bassey was made without prejudice to

his right at a later stage to claim in relation to the proceeds of sale. The Court also ordered that any moneys advanced by the mortgagee pursuant to the orders made would rank in priority to all other claims against the defendant vessel except in priority to the Registrar's claims against the defendant vessel for his costs of and incidental to maintaining the arrest and conducting the appraisement and sale.

The order of the Court was appealed by the cargo interests primarily because of the order that the cargo would be deemed to be abandoned unless they exercised the right given to discharge the cargo and undertook to pay the costs. The cargo interests therefore sought a stay of the order pending hearing of the appeal.

Holland J, conscious of the extensive delays which had already occurred, rejected the application for stay but he did order that, in order to protect the position of the cargo interests as much as possible consistent with also ensuring a prompt sale, the initial costs of discharge should be at the expense of the mortgagee who would then be entitled to a lien over the cargo for the costs of discharge and storage. (To some extent, therefore, the cargo interests achieved what they knew they could expect to achieve had the appeal proceeded).

His Honour also ordered that, notwithstanding the earlier order that the ship be sold by tender, the Registrar would have power to accept a private offer for the sale of the vessel on terms that the purchaser deliver the cargo to the consignee in North Korea subject to the mortgagee being given prior notification and being given the opportunity to make submissions to the Court. The cargo interests by that time were actively contemplating purchase of the vessel. His Honour therefore ordered that any offer for purchase of the vessel on this basis was to be submitted by 5pm on 3 June (i.e. within one week) and that the cargo was not to be discharged before that time.

On 12 June 1992 the Court made its final orders in relation to sale of the vessel. By that time the cargo interests and in particular the cargo owner had made an offer to purchase the vessel with the coal on board. The Court was satisfied on the affidavit evidence that the price offered was as high a price for the ship without cargo as could reasonably be expected in the circumstances.

The original offer made by the cargo owner was US$900,000 but in the light of a further offer which had come from Singapore to buy the ship without cargo at US$960,000 the cargo owner had increased its offer to the same level. It had also agreed to delete various conditions attached to its proposal.

The Court was concerned that no advertising overseas had taken place but noted that inquiries had been made by the ship brokers involved in the sale. Holland J therefore felt able to say that, given the time taken to advertise the sale overseas and the substantial holding costs which would be incurred during that time, further costs would not be warranted and it was therefore in the interests of all concerned that the amended offer of the cargo owner be accepted. He therefore directed the Registrar to accept the offer.

The Court, however, was then faced with a late application by Unitor Ships Services to intervene in the proceedings on the ground that various items of equipment had been supplied to the ship which Unitor claimed belonged to it pursuant to a Romalpa Clause in the contract of sale. The application was filed on 23 June 1992 notwithstanding that the vessel had been arrested since January 1992.

The Court held that Unitor had at least been aware of the situation of the vessel from 12 May 1992 and probably would have been aware of the vessel's predicament before that.

The Court held that it was not in a position to determine with any certainty whether the Romapla Clauses were effective so as to make a declaration that Unitor was the owner of equipment. Insofar as a hire purchase agreement relating to gas cylinders was concerned the Court was not persuaded either that there were cylinders on the ship in respect of which deposits had been paid, that there was evidence of hire charges outstanding or that whoever hired the cylinders was in default. Because of the uncertainties and also because of the delay in making the application the application was refused.

Finally the Court ordered that the costs of obtaining deletion of the vessel from the registry in Cyprus, including the cost of discharging a charge registered by the authorities in Cyprus in the vicinity of £2,733, be met by the cargo owner/purchaser of the vessel on the basis that whether this was a cost properly borne by the seller or purchaser would be determined subsequently. A similar order was made in respect of whether the cost of equipment for the ship which had been repaired in Singapore should be met by the owner if it wished to uplift the equipment (which was subject to a lien). The Court expressed the view, however, that the repairer's lien should be a commercial risk of the owner if it elected to uplift the equipment and pay the lien.

Court permitted mortgagee to bid for vsl at auction, by way of credit bid offset against mortgage debt, provided that bid contained a cash component sufficient to pay costs of arrest etc.

Priorities

Following sale of the vessel and payment of the proceeds of sale to the Registrar the remaining dispute was as to who should share in the fund after payment of the extensive costs relating to the arrest and the undisputed priority claims such as seamen's wages etc. The amount in dispute was approximately US$600,000.

