IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

ADMIRALTY DIVISION

CLAIM NO. 2016 A 00003

BETWEEN	**JEBMED S.R.L**	**CLAIMANT**
AND	**CAPITALEASE S.P.A.** **OWNERS OF M.V TRADING FABRIZIA**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

ADMIRALTY DIVISION

CLAIM NO. 2017 A 00006

BETWEEN	**ELBURG SHIP MANAGEMENT**	**CLAIMANT**
AND	**ENTERPRISE SHIPPING AGENCY**	**1ST DEFENDANT**
AND	**CAPTILEASE S.P.A.**	**2ND DEFENDANT**
AND	**THE MOTOR SHIP TRADING FABRIZIA**	**3RD DEFENDANT**

Mr. Vincent Chen and Mr. Makene Brown instructed by Chen, Green & company for the claimant (Jebmed)

Mr. Krishna Desai and Miss Amanda Montague instructed by Myers, Fletcher & Gordon for the defendant (Capitalease)

Mr. Ramone Foster instructed by Foster Galloway for the Applicant

Admiralty law - Application to be added as an interested party – Judicial sale of Maltese vessel on the application of the mortgagee – Vessel sold to the applicant free of encumbrances - Vessel subsequently arrested in Malta in respect of the same mortgage debt - Judicial sale in Jamaica not recognized by Maltese court – Mortgage debt paid by purchaser to secure vessel's release - Rule 70.11 of the Civil Procedure Rules, 2002

Admiralty law - Judicial sale – Distribution of the proceeds – Section 89 (2) of the Shipping Act and rule 70.13 (9) of the Civil Procedure Rules, 2002

March 11, July 18 and August 29, 2019

SIMMONS J

Background

[1] On October 30, 2016, a warrant of arrest was ordered in respect of the M/V Trading Fabrizia (the vessel). The application was based on the defendant's alleged failure to honour the terms of a mortgage between Jebmed S.R.L. (Jebmed) and Capitalease S.P.A. (Capitalease), the owner of the vessel. That mortgage was supported by a Deed of Covenants which provided that in the event of a default the security would become immediately enforceable. The defendant it was said, defaulted in its payments.

[2] A claim was filed in rem seeking the repayment of United States six hundred and ninety-nine thousand and forty-six dollars and thirty-eight cents (US$699,046.38) plus compound interest at the rate of 8% per annum. In the alternative, damages were claimed for breach of contract.

[3] Capitalease in its Amended Defence and Counter Claim has denied owing the sum claimed and has counterclaimed for damages for breach of contract and for the unlawful arrest of the vessel, loss of profits and damage to the shipowner's reputation.

[4] On November 28, 2016, the claimant filed an application for sale of the vessel. Among the grounds on which the application was sought were:

(i) The non-payment of the debt;

(ii) The risk that the vessel may be damaged and the security lost due to the lapse of its insurance;

(iii) The less than desirable conditions in which the crew were being kept which may have resulted in them abandoning the vessel; and

(iv) The increasing costs of the arrest in circumstances where there was no evidence that the defendant could provide alternative security.

[5] The application was refused and the release of the vessel ordered on the following conditions:

(i) That proof be provided to the claimant that the vessel has Hull and Machinery Insurance coverage;

(ii) That a satisfactory Bond, Guarantee or Undertaking in the sum of US$450,000.00 be provided to the claimant and a Bond, Guarantee or Undertaking in the sum of US$139,000.00 be provided to the intervener, XO Shipping;

In the alternative, the above sums could either be paid into court or a joint account in the names of the Attorneys-at-Law for the parties. The order also stated that in the event that the defendant failed to comply with the above conditions, the claimant was at liberty to renew its application for the sale of the vessel.

[6] On December 23, 2016, by order of Batts J, XO Shipping A/S was permitted to intervene in this matter.

[7] On June 1, 2017, the claim brought by Elburg Shipmanagement Phils. Inc (claim no. 2017 a 00006) was consolidated with Jebmed's claim.

[8] On June 1, 2017 Jebmed again applied for an order for sale of the vessel. At that time the defendant was said to be indebted in the sum of seven hundred and

seventy-eight thousand eight hundred and forty-six euros and sixty-one cents (€778,846.61) (the mortgage debt) plus compound interest at the rate of 8% per annum. An order was granted as follows;

(1) The application for sale is granted on condition.

(2) Provided that the defendant fails to provide alternate security in the amount of US$450,000.00, US$139,000.00, US$ 778,497.79 and US$ 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 appraisement and sale of the M/V 'Trading Fabrizia" within thirty days of the order.

[9] The order also provided for the release of the vessel in the event that the defendant complied with the above conditions.

[10] The conditions were not fulfilled and the vessel was eventually sold by the Admiralty Bailiff to Bluefin Marine Limited (the applicant) for United States ten million three hundred thousand dollars (US$10,300,000.00). The vessel which was originally registered in the Republic of Malta was subsequently registered in the Republic of Liberia and renamed M/V Bright Star.

[11] On March 9, 2018 by consent, judgment was granted in favour of Elburg Ship Management in the sum of United States six hundred and ninety-six thousand four hundred and twenty-three dollars and thirteen cents (US$696,423.13).

[12] On March 15, 2018 judgment was entered in favour of XO Shipping A/S in the sum of United States three hundred and ninety thousand dollars (US$390,000.00). On that same date judgment was entered in favour of Ligabue S.P.A in the sum of United States one hundred and twenty-eight thousand one hundred and twenty-one dollars and fifty cents (US$128,121.50) plus costs of United States five thousand dollars (US$5,000.00).

[13] The judgments obtained by X/O Shipping (claim no. 2016 A 0005), Elburg Ship Management (claim no. 2017 A 00006) and Ligabue S.P.A. (claim no. 2016 A 00004) as well as the Admiralty Bailiff's fees were satisfied from the proceeds of sale. The remaining sum of United States three million dollars (US$3,000,000.00) was paid into court. It is that sum from which Jebmed's claim was to be satisfied.

[14] On June 19, 2018 the vessel was arrested in Malta in respect of the same mortgage debt owed by Jebmed to Capitalease. In order to secure its release, the applicant was required to pay the sum due to Jebmed as cash security to the Maltese court.

