

**THE ADMIRALTY
MARSHAL'S ROLE**

BY

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Kipling might have written his following lines on the way from Court:

We have fed our sea for a thousand years
And she calls us, still unfed, ...
If blood be the price of admiralty,
Lord God, we have paid in full!

We must feed our sea for a thousand years,
For that is our doom and pride, ...
If blood be the price of admiralty,
Lord God, we have paid bought it fair!

As our English colleagues have long been enjoying, international admiralty practice is an invisible export service industry employing admiralty lawyers and judges. I am sure that my countrymen will agree with me that this is a practice that we should encourage in Australia. As always, I am speaking personally, but as long as it does not cost anything, I expect that the Commonwealth would also agree.

With the Australian government introduces the principle of "user pays" into the Court system, it is important to remember that one, though not the most important, of the Marshal's concerns is to ensure that the exercise of his role does not expose the Commonwealth financially.

In the Federal Court of Australia, both Justice Tamberlin in The "ZOYA KOSMODEMYANSKAYA" on 16 May 1997 and Justice Cooper in The "CAPE DON" on 15 May 1997 have applied the principle of full payment of the Marshal's fees and expenses of arrest. 

The Marshal is, of course, the custodian of the ship under arrest and acts at the direction of the Court. The Marshal also has a role to assist the Court to achieve the timely disposition of ships under arrest, either by release or judicial sale. A ship left lying idle under arrest benefits no one, she is costly to keep in terms of running expenses and even more costly when her lost opportunity for hire is taken into account. The Australian Federal Court Marshal has taken an active approach to keep the ship or the dispute moving.

The Marshal is also concerned to preserve the reputation of his bill of sale and the Court process because the ability to attract competitive bids for ships subject to sale by the Court rests upon international acceptance of the Admiralty Marshal's bill of sale giving the buyer a clear title, free of maritime liens and other encumbrances. (see The "ACRUX" [1962] 1 L.R. 405 at 409 and The "CERRO COLORADO" [1993] 1 L.R. 58). The effect overseas of the Admiralty Marshal's bill of sale depends upon international comity and due process.

My involvement in the collapse of ABC Container Line and Mr Rosenfeld's ship owning interests came later in the action when I was instructed by the Admiralty Marshal of the Federal Court of Australia after an order for judicial sale had been made. I had acted in the same capacity on the sale of the Baltic Shipping Co. vessels "SKULPTOR KONENKOV" and "SKULPTOR VUCHETICH" in Sydney.

The position that the Marshal should be paid fairly and in full for the ship, was challenged in at least two ways in the "MARTHA II" proceedings.

After referring Justice Sheppard to an order 6(d) made by Holland J. in the High Court of New Zealand in The "OFFI GLORIA" on 26 March 1992, counsel for Den Norske Bank, the first registered mortgagee of the "MARTHA II" originally obtained an order allowing a credit bid. In effect Den Norske Bank were originally permitted to tender for the "MARTHA II" and if successful to pay the price by off-setting as a credit the amount of their mortgage judgment.

There is nothing at all unusual, for a ship's mortgagee to purchase her through a Court sale to expunge maritime liens and other encumbrances. What is novel is the mortgagee's credit bid.

When making the initial order for sale in the "MARTHA II", the Court had not been aware that the credit bid order in The "OFFI GLORIA" had later been varied on 22 May 1992 by Holland J. making further orders providing that: priorities not be determined until 30 days after the proceeds of sale were paid into Court (order 1) and; the mortgagee was given leave to apply for an order that the proceeds of sale be paid into Court in such manner as it desired, but in the absence of any such order the Registrar invest the proceeds upon bank deposit. The credit bid was never tested as the ship was sold to cargo interests (see [1993] 3 N.Z.L.R. 576 at 579).

The Marshal's position is the same today as when Sir Robert Phillimore in the English Admiralty Court, quoted earlier American authority in The "KATHLEEN" (1874) L.R. 4 A. & E. 269 at 276 in relation to the proceeds of sale: "The possession of the property by the Court through its officers, is a possession protective of the interests of all concerned, and not displacing the rights or liens of any party."

The practical effect of a credit bid sale to a mortgagee is an immediate distribution on settlement of the sale of the vessel of the sale proceeds up to the amount of the judgment debt to the mortgagee. At that time, the vessel would be delivered to the plaintiff, freed from all encumbrances and free to sail out of the Court's jurisdiction before the rights and priorities against the proceeds of sale have been determined.

Even in cases of first registered mortgagees, it is unsafe to effect any distribution to the plaintiff until priorities have been properly determined. In The "LEOBORG" (NO.2) [1963] 2 L.R. 441 and 268, Hewson J. in the English Admiralty Court caused a warning to potential claimants to be published then due notice to be served of repeated motions by a mortgagee for payment out of the proceeds of sale.

Claimants and potential claimants, whom may not yet be parties to the proceedings, such as the crew, other maritime lien claimants and any other parties claiming to stand higher in priority to the plaintiff, would be prejudiced by allowing a mortgagee to off-set its judgment debt as part of the purchase price.

After a hearing and written submissions as outlined above, Den Norske Bank conceded the Marshal's application to vary the initial order for sale by deleting the provisions for a credit bid and all tenderers were put on an equal footing. An amended version of the standard terms of sale used by the English Admiralty Marshal was used.

The Marshal's ship broker for the "MARTHA II" had appraised her value at USD 12 million. This otherwise confidential appraisal was known by Den Norske Bank which had a valuation of USD 16 million and obtained a judgment for over USD 16 million.


The second instance of action taken to ensure that the Marshal was paid fairly and in full for the ship, arose when the frustrated Marshal's broker became aware of a rumour circulating in the shipbroking market that Den Norske Bank intended to bid USD 16 million. That rumour was discouraging other potential buyers from inspecting the ship and tendering. After obtaining an appropriate order, the Marshal advertised the appraised value of USD 12 million.

The successful tenderer at USD 14.9 million for the "MARTHA II" plus about USD 92,000 for the bunkers and lubes was a Liberian corporation represented by the same solicitors as Den Norske Bank so I assume that they had a common interest. It has been reported that the "MARTHA II" (renamed "SEA PRIDE") was later resold for USD 10 million.

It is more interesting to note that Den Norske Bank could well have done better by placing their confidence in the judicial sale conducted by the Admiralty Marshal of the Federal Court of Australia. The next highest bid for the "MARTHA II", further details of which must remain confidential, was substantially in excess of USD 10 million.

The "MARTHA II" was the first ABC ship to be sold. I trust all those mortgagee banks and other maritime creditors whom may be looking for a convenient jurisdiction in which to arrest and sell ships take notice that Australian admiralty legal services are available for export and compete internationally.

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