The main protagonists by this time were:

1. The First Plaintiff (ABC).

2. The Second Plaintiff (United Bank for Africa Limited).

3. Isbrandtsen Marine Services Inc.

4. Effiom Bassey.

By the time the matter got to hearing the main priority disputes were between ABC Shipbrokers, the United Bank for Africa as first mortgagee and Isbrandtsen Marine. Mr Effiom Bassey although making an appearance through Counsel did not make any submissions and his claim to priority was dismissed.

Claim By ABC

ABC were the managers of the ship and claimed various amounts which can be summarised as follows:

(a) Disbursements including the payment of crew's wages and travelling expenses US$121,507.30.

(b) Various legal costs incurred in attempting to arrest the vessel in various jurisdictions (including New Zealand).

(c) Management fees - US$124,000.

(d) Accrued brokerage commission US$99,200.00.

(e) Interest.

Although various arguments were advanced as to whether all or any of those amounts were statutory liens the primary issue was whether or not any of the amounts claimed gave rise to maritime liens. Unless they could be properly categorised as maritime liens (in which case they would take priority over the mortgage) it would not have assisted to have them classified as statutory liens because the moneys owing under the mortgage far exceeded the US$600,000 available.

In addition there was the question of the costs of arrest which it was accepted would rank in priority to the mortgage.

In endeavouring to support the argument that the payments for necessaries and payments for third parties should have priority over the mortgage two main arguments were advanced:

1. That many of the payments were analagous to a Master's disbursement lien although it was accepted that two of the six requirements for a Master's disbursement lien were not met. It was argued, however, that the statutory right in rem granted under section 4(1)(p) of the Admiralty Act 1973 had the effect of extending the categories of persons who might claim a maritime lien for what were previously only Master's disbursements. Section 4(1)(p) establishes a right of rem in respect of "any claim by a Master, shipper, charterer, or agent in respect of disbursements made on account of the ship".

2. The second basis for attempting to establish priority over the mortgage was that the claims by the First Plaintiff related to participation in a maritime adventure whereas the claim by the Second Plaintiff was for advances which seemed to relate in part only to the ship. It was argued that in those circumstances it was more equitable for priority to be accorded to the First Plaintiff's claim. The essential feature, it was argued, was that the majority of the First Plaintiff's claim related to items which, if incurred by the Master, would have attracted a maritime lien (crew wages).

Holland J had little difficulty in rejecting the attempt to establish a maritime lien.

First it was noted that Counsel for ABC did not endeavour to argue that the First Plaintiff was entitled to a maritime lien by virtue of some inferential assignment as the owners agent of Masters disbursements or its equivalent.

His Honour held that the payments made by the First Plaintiff were made in the normal way as part of the First Plaintiff's continuing contractual obligation to the Plaintiff. It had a right of action in personam against the owners and by virtue of the Admiralty Act 1973 had a right in rem against the ship but did not have the maritime lien which the Master and crew would have if their wages were outstanding nor the maritime lien available to a Master in respect of disbursements.

On the question of whether, in equity, the payments such as those for wages should be given priority even though no maritime lien was established His Honour referred to a passage from Thomas, **Maritime Liens** London 1980 page 234 at paragraph 418 that:

> "Such indeed, on occasions, is the degree of predictability that many commentators have been tempted to represent the operative principles as firm "rules of ranking". Whilst this approach is understandable it would appear not to be strictly accurate, for such "rules of ranking" are no more than visible manifestations of an underlying equity, policy or other consideration. Upon the underlying equity, policy or other considerations being displaced, either for want of substantiation or from the competitiveness of a greater equity or policy, so also the "rule" becomes inoperative or inapplicable. In the realm of priorities there would appear to be no immutable rules of law but only a number of guiding principles...".

Having acknowledged the accuracy of the above statement, however, His Honour went on to state that :

> "I am not persuaded that there is any element of equity requiring an owner's agent to have priority over other creditors of the ship. To allow such a priority would be a departure from principle and is not justified on the facts in this case."

Having found against the First Plaintiff on both of its arguments the Court held that although the First Plaintiff was entitled to judgment it was not entitled to any portion of the proceeds of sale of the ship (apart from costs of arrest) because the proceeds of sale would fall far short of meeting the amount owing to the Second Plaintiff under the mortgage. The question of the costs of arrest was reserved for later argument.

