



[2017]JMCC Comm 18

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN ADMIRALTY
CLAIM NO. 2016 A00003**

BETWEEN	JEBMED S.R.L.	CLAIMANT
AND	CAPITALEASE S.P.A. OWNERS OF M/V TRADING FABRIZIA	DEFENDANT
AND	LIGABUE S.P.A.	INTERESTED PARTY
AND	X/O SHIPPING A/S	INTERVENER

CONSOLIDATED WITH:

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN ADMIRALTY
CLAIM NO. 2017 A00006**

BETWEEN	ELBURG SHIP MANAGEMENT	CLAIMANT
AND	ENTERPRISE SHIPPING AGENCY	DEFENDANT
AND	CAPITALEASE S.P.A. OWNERS OF M/V TRADING FABRIZIA	2ND DEFENDANT
AND	MOTOR SHIP TRADING FABRIZIA	3RD DEFENDANT

Vincent Chen and Makene Brown instructed by Chen Green and Company for the Claimant Jebmed S.R.L

Krishna Desai and Amanda Montague instructed by Myers Fletcher and Gordon for the defendant Capitalease S.P.A

Arlene Williams and Tavia Dunn instructed Nunes Schofield Deleon and Company for the interested party

Anna Gracie and Mathieu Beckford instructed by Rattray Patterson Rattray for the Intervener

Kwame Gordon and Ramon Clayton instructed by Samuda and Johnson for Elburg Ship Management

Heard: 5, 8 and 28 June 2017

ADMIRALTY CLAIM - CLAIM IN REM AGAINST A SHIP - DEFENDANT ENTERING APPEARANCE AND DEFENDING CLAIM - SHIP UNDER JUDICIAL ARREST BUT NOT BAILED BY OWNER - RENEWED APPLICATION FOR SALE OF SHIP PENDENTE LITE - VALUE OF SHIP FAR EXCEEDS THE CLAIMS AGAINST THE OWNER - WHETHER APPROPRIATE FOR SHIP SHOULD BE SOLD PENDENTE LITE - FACTORS COURT MUST TAKE INTO ACCOUNT - WHETHER COURT BOUND BY PREVIOUS DECISIONS REFUSING APPLICATION FOR SALE PENDENTE LITE - CPR PART 70

EDWARDS, J

INTRODUCTION

[1] This is a renewed application by the claimant Jebmed S.R.L. for a judicial order for appraisal and sale of the ship 'Trading Fabrizia' (the vessel) currently moored in port in Jamaica under judicial arrest. The case falls under the admiralty jurisdiction of the Supreme Court of Judicature of Jamaica. There were two previous applications made before this court for the sale of the said ship; the first was before Batts J in an application made by Jebmed in December of 2016, which was refused; and the second was before Laing J in April 2017, made by the Admiralty Bailiff, which was also refused. Batts J gave an oral decision and later handed down written reasons and made several case management orders. Laing J gave no written reasons for his refusal but he too made several orders.

- [2] The facts of this case, gleaned from the affidavits filed herein, are as they appear in the judgment of Batts J, cited at [2016] JMSC Civ 232, at paragraphs 8-9. The account given there is accurate and is not disputed. I also accept as correct the reasoning of my brother as to the jurisdiction of this court in admiralty matters and there is nothing useful I can add to that discourse. See paragraphs 16-20 of the judgment of Batts J. I will, however, give some brief background as is necessary for me to make my own decision in this matter.
- [3] Jebmed contends that the defendant owes to them USD\$831,044.46. Also appearing in this matter as an interested party is Ligabue S.P.A. They have filed a claim for monies due and owing against the defendant Capitalease S.P.A. in Claim No. 2016 A00004 and have also successfully taken out a warrant of arrest against the ship. There is an intervening party, XO Shipping A/S who have made a claim for the bunker oil supplied to the vessel.
- [4] Elburg Ship Management represents the agents for the former crew of the vessel and has launched a claim against the defendant for outstanding wages in the sum of USD\$536,482.37 along with USD\$179,764.42 for miscellaneous costs for the crews as well USD\$62,251.00 for reparation costs and administrative costs. Elburg also has an application before the court to arrest the ship. On their application, that claim was consolidated with the instant claim. They have also lodged a caution against the release of the vessel to the defendant.
- [5] The vessel is a commercial bulk carrier which was registered in Malta. It is relatively new, having been built in 2011 with a gross tonnage of 22,988. The arrest of the vessel by Jebmed resulted from the alleged breach by the defendant of a Master Agreement and Ship Management Agreement, the vehicle through which it obtained a line of credit from Jebmed, the amount of which was secured by a mortgage of US\$900,000.00 over the vessel and its shares. It was a registered ship mortgage duly registered in Malta on 11 May 2016. It was also supported by a Deed of Covenant dated 5 May 2016, which was read into the Master Agreement.

- [6] An express term of the Deed was to the effect that in the event of a default by the defendant, the security would become immediately enforceable, including any amount whether principal or interest which had not been paid at the due date, in accordance with the Management Agreement. The claimant in addition to providing the line of credit also provided commercial management services.
- [7] The defendant apparently thereafter, ran into financial difficulties and as a result it obtained an additional line of credit amounting to USD\$90,000.00 from the claimant on the terms of a Private Agreement. At the same time the claimant sent the defendant an invoice for USD\$699,046.38 which was not paid.
- [8] The vessel was arrested in Balboa, Panama, on 13 September 2016 by Ligabue, on the basis that it had, pursuant to a contract, provided food, beverages and chemical supplies to the vessel for which, it alleged, it had not received payment. Having secured the vessel's release from arrest in Panama, by entering into an agreement with Ligabue to pay on the outstanding invoice as well as the costs of arrest, the defendant sailed the vessel to Haiti and unloaded its cargo, thereafter it sailed to Jamaica. The outstanding bill owed to Ligabue remains unpaid.
- [9] Jebmed has made several allegations against the defendant. It alleged that the defendant defaulted on the Master Agreement resulting in the termination of its relationship with the defendant. It alleged the defendant was in breach of the agreement to procure all the relevant insurance on the vessel, resulting in the vessel being refused passage in the Panama Canal. Jebmed also asserts that by mutual agreement as to the amount of the defendant's indebtedness, it issued an invoice amounting to \$699,046.38 for services rendered and that the defendant having admitted this indebtedness, has since refused to pay. It has also asserted that the defendant agreed to pay the sums due within five (5) days of the Private Agreement being signed but also breached that agreement, and having made the delivery in Haiti, sailed the ship to the Kingston Harbour without its consent and without paying over the monies due and owing. Jebmed claims

that as a result of this, it has the right to enforce its security against the vessel and to claim immediate possession of it.