[15] The applicant filed an action in that court for a declaration that the warrant was illegal and/or void under Maltese law. The applicant also sought an order to revoke the said warrant. The application was refused. The court found that Capitalease by way of a private agreement dated September 16, 2016 had admitted owing the amount claimed on the invoice and was served with a default notice when it failed to pay the debt. As a consequence, Jebmed was adjudged to be entitled to take possession of the vessel.

[16] The applicant appealed to the Maltese Court of Appeal. The appeal was refused on the basis that since the enforcement of the Maltese mortgage in Jamaica had to await a judicial determination, the mortgagor did not have an immediate right to the proceeds of sale as it would under Maltese law. The fact that money had been paid into court to safeguard Jebmed's interests was found to be an insufficient basis to revoke the warrant, as the Maltese court stated that this did not guarantee priority in respect of any other creditors. The appeal was heard on February 8, 2019.

The Application

[17] This is an application by Bluefin Marine Limited (the applicant) to be added as an interested party to the claim. The applicant also seeks the following remedies:

(i) That Jebmed and Capitalease be restrained from accessing, withdrawing, or transferring the remaining funds being held by Myers, Fletcher and Gordon, Attorneys-at-Law and Chen, Green and company Attorneys-at-Law, in account number 06772782 at the National Commercial Bank pursuant to the Order of Edwards J made on March 5, 2018 until Jebmed withdraws all proceedings against the M/V Bright Star (previously the MV Trading Fabrizia) in Malta or until the courts in Malta refuse all of Jebmed's claims against the M/V Bright Star in Malta or until there is a settlement between Jebmed and the M/V Bright Star in respect of the proceedings in Malta;

(ii) A declaration that the vessel was sold to the applicant *"free from all liens, mortgages and encumbrances";*

(iii) A declaration that the sum of US$3,000,000.00 was paid into court to secure the judicial claim of Jebmed for its mortgage debt;

(iv) A declaration that Jebmed's claim for its mortgage debt is currently being adjudicated before this Honourable Court and that it is not necessary for Jebmed to file a fresh claim to recover its mortgage debt.

The applicant also gave its undertaking to abide by any order as to damages.

[18] The grounds on which the applicant relies are stated to be as follows:

(1) The applicant satisfies the criteria in rule 70.11 of the **Civil Procedure Rules, 2002,** (**CPR**) to be joined as an interested party;

(2) The Applicant has an interest in the proceeds of sale and has been affected by the recent orders of the court as to the distribution of the said proceeds and payment out of court;

(3) The applicant purchased the vessel in a judicial sale on January 9, 2018 *"free from all liens, mortgages and encumbrances"* for the sum of US$10,300,000.00;

(4) The proceeds of sale were paid into court and orders given for its distribution for the satisfaction of different claims brought against Capitalease, the previous owners of the vessel;

(5) In particular, the sum of US$3,000,000.00 was paid into court by order of Edwards J to secure the claim brought by Jebmed for its mortgage debt;

(6) The vessel was subsequently registered in Liberia under the name *Bright Star*;

(7) That after the sale Jebmed filed a request for the arrest of the vessel and the M/V Bright Star was arrested on June 19, 2018 in Maltese waters in respect of the same mortgage debt;

(8) The applicant paid the mortgage debt to secure the release of the vessel;

(9) The applicant is involved in litigation before the Maltese courts for an order that the arrest of the vessel was illegal in light of its judicial sale in Jamaica being free and unencumbered;

(10) The injunction is necessary to protect the interest of the applicant who is the new owner of the vessel as Jebmed may be able to draw down on the cash security it paid to release the vessel in Malta.

[19] The application is supported by the affidavit of Iason Korbetis who is stated to be a director of the applicant.

[20] In that affidavit, the deponent states that the proceedings stem from a mortgage debt 'purportedly" owed to Jebmed by Capitalease in relation to M/V Trading Fabrizia. He indicates that the vessel was sold and the proceeds paid into court. Six months later the vessel was seized in respect of mortgage debt owed to Capitalease.

[21] The vessel was released after the applicant paid cash security in the Maltese Court. The deponent states that the arrest of the ship in Malta was wrong because it had been sold in Jamaica free of all mortgages and encumbrances. This issue is being litigated in the Maltese courts.

[22] The applicant asserts that it has an interest in the matter before the Jamaican courts Jebmed's claim for the mortgage debt was secured by the order of Edwards J. and the sums paid into court should be made available to Jebmed.

[23] It has also been asserted that it would be unjust for either Capitalese or Jebmed to be paid the sums remaining in Court if Jebmed draws down on the sum paid as security to the Maltese court. The deponent has also asserted that those sums should remain untouched until Jebmed withdraws the proceedings in the Maltese court.

The applicant's submissions

[24] Mr. Foster submitted that the applicant is of the view that it has an interest in these proceedings having purchased the vessel free of liens and mortgages and subsequently being required to pay the mortgage debt to secure its release. He stated that despite the applicant's objection to the arrest of the vessel in Malta on July 16, 2019, Jebmed, who is the claimant in this action, got an order to withdraw that sum. He argued that in light of the decision of the Maltese court which has resulted in Capitalease's debt being satisfied by the applicant who had received the vessel free from encumbrances, it should be given the right to assert its interest in the funds currently being held by this court. He submitted that it would be equitable to allow the applicant to intervene in order to prevent Jebmed and/or Capitalease being unjustly enriched.

[25] He directed the court's attention to the fact that Jebmed's interest had already been secured by the sum being held by this court and submitted that the applicant has a natural cause of action in the face of the unjustified arrest of the vessel. Counsel also stated that Jebmed and the Maltese court, by refusing or neglecting to give

legal effect to the judicial sale has undermined the credibility and dignity of this court.

[26] With respect to the applicant's possible cause of action, counsel relied on two cases. He submitted that if a judicial sale is not recognised in a foreign country the original court that ordered the sale will intervene to allow equity to assist the innocent party who in this case is the applicant. Reference was made to ***Vrac Mar Inc. v Karamanlis*** [1972] F.C. 430 as authority for this submission.