Claim to Priority by Isbrandtsen Marine Services Inc

The claim by Isbrandtsen raised more interesting issues and in particular whether it was entitled to priority because it had provided necessaries to the ship whilst the ship was in "custodia legis".

Pursuant to an order received on 8 January 1992 (before the arrest) Isbrandtsen accepted an order for 500 tonnes of intermediate fuel oil and 50 tonnes of marine gas oil. It supplied the vessel with this oil on 12 January 1992 while the vessel was under arrest. It was unaware of the arrest.

It was paid part of the purchase price of US$68,272.17 but sued for the balance unpaid of US$28,272.17.

Although under Amercian law (the claimant was an American company) it would have been entitled to a maritime lien it was accepted that that was not the law in New Zealand and the claimant relied instead upon the doctrine of "custodia legis". The Court held that although that doctrine had been referred to in a number of United States decisions there was such an affinity between New Zealand Admiralty law and the United Kingdom Admiralty Law that in considering the principles of common law to apply the Court should follow the United Kingdom authorities.

Perhaps unluckily for the claimant the order was confirmed by a telex shown as having been made at 17.32 Eastern Standard Time on 8 January. The time in New Zealand would then have been 10.32am on 9 January. The arrest took place at 16.15pm on 9 January.

The Court accepted that the oil was totally consumed during the period of the arrest but rejected the argument by the claimant that had it not been supplied an equivalent amount of oil would have had to be obtained by the Registrar and therefore, as the oil was supplied after the arrest (even though the contract to supply was concluded prior to it) it should be given the status of a maritime lien as being necessaries provided to the ship whilst in "custodia legis".

The Court, however, held that:

> "such an argument is capable of application to all sorts of supplies made to the ship prior to arrest and to equipment on the vessel and repairs and maintenance which have been provided or carried out long before the arrest and in respect of which the suppliers or contractors may have remained unpaid.

I am satisfied that there is no principle of Admiralty Law in New Zealand entitling the third intervener to priority over all other creditors of the ship. Nor is there any equity requiring such an order."

The Court therefore held that although the third intervener was entitled to judgment in rem it was not entitled to an order giving it priority over the claims for the Second Plaintiff as mortgagee.

The final order of the Court was, therefore, that the proceeds of sale of the vessel would be applied first in payment of all expenses and charges incurred by the Registrar in arresting, preserving, maintaining and selling the vessel, second in payment of the costs of arrest of the First Plaintiff (to be determined) with the balance and accumulated interest to be paid to the Second Plaintiff (the mortgagee).

CONCLUSION

As we said at the outset, the "Offi Gloria" presented problems which were distinguished more by their number than their complexity. No new law emerged.

However it is rare in New Zealand, and, we think, Australia, for a mortgage over a commercial vessel to be entirely worked out against a background of so many issues and so many competing interests. As a result, we hope that this paper will be of interest to others confronted in the future with some of these problems.

We think it is fair to say that the legal issues which required judicial resolution were all determined most expeditiously. It was not until March 1992 that the Bank concluded that it should exercise its rights under its securities. From then, it was about five months until the vessel, with its cargo on board, eventually departed from Timaru on its intended voyage. In that time, Holland J had heard at least six opposed interlocutory applications and delivered seven significant judgments. The substantive argument on priorities was heard on 5 April 1993 and judgment delivered on 20 May 1993.

Whilst admitting complete ignorance on the applicable law at the outset, Holland J dealt expeditiously and insightfully with the various applications made to him; and we doubt that any party could seriously complain either of the soundness of the judgments delivered or the final outcome.

We look forward to comment and discussion. Some of the issues which could be discussed are:

- How a mortgagee decides whether to withdraw or continue support to an owner;
- Payment for costs of discharge;
- Prospects for overt judicial co-operation between the Courts of various countries;
- Practical aspects of maintaining the vessel and crew (or deciding not to do so) whilst the vessel is under arrest;
- The role of the Admiralty Marshal (in New Zealand, simply the Registrar of the High Court in the relevant centre) in maintaining the vessel;
- Judicial sale: how to obtain the best price, offers from parties involved, giving title.

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"The Atlantic Trader" - Hong Kong case holding fees of lawyers acting for particular ship were a maritime lien

The Sea Friend - Later English decision held only disbursements necessary to keep ship giving good rise to maritime lien - ie insurance premiums + lawyers fees do not give rise to lien.

(1991) 2 Lloyds Rep 322