[10] The vessel was arrested in the Kingston Harbour on 30 October 2016, by Jebmed. The ship was subsequently arrested again on 11 November 2016, by Ligabue. Following from the arrest, the crew disembarked the ship and were repatriated. There appears to be no dispute that they are owed for outstanding wages.

[11] Jebmed claims to be entitled to possession of the vessel as a result of the breach and that it has a right to exercise its power of sale in accordance with the laws of the Republic of Malta, the country of registration of the vessel. It claims the sum of US\$831,044.46 and interest on the basis of a European Enforcement Order (EEO) obtained from the courts in Malta, as well as damages for breach of contract.

The Application

[12] At the hearing of this renewed application, I had before me the several bundles and documents inclusive of the numerous affidavits filed in this matter which were before Batts J and Laing J. In addition fresh affidavits were filed by Amanda Montague and the Admiralty Bailiff for my consideration in this renewed application. In all there were 14 affidavits filed by Amanda Montague and two by the Admiralty Bailiff.

[13] I also had before me for consideration an application by the defendant for Jebmed to provide security for costs. There was also an application, filed 10 May 2017, to strike out Jebmed's claim and to release the vessel and for judgment to be entered for the defendant on its counterclaim filed 12 December 2016 on the basis that no defence was filed to the counterclaim. Jebmed has an application to permit the amendment of claim form and particulars of claim. All these were adjourned pending the hearing of the application to sell the vessel *pendente lite*.

- [14] Elburg also had an application for consolidation of its claim with Jebmed's claim which I granted as well as an application to arrest the ship, which was adjourned to a later date.
- [15] The defendant contends that the arrest of the vessel by Jebmed was unlawful, on the basis that Jebmed's rights, as mortgagees, had not arisen, the vessel was arrested prior to the agreed deadline between the parties, and that the Private Agreement did not specify a designated port for the vessel to sail to. The defendant further contends that the amount Jebmed has claimed is incorrect and the real amount owed by the defendant is USD\$337,640.00. The remaining portion of the sum claimed, it was submitted, is the result of a penalty clause (severance costs) which was not a part of the Private Agreement that was later entered into between the parties. It was also contended that the claimant took advantage of the defendant who was in financial distress.
- [16] Since the vessel's arrest in Jamaica, the defendant has not bailed the ship, nor has an alternative form of security been provided by it. Jebmed, supported by Ligabue has requested that the vessel be made the subject of a judicial sale *pendente lite*, as the date for trial may be later this year or sometime in 2018 and the ship has currently been under arrest for almost 8 months. X/O shipping remains neutral on the sale of the vessel. The defendant appears to be impecunious although it has offered no reason for their failure to bail the ship. It has however objected to the vessel being sold *pendente lite* on the grounds, inter alia, that; the vessel is worth more than the monies being claimed by the parties, that the vessel is in good condition and that they have substantially complied with all the orders of the court. Notwithstanding this, however, no alternative security has been provided.

Judgment of Batts, J

- [17] The consideration whether to order the sale of the vessel *pendente lite* arose in December 2016 when the matter came before Batts J. In considering the issue Batts J took account of the fact that "the purpose of the order of sale *pendente*

lite is to preserve the value of [the] property pending a trial” and determined that it was not an appropriate time to make an order for the sale of the vessel, taking into account several considerations. These in summary were:

- i. That the defendant had raised triable issues some of which turn on the construction of written agreements in accordance with foreign laws which must be determined at a trial.
- ii. There was *prima facie* evidence that the vessel was in a relatively good condition, and that the value of the vessel far exceeded the sum total of the known claims against the owner.
- iii. The court should be slow to order a sale which may of necessity reduce the price obtainable on the open market and where the owner has considerable equity remaining in the vessel.
- iv. Speedy trial dates may be available in April and July 2017.
- v. The costs of arrest amounting USD\$4762.50 per day ought not to adversely affect the claimant’s position even if there was a further delay of up to six months.
- vi. This case could be distinguished from all the authorities cited by the claimant where the vessels were in poor condition and wasting away and the value of the claims were far above the value of the vessel.

[18] Batts, J further considered that that the USD\$250,000.00 severance costs, claimed by the claimant was unlikely to succeed at trial and therefore ordered that any bond to be stipulated as a condition for the release of the vessel ought not to take into account this cost of USD\$250,000.00. Therefore, he ordered that the defendant provide security, by way of a bond, guarantee, indemnity, payment into court or an undertaking in the amount of USD\$450,000.00 along with proof being provided to the claimant that Hull and Machinery insurance was acquired by the defendant, for the conditional release of the vessel, in addition to the amount owing to the intervening party. The deadline to satisfy the conditions was 3 April 2017, failing which the claimant was at liberty to renew its application for sale *pendente lite*.

[19] In coming to his decision Batts J, considered and distinguished the facts in the case of **The Myrto** [1977] 1 *Lloyds report* 243. Of particular significance to him was the fact that:

- 1) the vessel in **The “Myrto”** was in a poor condition or wasting away and;
- 2) the value of the claim and costs of arrest were on par with the value of the ship, and that the value of the ship was in danger of being overtaken by many claims and accruing costs of arrest pending trial.

It was based on these factors that Batts J refused the application for judicial sale of the ship and made the orders at paragraph 26 of his judgment.

The orders of Laing J

[20] On 20 March 2017, the Admiralty Bailiff filed a Notice of Application for the vessel to be sold *pendente lite*. On 18 April 2017, appearing before Laing J, Jebmed made an application for possession of the vessel and the Admiralty Bailiff’s application for sale of the vessel was also heard. The Admiralty Bailiff also asked the court for an order that the defendant pay USD\$10,000.00 as conduct money to help with the maintenance of the ship and to pay JMD\$3,500,000.00 that was already owed for work done.