[27] Reference was also made to the ***Acrux*** [1961] 1 Lloyds List Law Reports 471***.*** Counsel submitted that although the facts of that case are not the same as those in the case at bar, the same principle applies. He stated that in that case an Italian ship was arrested and judicial sale ordered by the English court. The purchaser was unable to register the ship in Italy and applied to the English court for assistance. The English court ordered that the parties to the judicial sale were bound by the English order and were to give an undertaking not to file a claim in any other jurisdiction.

[28] Mr. Foster submitted that the principle is that a wronged party can seek assistance from the court which ordered the judicial sale especially if the action complained of was done by one of the parties to the judicial sale.

[29] In closing, he urged the court to allow the applicant to intervene on the basis that it will be equitable for it to do so. He also underscored the point that the applicant has paid the mortgage debt and as such, has been deprived of its money in order to secure release of the vessel. He submitted that in those circumstances the applicant ought to be allowed to exercise a right of subrogation.

Claimant's/Jebmed's submissions

[30] Mr. Chen stated that the difficulty in this case has arisen due to the fact that the Maltese Court which is court of the Port of Registry, has not recognized the judicial sale in Jamaica. He indicated that the issue was litigated by the applicant to the

level by the Court of Appeal in Malta and that court ruled that the order of the Jamaican court was not binding and would not be given effect because the mortgagee's rights were not fully satisfied in Jamaica. Specifically, the mortgagee claimed possession of the vessel that was not dealt with by the Jamaican court. Reference was made to the judgment of the Maltese Court of Appeal dated February 8, 2019, which states:

> *"22. The refusal of the Jamaican court to recognise the effect of the Maltese mortgage inevitably means that the effect of the sale ordered by the Jamaican Court which annuls the Maltese mortgage is not recognised in Malta. In fact, the appellant ship admits this when it states that:*
>
> > *'Here we are not contesting the powers and strength of the mortgage – what is being argued is that, after a sale by auction, this power should be exercised with regard to the proceeds of sale and not against the ship…'*
>
> *23. Precisely because, as the law stands in Jamaica, 'those powers' – that the mortgage is an executive title and not just a means of proof, and the right of preference granted by the mortgage – cannot 'be exercised with regard to the proceeds of sale'. Since the mortgage is not recognised in Jamaica, the sale in Jamaica cannot have the effect that the sale in a country that recognises the mortgage would have had. This is the basis of the principle of reciprocity."*

[31] Counsel stated that the vessel was sold free from encumbrances in accordance with the **Shipping Act** (the **Act**)**.** In Malta where the mortgage is registered, the vessel is still subject to its terms. Mr. Chen stated that had the applicant enquired, it would have found that Jebmed had asserted its rights under the mortgage as that would have been apparent on the Register. In other words, the applicant would have been alerted to the fact that the mortgagee was claiming possession.

[32] He submitted that the applicant bought the vessel at its peril and that the maxim *caveat emptor* applies

[33] Counsel also stated that since this was a judicial sale, a reasonable and prudent buyer would have also checked the court's registries. He stated that Admiralty law applies between nations and the comity of nations dictates that if you buy in those circumstances you take the vessel at its own risk. He indicated that the vessel was registered in Malta and that registration is notice to the world. He stated that that is why ships are flagged. Mr. Chen also stated that when proceedings are brought in Jamaica, Malta has to be notified. He submitted that the equitable maxim *"Equity aids the vigilant and not the indolent"* is applicable in this case and the applicant has been indolent.

[34] Mr. Chen stated that the applicant having lost the case in Malta is now seeking to intervene in this suit but has no basis on which to do so. He stated that if there was an error in the court's order that is of no concern at the present time. Under Jamaican law title has been passed to the applicant and it cannot now assert that the money paid into court for the vessel is subject to any right of subrogation which it can claim under Maltese law. He also indicated that the Maltese court has ruled that the money is to be paid to Jebmed.

[35] Counsel also submitted that the moneys paid into the Jamaican court represents the appraised vessel and is available to all competing claims against it and its owners. He pointed out that the court in accordance with its rules has directed how the money is to be paid out and the **Act** prescribes to whom that money is to be paid. No mention is made in the **Act** of subrogated rights and by virtue of section 89 (2) (d) if any money is left over it is to be paid to Capitalease. Reference was also made to rule 70.13 (9) of the **CPR** which deals with payment out of the proceeds of sale and states that such payments will only be made to judgment creditors.

[36] Mr. Chen submitted that if the applicant has a claim it ought to be brought against Capitalease. He emphasized that the court should not be asked to question the correctness of an award made in this same court. He also pointed out that under Jamaican law it is a good sale. Counsel opined that there may be issues which

could be raised under Maltese law. The issue between Capitalease and Jebmed and in an ancillary way, the applicant is and have been subject of litigation in Malta which has been concluded, as their Court of Appeal is their final court. It is also the subject of ongoing arbitration between Jebmed and Capitalease in Italy.

[37] In addition, there is extant before this court a claim between Jebmed and Capitalease which has not yet been resolved. Once there is no formal order to stay there is an understanding that Jebmed will await the outcome of the arbitration proceedings in Italy. It was submitted that in the circumstances there is no need for the applicant to intervene in these proceedings which have nothing to do with it and for which perceived claim they can easily seek redress in the Maltese or Italian jurisdictions.

Capitalease's submissions

[38] Mr. Desai referred to the notice of application and reminded the court that while the applicant is seeking to be added as a party it is also requesting an order to restrain the court from ordering any payment to Jebmed or Capitalease. He submitted that paragraph 2 of the notice of application is asking the court to injunct itself. With respect to the injunctive relief, Mr. Desai also made the point that no affidavit addressing the necessary undertaking as to damages has been filed.

[39] With respect to paragraphs 2 – 5 which seek declarations, counsel submitted that this is improper as a person is only able to obtain declaratory relief if they have a substantive claim. Reference was made to rule 70.2 of the **CPR** which lists the claims to be dealt with. He submitted that the applicant has made no claim, as subrogation does not fit within the rubric of section 89 of the **Act**.