[21] His reasons for making the application included:

- a. The ship’s agent was threatening to or had withdrawn its services because of non-payment of outstanding debt by the defendant in the matter.
- b. The crew was not being paid, nor were they being provided with food on a regular basis, as he had to purchase food on one occasion in addition to providing the crew men with monies for them to embark on their journey home.

[22] Overall the Admiralty Bailiff was of the view that the defendant had no money and on that basis he asked the court to have the ship sold. Laing J refused the

application by Jebmed for possession and also refused the application for sale of the vessel *pendente lite*.

[23] On 8 April 2017 Laing J made the following orders:

- 1) *“Defendant is to provide an interim payment in the sum of JMD\$4,000,000.00 on or before 4:00 pm Eastern Standard Time Zone (“EST”) on the 5th day of May 2017 by wire transfer to its Attorneys-at-law, Myers Fletcher and Gordon, which firm will then make appropriate arrangements for onward forwarding to the Bailiff.*
- 2) *The Defendant is to communicate in writing with the Malta Shipping Registry/Malta Transport by 4:00 pm (central European Time Zone) by the 21st day of April 2017 updating the registry as to steps taken to rectify the areas of concern, propose a timeline to correct any remaining concerns and to apply for an extension of the deadline by which Motor Vessel Trading Fabrizia (“the Vessel”) is to be removed from Registry. Evidence of this communication is to be filed and served by 4:00 pm EST on or before the 24th day of April 2017.*
- 3) *The Defendant is to by 4:00 pm EST on the 24th day of April 2017 advise the Maritime Authority of Jamaica in writing of the steps taken to correct the deficiencies outlined in the Report of Inspection dated 30th January 2017 and propose a timeline for the remaining deficiencies to be remedied. Evidence of this communication is to be filed and served by 4:00 pm EST on the 28th day of April 2017.*
- 4) *In any event, the Defendant is to repair the leaking generator and repair the non-functioning generator and is to have three (3) working generators, in addition to an emergency generator on the Vessel by May 20, 2017. Evidence of this is to be filed and served by 4:00 pm EST on the 30th day of May 2017.*
- 5) *The Defendant is to obtain confirmation from the Maritime Authority of Jamaica that it has a competent crew on board the Vessel and that the necessary safety standards for the*

Vessel while it remains in arrest and anchorage in the Kingston Harbour or elsewhere in the jurisdiction of Jamaica have been met. The Defendant is to file and serve evidence of this on or before the 30th day of May 2017.

[24] The defendant's attorney and the Admiralty Bailiff have indicated that the JMD\$4,000,000.00 was paid over. In fact, the defendant maintains that the fact that they have complied substantially with the orders of Laing J is proof that the sale is not necessary at this time.

Issues raised in this renewed application

[25] The issues to be determined are as follows:

- i. Whether or not the M/V "Trading Fabrizia" should be sold *pendente lite* where the claim is defended, taking into account the following considerations:
 - a) The ship has been arrested in the Kingston Harbour for almost 9 months;
 - b) The defendant appears to be impecunious, and has failed to put forward any bonds, guarantees or undertakings for its release;
 - c) The said application was already heard by two judges of concurrent jurisdiction both of whom refused the application to sell the vessel *pendente lite*;
 - d) The defendant has substantially complied with the orders of Batts J and Laing J, namely; putting the ship in a physically good condition, obtaining Hull and Machine Insurance and providing a crew to man the vessel.
- ii. Whether in any event, I am bound by the decisions of Batts J and Laing J.

The condition of the vessel

[26] It is perhaps necessary to have a look at the history of the condition of the vessel. The defendant seems to have run into problems maintaining the vessel from as early as September 2016. In October 2016 the captain of the vessel was writing to urgently request fuel and cash advance for the crews, as well as for

provisions. There seem to have been no provision made for travelling, no charts for the next voyage and there were already problems with the diesel engines.

[27] A condition survey of the vessel was conducted in December 2016. At that time there were two functional generators and one was being overhauled. The Hull of the ship was found to have algae bloom and acorn shells but was otherwise in generally good condition. The ballast tanks were rusting, although within acceptable limits. The vessel needed painting and had outstanding deficiencies in the engine room. The ship was found to be well maintained and in 'excellent condition'.

[28] A further survey was done in January 2017, where three deficiencies were indicated and those were;

- I. The engine crew were not generally well trained.
- II. Diesel Engine number 3 was being overhauled and could not be tested.
- III. The hull was dirty.

[29] It was further indicated that hull would need to be painted along with five holds, the bottom of the vessel was completely dirty and needed to be cleaned and that the vessel needed constant maintenance. There was also some deficiency in documentation, certification and communication. The survey further showed that the vessel also required painting, especially in the exposed areas.

[30] After the vessel arrived in Jamaica, Port State Control carried out an inspection on the vessel on 30 January 2017, found 17 deficiencies and detained the vessel as a result. No further information was provided to me as to what those deficiencies were or what was done to remedy them, if anything. However, most of them appeared to relate to the vessel's expired certificates and poor or missing equipment.

- [31]** Since the report made in January however, the generators on the vessel began to malfunction, one had a leak and the others were non-functional. It appears that the vessel had no Protection and Indemnity insurance, and this was an issue for the Maritime Authority of Jamaica, as the ship was arrested in Jamaican waters. The ship was in danger of falling into general disrepair. The three generators were not working, there was an absence of spare parts, the vessel was low on fuel and was in grave danger of becoming a “dark ship”. Since then the main engine was repaired.
- [32]** An addendum to the earlier condition survey was carried out in April 2017 and at that time only two serious deficiencies remained although there was what was described as other “light deficiencies” resulting from the expiration of the certificates. The new engine crew was said to be now satisfactorily knowledgeable.
- [33]** In April 2017 there was allegation that the crew were disgruntled, that they lacked provisions and were not being paid. The crew eventually abandoned the vessel and left Jamaica, wherein the Admiralty Bailiff had to engage a local crew to man the vessel and ensure its safety. The vessel now has a replacement crew of eight men.
- [34]** The vessel now has a cover note for Hull and Machinery and war risk Insurance obtained by the defendant for a period of 12 months. The vessel has been de-registered from the Malta Flag due to its bad and deteriorating condition and its expired certificates, such as its safety Construction certificate and its annual statutory certificates.
- [35]** Judgment has been handed down in Malta in favour of the claimant declaring it has a right to possession of the vessel, subject to the decision of the Court in Jamaica. The defendant also obtained an EEO from the Maltese Court and the defendant contends that the sums referenced in the judgment includes the same sums subject to litigation here in Jamaica and that therefore there was no requirement for security to be given by the defendant.