[40] With respect of paragraph 6 of the application, Counsel stated that this is the closest that the application gets to providing an undertaking. He asked the question: If the application is granted, what then is the result? He submitted that the relief that the applicant is seeking cannot be properly be granted. Mr Desai stated that the applicant is asserting that it is interested in the proceeds of sale but

in order to qualify as an interested party, it must be directly affected by these proceedings. He stated that the applicant is not directly affected by the proceedings as it is not a claimant, defendant or ancillary claimant. Reference was made to the judgment of Sykes, J in ***Regina v Industrial DisputesTribunal (ex parte J. Wray and Nephew Limited)*** unreported, Supreme Court Jamaica Claim no. 2009HCV04798, judgment delivered 23 October 2009 in support of that submission. It was submitted that the applicant has not met that threshold required to be permitted to intervene as it has no lien, or charge capable of being registered in Jamaica and does not fall within the categories of persons listed in the **Act** or the **CPR**.

[41] He stated that whilst Bluefin has a grievance, its remedy lays solely outside of Jamaica and does not involve Capitalease. He stated further that the judicial sale was ordered on the application of Jebmed which Capitalease sought to resist.

[42] With respect to ***Vrac Mar Inc. v. Karamanlis (supra)*** counsel submitted that that case dealt with Canadian legislation and the sums in question related to certain taxes, incurred and a caveat. He stated that their legislation appears to treat specifically with sums owed to the government and also dealt with the interest protected by the caveat. He submitted that these charges maybe in the nature of those in section 89 (2) b) of the **Act**.

[43] With respect to the applicant's assertion that Jebmed and Capitalease had agreed to the sale Mr. Desai stated that that is not correct as the defendant resisted the sale. He also stated that the defendant also had no say in the conduct of the auction, appraisal, bidding process but has made no adverse comment in respect of those processes. In fact, neither the claimant or the defendant has any compliant with respect to the process.

[44] With respect to Mr. Foster's submission that the applicant is seeking the assistance of equity counsel stated that it must be remembered that equity aids the vigilant and not the indolent. He made the point that Mr. Foster was not involved in the

matter at the time of the sale which had been advertised and the litigation was hotly contested. This he said, resulted in a judgment by Batts J in 2016, hearings by Laing J, three judgments by Edwards, J, rulings by Sykes J (as he then was), and Court of Appeal judgments. There are approximately five or six judgments that are available online and the matter has been reported in the press.

[45] Mr. Desai stated that the vessel was sold by public auction pursuant to an order for sale *pendente lite* which is not insignificant and could have been discovered with due diligence. He stated that if there is some equitable jurisdiction that could be invoked by the applicant, one must remember that *delay defeats equity*. The litigation in Malta he said, was significant and lasted several months.

[46] With respect to the ***Acrux*** (supra), Mr. Desai submitted that the circumstances of that case differs from those in the case at bar and as such the case does not assist the applicant.

[47] Counsel submitted that it appears as though a complaint is being made of some wrongdoing by Jebmed. He submitted that if something wrong was done that was elsewhere and ought to be litigated elsewhere. Mr. Desai also submitted that the litigation does not directly affect the applicant and it ought not to be allowed to intervene. He submitted that the relief being sought cannot be granted in equity or in law.

[48] Counsel indicated his agreement with some of the submissions made by Mr. Chen. However, he informed the court that based on his instructions, the arbitration has been frustrated and is not proceeding. He agreed with Mr. Chen's submission that the applicant bought the vessel at its peril. He also stated that there is no mention of subrogation rights in the **Act**. Mr. Desai submitted that for all those reasons the applicant ought not to be added as a party to the claim and such an order would not further the overriding objective. Counsel also stated that the applicant needs to seek redress elsewhere, that is, in either Malta or Italy.

[49] Mr. Desai stated that the issue at this stage is who is entitled to the remainder of the fund. The applicant he submitted, does not fall in that list.

[50] Mr. Ramon Clayton who represents Elburg Ship Management Limited adopted the submissions of Mr. Chen and Mr. Desai. I have however, noted that the judgment obtained by his client has been satisfied and as such, this application does not affect that party.

Applicant's Reply

[51] Mr. Foster submitted that the issue is that the mortgage debt to Jebmed was satisfied by an innocent party and it is only natural that that party would seek to recover that sum in these proceedings.,

Discussion

[52] The basis on which a person may be joined as a party in admiralty matters is set out in rule 70.11 (7) of the **CPR** states:

> *"Any person –*
>
> *(a) interested in property under arrest or in the proceeds of sale of such property; or*
>
> *(b) whose interests are affected by any order sought or made, may be made a party to any claim in rem against the property or proceeds of sale."*

[53] The applicant seeks an opportunity to access the remaining funds being held in National Commercial Bank account #06772782. In other words, it is asserting that it is interested in the proceeds of sale.

[54] The funds in question, represent the balance of the proceeds of sale of the vessel. The account was opened pursuant to the order of Edwards J dated March 5, 2018. The order states in part, that:

> *"1. The sum of US$3,000,000.00, representing proceeds paid into court to satisfy Jebmed's claim (Claim No 2016 a 00003), is to*

be paid into a US dollar interest bearing account at National Commercial Bank in the joint names of Chen Green 7 Company, Attorneys - at - Law and Myers, Fletcher & Gordon, Attorneys - at - Law (hereinafter "Myers, Fletcher & Gordon"), on their undertaking not to part with the funds until further order of the Court.

2. The sum of US$1,790,00.00, representing proceeds paid into court to satisfy the following claims in the following amounts:

(i) US$850,000.00 for X/O Shipping A/S's claim (Claim No 2016 A 00005);

(ii) US$800,000.00 for Elburg Ship Management's claim (Claim No. 2017 A 00006); and

(iii) US$140,000.00 for Ligabue S.P.A's claim (Claim No 2016 A 00004),

is to be paid in a US dollar interest bearing account at the National Commercial Bank in the joint names of Rattray Patterson Rattray, Attorneys - at - Law and Myers, Fletcher & Gordon, on their undertaking not to part with the funds until further order of the Court.

3. The balance of US$4,847,188.88 is to be divided as follows:

(i) US$2,847,188.88 is to be held by Myers, Fletcher & Gordon in a US dollar interest bearing account at the National Commercial Bank on Myers, Fletcher & Gordon's undertaking not to part with the funds until further order of the Court; and

(ii) Once the claims are satisfied by the distribution of the proceeds as above, the balance of US$2,000,000.00 is to be immediately transferred to Capitalease S.P.A.

[55] On March 9, 2018 the payments in paragraph 2 were made and the sum mentioned in paragraph 3 (ii) of the order, sent to Myers, Fletcher & Gordon. On March 15, 2018 the court ordered that after the payments set out in paragraph 2 of the order were made, the residue and any accrued interest were to be paid to Capitalease and the account closed. By order dated May 30, 2018 the sum of United States two million eight hundred and forty-seven thousand one hundred and eighty-eight dollars and eighty-eight cents (US$2,847,188.88) (paragraph 3 (i) of the order) was

returned to Capitalease. By order dated October 22, 2018 the sum of United States two million dollars (US$2,000,000.00) (paragraph 1 of the order) was returned to Capitalease leaving a balance of United States one million dollars (US$1,000,000.00) in court. That order was sought on the basis that in accordance with the Deed of Covenants and the Mortgage, Jebmed would only be entitled to recover a maximum of United States nine hundred thousand dollars (US$900,000.00) from Capitalease.

[56] The applicant has asserted that if Jebmed is allowed to access those funds it will be unjustly enriched. It has also submitted that in the particular circumstances of this case, it has an interest in the remaining funds and seeks an order for it to be added as an interested party. The applicant also seeks an order to restrain Capitalease and Jebmed from accessing the sums remaining in that account.

[57] Mr. Chen and Mr. Desai have both argued that the applicant has no legal interest in the remaining funds as they comprise the residue of the proceeds of sale and any grant of injunctive relief as prayed, would result in the court injuncting itself.

[58] The distribution of the proceeds of a judicial sale of a vessel is governed by the provisions of the **Act** and the **CPR**.

[59] Sections 89(2)(a), (c) & (d) and 89(3) of the **Act** state:

> *"(2) In the event of a forced sale of a ship, the proceeds of sale shall be distributed as follows-*
>
> *(a) any sum awarded by a court as costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel shall be paid out first; such costs and expenses to include the costs for the upkeep of the vessel and the crew as well as wages and other sums and costs referred to in paragraph (a) of section 80 incurred from the time of the arrest or seizure;*
>
> *(b) …..*
>
> *(c) the balance of the proceeds shall then be distributed among-*

(i) the holders of maritime liens securing any claim under section 8O(a);

(ii) the holders of mortgages registered under this Act;

(iii) the holders of maritime liens securing any claim under section 80(b), (c) and (d);

(iv) the holders of rights under section 84;

(v) the holders of other preferential rights. in accordance with the provisions of this Part, to the extent necessary to satisfy the respective claims;

*(d) upon satisfaction of all claimants referred to in paragraphs (a), (b) and (c), the **residue** of the proceeds **shall** be paid to the immediately previous owner and it shall be freely transferable.*

(3) The proceeds of a forced sale shall be made available promptly and shall be freely transferrable."

[60] Rule 70.13 (9) of the **CPR** which deals with the payment out of the proceeds of sale states:

"Payment out of the proceeds of sale will be made only to judgment creditors and-

(a) in accordance with the determination of priorities; or

(b) as the court orders."

[61] The applicant cannot claim to be a judgment creditor and does not fall within the categories of persons listed in section 89 (2)(c) of the **Act**. It is at best, a creditor, who, in addition to having bought the vessel free from *"all liens, encumbrances and debts whatsoever up to 11:20 A.M. on January 9, 2018"*[1] satisfied the mortgage debt in Malta to secure its release.

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[1] See the Bill of Sale issued by the Bailiff of the Supreme Court of Judicature of Jamaica dated January 16, 2018.

[62] In order to establish that it ought to be allowed to intervene, the applicant must demonstrate that it has an arguable claim against Capitalease.

[63] Capitalease has already received United States three million dollars (US$3,000,000.00) from the proceeds of sale and has filed an application for the payment of the “residue”. The application is based on section 89(2)(d) of the **Act.** In keeping with that section, Capitalease would, prima facie, be entitled to the remaining sum of United States one million dollars (US$1,000,000.00) once it is established that it is in fact, residue. The result of this is that Capitalease whose mortgage debt was paid by the applicant to secure the release of the vessel would have received a benefit to the detriment of the applicant.

[64] The application is being resisted on the basis that the applicant has delayed in asserting any rights that it may have against Capitalease. Where a mortgage of a ship is granted it must be recorded by the Registrar of the ship’s port of registry in the register book. That register is open for inspection in most cases by the payment of a prescribed fee. The mortgage in this case was registered on May 11, 2016 in the Ships Registry in Malta. I agree with the submissions of counsel for Jebmed and Capitalease that the terms and effect of the mortgage could have been ascertained by the applicant.

[65] A judicial sale extinguishes the maritime lien or the statutory claim in rem in respect of the particular ship and transfers it to the proceeds of the sale being held in court. The purchaser therefore gets a clear title free from all liens and encumbrances. There is however, a risk that the courts of another country may refuse to recognize the judicial sale as having that effect. Such a situation arose in ***The Acrux*** [1962] 1 Lloyds List Law reports 405.

[66] In that case, as was stated by counsel for the applicant, the ship was sold pursuant to an order made by the English Admiralty Court. The purchaser was unable to obtain a certificate of deletion from the Italian Register of Ships in order to register the ship elsewhere. The Admiralty Marshall was informed and brought it to the

court's attention. The Admiralty Marshall was also privy to correspondence including one from a lawyer which indicated that the ship was charged with a mortgage in favour of Banco di Sicilia who may seek to start proceedings in Italy or elsewhere. The court, in those circumstances asked the claimants for an undertaking that they would not proceed elsewhere against the ship in respect of the unsatisfied balance or institute proceedings against the Acrux in any other jurisdiction.