- [36] According to the affidavit of Amanda Montague filed 19 May 2017 the arrest of the vessel has resulted in various costs inclusive of salaries for the crew, agency fees, provision of cabin items, fuel, lubes, bottom cleaning, spare parts, port and registry fees, superintendent and crew travel expenses, payment to the Bailiff, cost of legal fees already incurred to the tune of USD\$281,000.00 and JD\$4,000,000.00 and continuing. The defendant has also been exposed to liability for lost charter to the sum of USD\$451,500.00 plus interest.
- [37] According to the affidavit of the Admiralty Bailiff filed 8 June 2017, the vessel was operating on the emergency generator only due to the lack of bunker oil, garbage and sewage is now a looming problem although the defendant says the garbage has been removed and sewage production is low and being stored in a holding tank. The defendant also submitted that the situation with the bunker was temporary. There is also a build up of bilge and sludge for which consideration has to be given by the Admiral Bailiff as to how this will be discharged from the ship.

The submissions

- [38] Counsel for Jebmed argued that the defendant now owes to it a sum of Euro \$778,846.61 with interest and since the arrest of the ship the defendant has neither paid over the sums due nor posted bond for the release of the ship. Counsel for Jebmed further argued that despite being given time to do so, the defendant has failed to satisfy all the conditions set by Batts J.
- [39] Counsel argued that the vessel has now been struck off the registry in Malta since the defendants have failed to keep the ship in good standing. This, he said would result in its rights as mortgagees being prejudiced. Counsel argued that it was imperative that the ship be sold.
- [40] Counsel for Ligaboo also supported the application for sale pendente lite. Counsel pointed that at each stage of these applications the defendant had to be called upon by the court to do what was necessary to maintain the vessel.

Counsel questioned the bona fides of the defendant in wanting to keep the vessel viable. Counsel relied on the authority of **The “Myrto”** especially the reasoning of the court found at pages 260-261. Counsel noted that the costs of maintaining the arrest did not only stop at the Admiralty Bailiff but that there were other charges such as berth charges etc and were continuing.

- [41] Counsel for Elburg indicated they had no instructions regarding a sale *pendente lite* but would approve the legal application of the case of **The “Myrto”**. He suggested that even if an outright sale is not ordered, an unless order could be made for the vessel to be re-registered. Counsel also asked that the court takes into account that they had a maritime lien under the Shipping Act s 80 for outstanding wages relating to two sets of crews.
- [42] Counsel for XO Shipping indicated that their clients were neutral on the issue whether there ought to be a sale or not but reminded the court that they had a caution against release of the vessel.
- [43] Counsel for the defendant argued that there has been no finding in this jurisdiction that it owes Jebmed any sums of money and that it was an issue joined between the parties to which it has filed a defence and counterclaim. Counsel further argued that the sum was ordered under a European Executive order (EEO) in Malta which was enforceable only in EU member states. Counsel further argued that Jebmed had taken no steps to enforce the EEO and pointed out that even though it had secured declarations in its favour in a court in Malta, it had taken no steps to enforce that judgment in this jurisdiction. They both therefore, have no effect in these courts and the defendant, he says, has no obligation to pay over any sums to Jebmed, as no such sums were due.
- [44] Counsel noted that it had always been the defendant’s position that the arrest by Jebmed was unlawful and that the matter should be determined by way of a speedy trial. Counsel reminded the court that Batts J had in fact set a trial date which had been vacated at the instance of Jebmed. Counsel pointed out that it

was Jebmed which chose not to prosecute its claim in Jamaica and chose to commence litigation in Malta.

[45] Counsel argued that, this was a defended claim and that the circumstances in which a court would exercise its jurisdiction to order the sale of a ship *pendente lite* was set out in the case of **The Myrto**. Counsel also noted that Batts J had relied on the case of **The Myrto** in coming to the decision that the sale of the M/V “Trading Fabrizia” was not appropriate at this time. Counsel argued that the reasons put forward by Batts J are still applicable and therefore no order for sale *pendente lite* should be made.

[46] Counsel further made the following points in support of his contention that there were no reasonable grounds for selling the ship *pendente lite*:

- 1) That the current evidence is that the vessel is in good condition.
- 2) That there is evidence of the value of the ship being in the region of approximately \$10- \$17,000,000.00.
- 3) That there have already been two failed applications.
- 4) That despite the dire circumstances the ship had been found to be in at the time of the last application in April, no sale had been ordered then and the defendant had provided evidence of its compliance with all the orders of the court.
- 5) That the vessel had now been struck off the Maltese ship registry and this was no longer a consideration as re-registration was possible and the rights of the mortgagee was not affected by de-registration.
- 6) That the owner of the vessel was now taking steps to address the deficiencies relating to an ocean going vessel.
- 7) That although Jamaica is entering the hurricane season, the ship is manned and is safe to be at anchor at arrest.
- 8) That the ship is insured.
- 9) That this court is bound by the two previous decisions.

Is this court bound by the decision of Batts J, and Laing J's Judgment?

- [47] Taking into account all the factors, especially in light of the deficiencies of the vessel that arose after the judgement of Batts J and the order permitting a renewed application if certain conditions were not met, I do not consider myself bound by the decision of Batts J to refuse the application for sale *pendente lite*.
- [48] In the case of the refusal by Laing J, I do not feel myself bound by that decision either. The application to sell the vessel that was before Batts J was made by the claimant. It is the claimant that is now renewing that application pursuant to the order of Batts J granting liberty to do so upon certain failings by the defendant. The application before Laing J was made by the Admiralty Bailiff. The Admiralty Bailiff has made no application before me but has filed an affidavit at my instance to assist the court with information concerning the current status of the vessel. I therefore, do not have to consider myself bound by the decision made by Laing J to refuse the Admiralty Bailiff's application to sell the vessel *pendente lite*.
- [49] Part 70, rule 70.8(1) of the Civil Procedure Rules (CPR) which deals with directions as to property under arrest provides that the bailiff may apply to the court at anytime for directions with regard to any property under arrest. Rule 70.8(4) provides that any person other than the bailiff may apply for directions under this rule. Rule 70.13 provides that an application for an order for the survey, appraisal or sale of a ship may be made in a claim in rem, at any stage, by any of the parties. To my mind these rules contemplate that there may be multiple applications for directions as to the property under arrest. It means also that there may also be multiple applications by different parties at any stage of the proceedings. Whilst the Admiralty Bailiff is not a party, it is thought possible that he could utilize rule 70.8(1) to seek directions as to the necessity for a sale. It means therefore, that not only am I not bound by the two previous decisions but I may not even be bound by any decision which I may make regarding the property under arrest.

[50] In any event matters may have changed since the last application and in that regard it is important to note that while the defendant has remedied the defects or deficiencies of the vessel as per the two previous court orders, one has to recognize that this was only done with the court's intervention after the applications were made.

The applicable principles

[51] The purpose of arresting a vessel in an action in rem, that is, an action against the vessel, is to obtain security for the satisfaction of any judgment which a plaintiff or defendant may obtain in any such action or counter claim. Normally once a vessel is arrested, the owner or other interested party will take steps to procure its release. Bail may be put up or money paid into court in lieu of bail, as this provides a means of alternate security for the claimant's claim and to obtain release of the vessel. See (CPR Rule 70.9(1)(a)). The claimant is entitled to sufficient security to cover the amount or such amounts as determined by the court, and security is usually provided for in the form of a bond, undertaking or bank guarantee.

[52] Where a defendant fails to "bail" the ship it must remain under arrest until the judgment of the court, or until the court determines that it is appropriate to order the appraisal (valuation) and sale of the arrested ship *pendente lite*, wherein the proceeds of sale will be paid into court and thereafter applied to the satisfaction of the judgment debt.

[53] Part 70.13 of the CPR provides that an application for an order for the survey, appraisal or sale of a ship may be made in a claim in rem at any stage by any party. The court may order that an arrested ship be sold either on giving judgment at trial, by default judgment or prior to judgment, *pendente lite*. However, the authorities have shown that the court is usually reluctant to order a sale *pendente lite* but is likely to do so in circumstances where there is no defence or the defendant is in default and the claimant has shown that the ship is a wasting asset.

[54] A sale *pendente lite* has the potential to work significant injustice to the interests of the ship owner and therefore, it is something which has been approached with caution by the courts. Such a sale will not be ordered except for good reason, such as where the vessel is dangerous, perishable or deteriorating rapidly under arrest, or where the costs of maintaining the arrest are greatly disproportionate to the value of the vessel. See *The Journal of International Maritime Law*, Vol 22, Issue 5.

[55] Factors which the court may take into account when considering an application for sale *pendente lite* includes the high maintenance costs of the vessel, the mounting daily expenses, the deteriorating condition of the ship and unpaid crew wages.

[56] In considering whether to order a judicial sale a court will consider whether it is necessary or expedient to do so, taking into account such factors including but not limited to:

- a) *The amount claimed compared to the value of the ship;*
- b) *whether the continuing arrest will result in the claimant's ability to recover the amount claimed from the sale of the ship;*
- c) *the timeline of the sale and the factors likely to impact on the value of the ship during arrest, that is, whether there will be any diminution in the value of the vessel or the sale price caused by the failure to sell now;*
- d) *the continuing maintenance costs of the ship whilst under arrest including the wages of the crew, daily mounting expenses and the costs of insurance;*
- e) *the deterioration in the condition of the ship and the rate of depreciation in value;*
- f) *whether there is an arguable defence;*
- g) *whether the owner can carry on, that is, is it reasonable to assume that there must be a sale of the vessel at some point;*

h) any other good reason for the sale.

[57] Three cases were referred to me in this application. The first was the **Maule** [1997] 1 WLR 528 a decision of the Privy Council cited by counsel for Jebmed. Save and except that it confirms the right of a mortgagee acting under a power of sale in the mortgage contract, to arrest a ship in an action in rem, where an express power may arise even though nothing is due on the loan, it is otherwise unhelpful to any decision that has to be made in this application. The case of **The “Myrto”** [1977] 2 Lloyds Rep. 243 and **The Emre 11** [1989] 2 Lloyds Rep. 182 was relied on by the defendant. I also considered the case of **The “Gulf Venture”** (1985) 1 Lloyds Rep.131; **Banco do Brasil SA v Alexandros G Tsavlis (The)**, [1987] Carswell Nat 252; (1987) C.L.D.1235, decision of the Federal Court of Canada and **Avina v The “Sea Senor” (Ship)** 2016 BCSC 749, decision of the Supreme Court of British Columbia.

[58] In the first three cases cited above, the ship was sold *pendente lite*. In the latter two, with regard to **The “Sea Senor”** the application was refused on the basis that it was not expedient to sell the ship *pendente lite*, as the value of the ship outweighed the value of the claims, which were modest and there was no serious risk of deterioration or diminution of value. The application in the case of **Banco do Brasil** was refused, although the value of the claim far exceeded the value of the ship, on the basis that the defence was strong and likely to succeed. There was only one claimant and the balance of convenience favoured the vessel remaining under arrest unsold as there was a likelihood the defence could succeed. That court also considered the principles espoused in **The “Myrto”** and **The “Gulf Venture”**. It distinguished **The “Myrto”** on the basis that there were several claims against that vessel and it was likely to be sold in any event.