[67] Justice Hewson, in his examination of the principles regarding the judicial sale of a ship said:

> *"The sale was effected and the title given by this Court to the purchaser was, in accordance with long-recognized practice in the maritime Courts of the world, a valid title.*
>
> *I quote the following words from Dr. Lushington in the case of* ***The Tremont*** *(1841) 1 Wm. Rob, at p. 164:*
>
> > *'The jurisdiction of the court [-that is, the Admiralty Court -] in these matters is confirmed by the municipal law of this country and by the general principles of maritime law;* ***and the title conferred by the Court in the exercise of this authority is a valid title against the whole world, and is recognized by the courts of this country and by the courts of all other countries****'."*[2]

[My emphasis]

[68] The learned judge also referred to the headnote in ***Louis Castrique v. William Imrie and Another,*** (1869) L.R. 4 H.L. 414, which reads:

> *"Where a foreign Court, having competent jurisdiction in the matter, and honestly exercising it, delivers in a proceeding in rem, a judgment, by which the sale of a chattel (a British ship) then lying in the foreign port) is ordered, the sale cannot afterwards be impeached in this country in an action against the vendee, even though the*

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person seeking to impeach it would, by the law of this country, have a preferential title to the chattel here.[3]

……...

He also stated:

"As I see it, the title to the Acrux was given to an innocent purchaser, and the money he paid is in this Court to satisfy all legitimate claims regardless of the nationality of the plaintiffs according to their priorities. It may well be that the sum which represents the ship is insufficient to satisfy all the claims, or, indeed, wholly to satisfy the mortgagees' claim, …….. That is no fault of this court …..

So far as all claimants against this ship before her arrest are concerned, their claims are now against the fund in this Court and not against the ship properly sold to an innocent purchaser free of incumbrances. Were such a clean title as given by this Court to be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interests of the world would suffer. Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give a clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper process of any competent Court. It would be prejudiced for this reason, that no innocent purchaser would be prepared to pay the full market price for the ship, and the resultant fund, if the ship were sold, would be minimized and not represent her true value.

……..

It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this Court and received its aid and, by implication, assented to the sale to an innocent purchaser, should thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership. This Court recognizes proper sales by competent Courts of Admiralty, or Prize, abroad – it is part of the comity of

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> ***nations as well as a contribution to the general well-being of intentional maritime trade**."*[4]
>
> [My emphasis]

[69] A similar view was also expressed by Noel A.C.J. in ***Vrac Mar Inc. v. Karamanlis*** (supra) who said that the refusal of the Republic of Panama to comply with the proceedings for the sale of the ship Norsland to observe the order of the court giving the purchaser clear title was "…in addition to being an affront to a Canadian court, represents a refusal by that country to abide by the decisions of a court of another country, and an exception to a rule honoured by every nation in the world. Indeed, if other countries, or other debtors, decided to follow this bad example, it would create confusion in an area which can be effectively controlled only with the good faith of all seafaring nations".

[70] The issues surrounding the recognition of foreign judicial sales was discussed at length in the United Nations' **Proposal of the Comité Maritime International (CMD for possible future work on cross-border issues related to the Judicial sale of ships** dated April 13, 2017. I have reproduced its contents at some length as it sets out in detail the purpose of the principle and the effect on the global shipping industry where it is not observed. The report states:

> *"5. Clean Title; Reflagging*
>
> *Purchasers, and subsequent purchasers, must be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry so as to be able to trade the vessel appropriately without the threat of costly delays and expensive litigation. This, in turn, will enable the purchased ship to trade freely; and ensures that the ship will realize a greater sale price which will benefit all the related parties, including creditors (which could include port authorities and other government instrumentalities that have provided services to a ship owner).*

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It is important to highlight the important legal principle that flows from a Judicial sale that once a ship is sold by way of a Judicial sale, the ship should, with only very limited exceptions, no longer be subject to arrest for any claim arising prior to its Judicial sale. If purchasers and their financiers lose confidence in the predictability of obtaining a clean title and being able to reflag the vessel after acquiring a ship from a Judicial sale the process becomes less attractive and effective to the detriment of the purchaser and other creditors of the ship owner whose vessel is to be sold by way of Judicial sale.

The purchase of vessels is generally financed by a ship mortgage from a bank where the bank's main security for repayment is the ship itself. The international instrument, once it has received widespread support, will permit banks to provide ship finance with greater confidence that the ship will realize its full market value at a Judicial sale and not the reduced value realisable where there is the risk, as at present, that the ship may be subsequently arrested for claims predating the Judicial sale, and by reason of a general loss of confidence in the sanctity of the process.

Most importantly, the judiciaries of many countries have observed that the need to recognize Judicial sales by foreign, competent courts forms part of the comity of nations and contributes to the general well-being of international trade.

There is currently no international instrument that addresses the recognition of Judicial sales. Nor is there any instrument that adequately protects purchasers from prior claims and which addresses the de-registration on re-flagging and re-registration of ships from and to national registries.

As there is currently no international instrument dealing with the recognition of foreign Judicial sales of ships it can be said, with some confidence, that in this regard maritime transportation is neither secure nor efficient and hinders rather than promotes global trade and the world economy. The need for intervention by inter-governmental and international organizations has been clearly recognized both Judicially and by national and international maritime bodies. The recognition of foreign Judicial ship sales is fundamental to international maritime law.

The difficulties that arise when one country will not recognize an order for the Judicial sale of a ship in another country has been succinctly summarized as follows:

(1) It is an affront to the Court and the State ordering the sale;

(2) It represents a refusal by that country to abide by the decisions of a Court in another country, and an exception to a rule honoured by most nations in the world;

(3) If other countries, or other debtors, decided to follow this bad example, it could create confusion in the area which can be effectively controlled only with the good faith of all seafaring nations.