[59] Also of consideration is the fact that in the case of the first three cases, the vessels had been under arrests for relatively short periods of time between three to 6 months. In the case of the **“Sea Senor”** it had been under arrest for approximately twelve months when the application was heard. In the case of the

Banco do Brasil, it was under arrest for approximately a month at the time the application was heard.

[60] Whereas in most cases the application for a judicial sale of a ship *pendente lite* is made in default of appearance or defence by a defendant, in rare cases it may arise in a defended action. One such case was in **The Myrto**. In that case the court had before it two interlocutory application in a mortgage action in rem. The plaintiff bank applied for a judicial sale *pendente lite* on the grounds that the vessel was a wasting asset and it was in the interest of all the parties that it be sold. This application was resisted by the owner. Brandon J after confirming that this was a contested action in rem over which the court had an inherent jurisdiction in admiralty supplemented by the Rules, said this:

“The question whether an order for the appraisal and sale of a ship should be made pendent lite arises normally only in a case where there is a default of appearance or defence. In such a case it has been a common practice for the Court to make such an order on the application of the plaintiffs on the ground that, unless such order is made, the security for their claim will be diminished by the continuing costs of maintaining the arrest, to the disadvantage of all those interested in the ship, including, if they have any residual interest, the defendants themselves.

Where defendants to an action in rem against a ship appear in the action with the intention of defending it, they almost invariably obtain the release of the ship from arrest by giving bail or providing other security for the claim satisfactory to the plaintiffs. For this reason there appears to be no reported case in which the Court has had to consider in what circumstances it would be right to make an order for appraisal and sale of a ship pendent lite in a defended case.”

[61] I have had recounted this statement by Brandon, J to emphasise the unusual nature of this application. For it is true that despite the ship being under arrest for nearly 9 months, the defendant has not provided any security for its release contrary to the usual actions by ship owners following an arrest. Like the position which faced Brandon J in **The Myrto**, until the first application in the instant case

had been decided by Batts J, there was no recorded decision in which the courts in this jurisdiction had to make such a decision.

[62] Brandon J considered the various costs of maintaining the ship under arrest including berth charges, crew wages, supply of bunker, supply of food and water and other necessaries and insurance. He also considered that the defendant in that case was paying for none of these.

[63] In the instant case the defendant is facing a claim for wages made by the crew who have left the ship, amounting to almost USD\$700,000.00 which has not been paid and for which they are seeking to also have the ship arrested. With respect to the current crew of 8 men, there is no evidence as to how their wages are being met or their necessaries such as food and water and other incidentals. With respect to bunker oil, there is evidence that the Admiralty Bailiff had to secure a loan of US\$16,800.00 to provide bunker oil in the last round. The defendant alleges that this was done with its knowledge under an agreement with the Admiralty Bailiff but I remain unsure as to what this means exactly. The Admiralty Bailiff provided proof of the loan from a reputable institution in his name payable to a supplier of bunker oil.

[64] Brandon J also considered that the continuing costs of maintenance over a period of 7 months to 1½ year when the matter was likely to go to trial meant that additional maintenance costs would be incurred to prevent a physical deterioration of the ship. Brandon J in further considering the issue said this:

“I accept that the Court should not make an order for the appraisalment and sale of a ship pendente lite except for good reason, and this whether the action is defended or not. I accept further that, where the action is defended and the defendants oppose the making of such an order, the Court should examine more critically than it would normally do in a default action the question whether good reason for the making of an order exists or not. I do not accept, however, the contention put forward for the owners, that the circumstances that, unless a sale is ordered, heavy and continuing costs of maintaining the arrest will be

incurred over a long period, with consequent substantial diminution in the value of the plaintiff's security for their claim, cannot, as a matter of law, constitute a good reason for ordering a sale. On the contrary, I am of (sic) opinion that it can and often will do so."

- [65] Brandon J did make an order for sale *pendente lite* in circumstances where he formed the view that it would be unreasonable to keep the ship under arrest at great expense for such a long period of time resulting in the plaintiff's security being reduced by the costs incurred. Brandon J was also prepared to consider ruling otherwise, if the defendant's had been prepared to bear the costs to prevent the sale. As to the interests of third parties, Brandon J took the view that their interest was equally affected by a prolonged arrest as by a sale *pendente lite* but that they may in the circumstances be less affected by a sale *pendente lite*. Brandon J also made it clear that the court was not obliged to pursue the merits of the case at the interlocutory stage so that notwithstanding the existence of an arguable defence, the court could still order a sale *pendente lite*.
- [66] I take into account the fact that Batts J in refusing the application for sale heard by him, distinguished the case of **The "Myrto"** and the other cases cited to him on the basis that the vessels in those cases were either wasting away or as in the case of **The "Myrto"** itself, the value of the vessel was less than the value of the claim.
- [67] In **The "Emre" II**, the plaintiffs issued a writ in rem against the defendant's ship on the basis that there were monies due to them as mortgagees which the defendant had failed to pay to them. The plaintiffs applied for an order that the vessel be appraised and sold by the Admiralty Marshal *pendente lite*. The cost of the arrest was approximately £10,000.00 per month. Although the cost of the vessel on the market was less than the value of the claim, the plaintiffs indicated to the court that with each passing month their security was being eroded. The defendant was unable to provide any security to release the vessel. The court applied the principles set out in **The "Myrto"**.

- [68] In deciding not to order the sale of the vessel unconditionally, the court took into account the desire of the impecunious defendant to keep the vessel while at the same time recognizing the concern of the claimant. The court in that case exercised a balancing act by deciding to give the defendant an opportunity to give to the Admiralty Marshal their personal undertaking to pay the costs of arrest on demand, but if they failed to do so within 21 days of the order being handed down, the court would grant the order for appraisalment and sale *pendente lite*.
- [69] The court also considered the defendants argument that the action ought to be stayed as the parties had agreed Turkish jurisdiction and that, in any event, Turkish court was the forum conveniens. The court agreed Turkey was the most convenient forum to hear the action but determined that it would not stay the action against the ship which was mortgaged as security for a loan, on that basis, unless the defendant was able to provide equally good security in the other forum. The plaintiff would not be deprived of its juridical advantage in arresting the ship. The court found that the justice of the case demanded that a stay of the action in the English court be granted until the determination of the dispute in the Turkish court but that the ship would continue to be detained under arrest until those proceedings reached finality. At that time the stay would be lifted and appropriate orders would be made in relation to the ship or her proceeds of sale.
- [70] In **The “Gulf Venture”** the plaintiffs issued a writ in rem against the defendant’s vessel for expenses incurred by them as port agents. The vessel **The “Gulf Venture”** was arrested on 4 July 1984, and on 18 July 1984 the defendant’s application to set aside the writ and release the vessel was dismissed. However, an order was made for them to provide security for the vessel to be released from arrest. The defendant declined to put up any security. By October 1984, the plaintiff applied for an order that the vessel be sold *pendente lite* on the ground that the cost of maintaining the arrest exceeded £5,000.00 per month and that the vessel was a wasting asset and ought to be sold for the benefit of all creditors with claims against the defendant.