The recognition of Judicial sales at an international level has also been highlighted in the Canadian case of the ship "Galaxias"4 where the Court noted that:

(1) While a purchaser on a Judicial sale will take a clean title free and clear of all encumbrances according to the laws of Canada and notwithstanding that it is clear that Canadian Courts desire and expect that the Courts and Governments of other nations will respect its orders and judgments, particularly in the area of maritime law, however this was not an area over which a national jurisdiction exercises control, nor is it appropriate that it attempt to do so;

(2) International regulation of the Judicial sales was necessary; and

(3) In order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This would not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognized in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with.

In commenting on judicial orders for the sales of ships that did not ensure the passing of clean title, the same Court noted that admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from court sales of vessels and render some ships completely unsaleable. The legitimate claims of many local and foreign creditors would thus be defeated by the resulting low bids made at the auction conducted by the court seised of the case.

> *In order for the recognition of foreign Judicial ship sales to be uniformly accepted by way of an international instrument, the intervention of UNCITRAL would be of considerable benefit to the international maritime community. Necessary and sufficient protection should be provided to purchasers of ships at Judicial sales by limiting the remedies available to interested parties to challenge the validity of the Judicial sale and the subsequent transfer of the ownership in the ship".*
>
> [My emphasis]

[71] It is indeed unfortunate that that Jebmed has chosen to pursue its claim in both Jamaica and Malta. The situation is compounded by the fact that the effect of the Maltese mortgage and the rights conferred by that mortgage are not the same here as in Malta. However, as there was no undertaking given to the court that Jebmed would not pursue its claim in any other jurisdiction it was free to do so in order to protect its rights. I have however, noted that it has not sought to access the funds being held by the court in this jurisdiction.

[72] It is clear to me that the applicant has suffered an injustice. Both Jebmed and Capitalease have argued that it did not exercise sufficient care in its purchase of the vessel. They have stated that the fact that it was a judicial sale ought to have spurred the applicant to seek information in respect of the mortgage and in particular, its effect. They have also argued that neither the **Act** or the **CPR** contemplates any rights of subrogation being granted to a purchaser who has found itself in a similar position as the applicant. Perhaps the time has come for such an amendment.

[73] Mr. Foster has asked the court to consider the application in the context of the principles of the law of restitution and allow the applicant to intervene in the proceedings.

[74] Both Jebmed and Capitalease have relied on the equitable maxim "*equity aids the vigilant and not the indolent".* I do however feel compelled to state that: *equity will not suffer a wrong to be without a remedy.* I am however, also mindful of the fact that; *equity follows the law.* Therefore, in order to justify a departure from the strict

application of the **Act** and/or the **CPR** the circumstances must fall outside the ambit of their operation or have not been contemplated.

[75] Having failed in its bid to set aside the Maltese warrant, the applicant's only recourse at this stage, is to seek to convince this court, that it may be entitled to recoup the sum paid in Malta from the remainder of the proceeds of sale.

[76] Where money has been paid to a third party to discharge the debt of another, an action may be brought for money paid to the defendant's use. However, it must be proved that the payment was made at the debtor's request. Clearly, there has been no actual request in this case but such a request may be implied where the payment was made under compulsion of law. In ***Moule v Garrett*** (1872) L.R. 7 Ex. 101, Cockburn C.J. in stating the applicable principle adopted the following quotation from the first edition of **Leake on Contracts**:

> *Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount".*

[77] The applicant will have to prove that it was either compelled or was compellable by law to make the payment in order to ground its application for the recovery of the sum paid in the Maltese Court. It must also demonstrate that it did not voluntarily expose itself to the liability to make the payment and that the payment discharged Capitalease's liability to Jebmed.

[78] Compulsion is strictly defined and the learned authors of **Goff and Jones: The Law of Restitution,** have stated that the cases in which restitutionary claims have succeeded, fall into three main groups. Among this group is relief of property from distress. The general rule is that a claimant can recover by way of restitution, any payment made to discharge the defendant's liability to a third party where that payment was made under legal compulsion.

[79] This was the case in ***Exall v Partridge*** (1799) 8 T.R. 308, where the plaintiff's carriage which was situated on land leased to the defendants was seized by the landlord in distress of rent. The plaintiff paid the debt to secure the release of his goods and he was allowed to recoup that sum from the defendants.

[80] This principle was also applied in ***Johnson v Royal Mail Steam Packet Co.*** (1867) L.R. 3 C.P. 38. In that case, a shipowner mortgaged two of his ships to the plaintiff. He later entered into an agreement with the defendants for the defendants to work the ships. A few months later, the plaintiff gave notice to the defendants of their mortgage and called on them to deliver up the ships. The defendants complied but at the time of delivery, money was owed by them to the officers and the crew. The vessels were seized. The defendants did not pay the debt and the plaintiff paid it in order to obtain their release. The Court of Common Pleas found that the defendants had been compelled to make the payment and held that they were entitled to recover the sum paid from the defendants.

[81] This principle was also applied in ***The Orchis*** (1889) 15 P. D. 38. In that case, the plaintiffs who were mortgagees of forty-eight sixty-fourth shares in a vessel paid the sum claimed by its master in an action in rem, to secure its release and to enable them to take possession under their mortgage. The plaintiffs then sued the defendants who were the owners of sixteen sixty-fourth shares, to recover the amount paid to the master. It was held that they were entitled to recover from the defendants, the amount paid by them as they could not obtain possession while the ship was under arrest.

[82] The **Act** indicates that once the persons referred to in section 89 (2) have been paid, the residue of the proceeds is to be paid to the immediate previous owner. In the present context, that would be Capitalease.