- [71] That court also relied on the principles in **The “Myrto”**. Sheen J in delivering judgment found that mortgagees of a ship were at a disadvantage whilst a ship is under arrest at a costs of USD\$5000.00 per month whilst not earning any freight and was only deteriorating in condition. He also considered that if the plaintiffs were to establish their claim even in part and gain a judgment in their favour it was not likely to be paid by the defendants, so the ship would have to be sold in any event. It found that it would be in the interest of the parties for the ship to be sold now rather than later when the security available would be reduced by the increasing costs of maintenance.
- [72] In consenting to make an order of *sale pendente lite*, Sheen J considered that the continued arrest of the ship would only reduce its value as security. He took the view that if the defendant’s financial situation was so unstable that they were unable to persuade a bank to grant them a bail bond, then the situation would not be improved by keeping the ship under arrest for a year pending trial, and therefore made an order that the ship be appraised and sold *pendente lite*. It is important to note that in **The “Gulf Venture”**, although the value of the ship was more than the claim made by the plaintiffs, there were two other mortgagees with possible claims against the owners and there was some doubt whether the value of the ship would be such as to provide security for all the claims.
- [73] In the remaining two cases the court determined that it was neither necessary nor expedient to order a sale *pendente lite*. In the case of **Banco do Brasil** the amount of the mortgage exceeded the value of the ship. It considered **The “Myrto”** but distinguished it on the basis that there was a good arguable defence and only one claim and if the owner succeeded at trial he would be deprived of the ship and his means of trade. In the case of **Avina v The “Sea Senior”** the value of the vessel far exceeded the single claim. The court found that the deterioration to the vessel was merely cosmetic, that the defendant had an arguable defence and that it was neither necessary nor expedient to order a sale *pendente lite*. The ship had been under arrest for a year.

Is it appropriate to sell the ship at this stage

- [74] It was submitted by Mr. Desai on behalf of the defendant that Batts J was correct to distinguish this case from the cases cited to him, such as **The “Myrto”**, as the value of the vessel significantly exceeds the value of the claim, the cost of the arrest and the costs of maintaining the ship. In that regard, he submitted, there was no reason and no basis to depart from the rulings made in this matter previously.
- [75] While this is true, the court must now consider whether or not the fact that the value of the ship significantly exceeds the value of the claim is to be treated as paramount, where the defendant is impecunious and has been unable to provide any form of security to release the ship from arrest and is clearly incapable of adequately maintaining the ship, until the trial and disposition of this case.
- [76] It also begs the question whether, if any of the parties were to succeed against the defendant in their various claims, could they look to the defendant for payment, or would the ship have to be sold to satisfy the various debts, in any event. The defendant has not placed before the court any evidence as to its financial status. The court is forced to draw its own inferences from its failure to provide alternative security. Once a vessel is sold *pendente lite* the proceeds are paid into court and it becomes the *res*. I agree with Mr Chen when he states that the issue of substantive rights is separate and apart from the issues concerning the sale *pendente lite*.
- [77] In assessing the relevant considerations I have taken into account the factors I consider paramount. Firstly, the defendant claims that it is willingly to provide a crew to man the ship whilst under arrest. It places crew costs at approximately USD\$4762.50 a day, which the defendant argues, would not cause the value of the ship to depreciate to the extent where it would jeopardize the claimant’s security, even if the case is not tried in the next 18 months. These costs therefore, are not disproportionate to the value of the arrested *res*.

[78] Another relevant factor is the existence of other claims. Apart from the claim of the applicant, there are other actual or potential claims some of which will take priority over the claimant's claim in any payment out. If the ship continues under arrest and continues to incur costs, I have to ask myself what the prospect is of there being a sufficient fund in the custody of the Court to satisfy all the interested parties. We already know of the substantial claims by the crew, by Ligabue and XO Shipping, none of which have been settled.

[79] The other factor to consider in this case is whether the market value of the vessel is declining during the period of the arrest. It would appear that the value of the vessel, indicated from the Hull and Machinery insurance was USD\$17.6 million, and the judgment in favour of the claimant out of the Maltese court had the value of the vessel at USD\$17,000,000.00. According to the submission of Mr Desai, this shows an increase in the valuation placed on the ship. The value at the time the case first came before Batts J was USD\$10.5 million. However, this earlier appraisal on the ship, according to Mr. Chen, indicated that a further appraisal was necessary due to the fact that a ship depreciates rapidly while standing idly in tropical waters for any length of time. There is no evidence what, if any appraisal was done for the insurance or in the Maltese Courts. There is evidence however, that there is damage being done to the Hull of the ship from being stationary in tropical waters for a long period of time.

[80] The physical integrity of the arrested *res* is another factor for consideration. It will rarely be in the interests of the parties to defer the sale of a ship which is in a state of persistent physical deterioration whilst under arrest. In this case the defendant claims the ship is in a better condition that it was previously, it having made good all the deficiencies which were previously highlighted. The Admiral Bailiff maintains however, that the ship continues to have problems relating directly to the defendant's inability to maintain it whilst under arrest. The claimant argues that the defendant does not contribute to the maintenance of the ship unless ordered to do so by the court. It has been de-registered by the Maltese

ship registry for the sole reason that it has failed to comply with the requirements to remain on the registry.

[81] There are other considerations too. There is only an 8 man crew on a vessel generally crewed by twice that amount. Whilst the vessel is safe whilst anchored in harbour for the time being, it is the hurricane season and the dangers are obvious. The defendant is willing to take the risk; the claimant is not so willing with its only security. The vessel is also under administrative detention by port control. The maritime authorities have refused to certify the ship as safe at anchor, with only a crew of 8 on board.

[82] It is the defendant's position that the arrest was unlawful and because of this it holds fast to the view that the matter should proceed to trial. The presence of this defence raises the question as to what extent the court should have regard to the strength of the defendant's case at this stage, not having heard any evidence on the substantive claim. At this interlocutory stage it is not desirable or necessary for me to make any finding on that score. The claimant has obtained an EEO and a judgment for possession against the defendant in Malta. It is entitled to move against its security in rem unless alternative security is offered here or in Malta. No alternative security has been offered elsewhere or here.

[83] Accepting as I do that all ships arrested are subject to depreciation from ordinary wear and tear and natural elements, in this case significant time has elapsed since the arrest. I believe it is now an appropriate time for the vessel to be sold and that there are good reasons to do so. The main reasons for this decision are that;

- i. Despite every opportunity afforded the defendant and despite its indication that it was willing and able to do so, it has not offered any form of security to bail the ship even though the sum has been reduced. The ship has been at anchor for nine months.*
- ii. There is no profit being made by the ship whilst under arrest.*

- iii. *The Admiralty Bailiff has incurred, and will continue to incur costs, time and expense to keep the vessel under arrest until whichever time the matter is determined.*
- iv. *The Hurricane Season in Jamaica has commenced, and the Meteorological office has indicated that this season will be an active one in Jamaica.*
- v. *The Admiralty Bailiff has been and continues to be burdened with the task of being responsible for the vessel, and while one does understand that it is the duty of the Admiralty Bailiff after a vessel has been arrested to keep it in safe custody and to take all reasonable steps necessary for the preservation of the vessel so as to prevent deterioration in its condition, this is not always possible, as there is always a measure of deterioration due to ordinary wear and tear which occurs with the passage of time and there may be deterioration due to the vagaries of the elements particularly where the vessel lies stationary in tropical waters. The vessel will be coming under great risk during this active hurricane season.*
- vi. *The ship once again had to be operating on the emergency generator because it ran out of bunker fuel in the engine room which the bailiff had to secure by loan of USD\$16,800.00. The third generator has still not been overhauled after several months.*
- vii. *There is ongoing environmental concern for a large ship moored for an extended period in tropical waters as well as the issue of sewage and garbage and the discharge of bilge and sludge coming from the engine room. Regardless of the value of the ship, if the owner fails to bail the ship, this cannot be allowed to continue for an extended period of time with risk to environmental safety in the harbour.*
- viii. *There have been allegations of safety concerns for the vessel and its crew in the harbour at nights. Part of the costs of arrest has been the cost for watchmen hired by the Admiralty Bailiff to protect the vessel from possible piracy.*

- ix. *I do not accept that insurance on the vessel is security for the claims. The fact that the vessel is moored without a flag is also not an insignificant factor.*
- x. *In only one of the cases where the court refused to sell the vessel because the value outweighed the value of the claim, was the ship under arrest for such a length of time as this. Significantly, in that case, there was only one claim against the vessel.*
- xi. *A trial date has yet to be set, with the possible trial dates being in November of this year or potentially next year.*
- xii. *The defendant is impecunious, and has claims against it not only from the claimant Jebmed but also from three other claimants.*
- xiii. *If the vessel is released from this claimant's arrest, it still remains under arrest and there is still one other application for arrest waiting to be heard. The defendant has not indicated if or when it will deal with these claims, other than its gentleman's agreement with XO Shipping, so that the period of arrest will be much longer whether or not Jebmed claim is heard speedily or not.*

[84] I have given grave and weighty consideration to this application. I have considered especially the authorities in which based on the value of the ship the courts have been reluctant to order a sale. However, I do not believe that the fact of the value of the ship will, in all circumstances, be the paramount consideration. Even though this vessel is not in the classical definition of a wasting asset, it is a wasted asset and in danger of depreciating while at anchorage. It is also clear that the defendants are not in a position to maintain it, or to continue on financially. It follows that if all the claimants are successful in securing judgments, the vessel will have to eventually be sold. The defendant has not provided any other security in any other forum. Since the vessel will inevitably be sold, it is in the interest of all concerned that it be sold now rather than later when its value would have drastically been depreciated, even if the defendant's equity in it remains high. To borrow the words of Brandon J in **The "Myrto"** it would be

unreasonable to keep the ship under arrest at great expense for what could amount to as much as eighteen months to two years. It is both necessary and expedient, despite the objections of the defendant, to sell the vessel *pendente lite*.

[85] Though the defendant wishes to retain the ship, they have not expressed any desire to bail the ship, but instead they contemplate an early trial of this matter. That may well be a sanguine expectation, for though an early trial date may be achieved, at the earliest November 2017 or at the latest, early January 2018, for Jebmed's claim, there are three claims against the vessel. It may not be possible to have an early trial date for all three. The vessel would still have to remain under arrest until all claims (especially if Elburg succeeds in arresting the ship) are heard. I am still however, cognizant of the defendant's desire to retain ownership of the ship, and the order I have decided to make reflects that.

[86] The court therefore orders that:

- 1) The application for sale is granted on condition.
- 2) Provided that the defendant fails to provide alternative security in the amount of USD\$450,000.00, USD\$139,000.00, USD\$778,497.79 and USD\$537,836.00 in the form of bonds, guarantees, payments into court or undertakings satisfactory to Jebmed S.R.L., Ligabue S.P.A., Elburg Ship Management and XO Shipping A/S, respectively, the Admiralty Bailiff is empowered to proceed to appraisal and sale of the M/V "Trading Fabrizia" within 30 days of this order.
- 3) Should the defendant comply with the conditions at (2) before the expiration of 30 days following upon the date of this order, the vessel shall be released from arrest.
- 4) Liberty to apply.
- 5) Costs to the claimant Jebmed S.R.L. to be agreed or taxed.