[83] Whilst it is generally accepted that mere commercial interest in the outcome of an action may be insufficient to establish an entitlement to intervene, the facts of the present case, in my view call for some flexibility in that approach. I have found

support for this position in ***Jamaica Citizens Bank v Dyoll Insurance Company and another*** (1991) J.L.R. 415. In that case, the Court of Appeal considered the effect of section 100 of the **Civil Procedure Code Law** which dealt with the power of the court to add parties to the proceedings. It reads:

> *"The Court or Judge may, at any stage of the proceedings …order that the names of any parties…whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."*

[84] Carey, P (Ag.) in that case cited with approval the views expressed by Lord Denning in ***Gurtner v Circuit*** [1968] 2. Q.B. 587 as to the meaning of a similar provision in the English **Rules of the Supreme Court.** Lord Denning said:

> *"…it seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terns as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute "to be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome."*[5]

[85] The learned President also examined several cases in which the issue was dealt with and agreed that a more liberal approach is the proper one. He said:

> *"The case under the rule which was superseded by R.S.C. Order 15 r. 6(B) showed that a person may be added as a party who is directly affected either legally or financially by any order which may be made in the action. Mr. Robinson submitted that a narrow meaning should be given to "financial rights" and accordingly the mortgagee's interest in the present action was a mere commercial interest. He relied on* ***Amon v. Raphael Tuck & Sons, Ltd.*** *(1956) I All E.R. 273 where Devlin, J., held that a mere commercial interest was sufficient to enable the joinder to take place. That case was treated by a Privy Council decision of* ***Penang Mining Co. v. Choong Sam*** *[1969] 2 Malay Law Journal 52 as having been rightly overruled by* ***Gurtner***

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[5] ***Gurtner v Circuit*** (supra) at page 587

> ***v. Circuit*** *(supra).* ***Amon v. Raphael Tuck & Sons Ltd****. (supra) represented the narrow interpretation of the rule which* ***Gurtner v. Circuit*** *(supra) disapproved. The more liberal approach was also taken in* ***Re Vandervell Trusts: White v. Vandervell Trustees Ltd. & Anor.*** *[1969] 3 All E,R. 496. Lord Denning at p. 499 expressed himself in these words:*
>
> > *'That wide interpretation was adopted and applied by this court in the recent case of* ***Gurtner v Circuit*** *…I know that there have been cases at first instance …when the rule has been given a narrow interpretation. But that narrow interpretation should no longer be relied on. We will in this court give the rule a wide interpretation so as to enable any party to be joined whenever it is just and convenient to do so. It would be a disgrace to the law that there should be two parallel proceedings in which the self-same issue was raised, leading to different and inconsistent results.'*

[86] The President continued:

> *"I must mention* ***Sanders Lead Co. Inc. v Entores Metal Brokers Ltd.*** *[1984] 1 All E.R. 857 in which it was held that:*
>
> > *'A mere commercial interest in the outcome of the action, divorced from its subject matter, such as the interest of a creditor of one of the parties, was not sufficient to entitle a person to intervene.'*
>
> *…in my view, this case is distinguishable from the present case. In that case, the Court was being asked to join "a mere creditor". This case is valuable however for another reason. It shows that there need be no cause of action between the intervener and one of the parties."*

[87] In ***Sanders Lead Co. Inc. v Entores Metal Brokers Ltd.*** (supra) Kerr L.J. stated:

> *"In my view, the rule requires some interest in the would-be intervener which is in some way directly related to the subject-matter of the action. ... It may well be impossible, and in any event be undesirable, to attempt to categorise the situations*

> *in which the interests of would-be interveners are sufficient to satisfy the requirements of the rule."*[6]

In that case, the sole issue before the court was whether the purchase which gave rise to the debt was from the plaintiff or its subsidiary.

[88] The circumstances in the case at bar can, in my opinion, be distinguished from those in the above case. The debt, which was paid by the applicant was owed by Capitalease and secured by a mortgage of the vessel which was sold to the applicant to satisfy that same debt. In addition, the seizure of the vessel, which was the action that caused the applicant to pay Capitalease's debt to Jebmed, was at the instance of Jebmed whose mortgage was already secured by funds being held in this court. The applicant's proprietary rights were adversely affected as a result of the litigation between Jebmed and Capitalease. It is arguable that there was no need for Jebmed to seek relief from the Maltese court unless there was a real danger that it would be denied justice in Jamaica. The applicant, in those circumstances, cannot, in my view, be described as either a "mere creditor" or someone with a "mere commercial interest".

[89] I have also noted that Capitalease has had three judgments entered against them in this court. Those judgments were not satisfied out of its own resources but from the proceeds of sale of the vessel. It is therefore reasonable to infer that the applicant may have some difficulty in enforcing any judgment it may ultimately obtain against Capitalease. I do however, bear in mind that this would not be a sufficient basis for permission to be granted for the applicant to intervene.

[90] The issues between Jebmed and Capitalease are as yet to be determined. However, Capitalease has applied for the remaining sum of United States one

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[6] Page 863

million dollars (US$1,000,000.00) to be treated as the residue of the proceeds of sale and for that sum to be paid to them.

[91] The issue of whether the remaining sum can be properly designated as being residue ought to be determined with the input of the applicant. The present situation does not appear to have been contemplated by the framers of the **Act**. In fact, the extract from United Nations' **Proposal of the Comité Maritime International (CMD for possible future work on cross-border issues related to the Judicial sale of ships** [7] indicates that it is a very real problem which has significant commercial implications.

[92] Capitalease it may be argued, stands to receive a windfall in the event that Jebmed does not pursue its claim in this court. It would have neglected to pay the alleged mortgage debt and would also be eligible to receive the sum set aside to secure that debt. The payment by the applicant has saved Capitalease the expense of having to pay the said debt. A claim filed by the applicant for unjust enrichment is in my view, arguable. The applicant will have to decide whether it will file a claim for unjust enrichment against Capitalease. If it intends to do so, it should embark on that course without delay.

[93] The applicant has also asked for injunctive relief. Both Mr. Chen and Mr. Desai have argued that it is a request for the court to issue an injunction against itself. I disagree. The fund in relation to which the applicant seeks relief is not that which is referred to in paragraph 3 (ii) of the order of Edwards J dated March 5, 2018. However, the applicant has not presented any arguments as to why damages would not be an adequate remedy and has not fulfilled the legal requirements to demonstrate that it has the ability to satisfy any undertaking as to damages. In

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[7] See paragraph 73 of this judgment

those circumstances the application to restrain Jebmed and Capitalease from accessing the remaining sum in court is refused.

[94] In the circumstances, it is ordered as follows:

(1) The application to add Bluefin Marine as an interested party is granted.

(2) The application to restrain Jebmed and Capitalease from accessing the remaining sum in court is refused.

(3) Costs to the applicant to be taxed if not agreed.