

The “Songa Venus”
[2020] SGHC 74

Case Number : Admiralty in Rem No 275 of 2016 (Summons No 1213 of 2019)
Decision Date : 15 April 2020
Tribunal/Court : High Court
Coram : Pang Khang Chau J
Counsel Name(s) : Tan Boon Yong Thomas and Josiah Fong (Haridass Ho & Partners) for the plaintiff; Liang Junhong Daniel (Allen & Gledhill LLP) for the intervener.
Parties : Keppel FELS Ltd — Owner of the vessel "SONGA VENUS" — Songa Offshore SE

Admiralty and Shipping – Practice and procedure of action in rem – Priorities

15 April 2020

Pang Khang Chau J:

Introduction

1 Where a claimant has a possessory lien over an arrested ship in respect of a claim which, but for the possessory lien, would have priority only as a statutory lien in admiralty, should the claimant’s costs in enforcing the claim be accorded the same priority as the possessory lien or the statutory lien? For the reasons given below, I decided that costs incurred in enforcing a claim protected by a possessory lien should be accorded the same priority as the possessory lien.

Background

2 The plaintiff, Keppel FELS Ltd (“Keppel FELS”), provided various services to the vessel, *Songa Venus* (“the Vessel”), including repairs, modifications, supply of materials and equipment as well as berthing. Having failed to obtain payment for the said services from the owner of the Vessel, Keppel FELS commenced the present proceedings, arrested the Vessel, and obtained an order for the Vessel to be appraised and sold *pendente lite* “without prejudice to [Keppel FELS’] possessory lien over the Vessel, if any”. Pursuant to the order, the Vessel and the bunkers on board were sold by the Sheriff for US\$3,749,463.14.

3 Thereafter, Keppel FELS obtained final judgment in default of appearance for the sum of US\$1,169,370 with interest. In granting the final judgment, Belinda Ang Saw Ean J also declared that Keppel FELS had a possessory lien over the Vessel in respect of the portion of its claim relating to repair and modification works, as well as supply of various materials, equipment and services. This portion amounted to US\$328,723. Belinda Ang J also awarded Keppel FELS the costs of its action, fixed at S\$10,000 in addition to reasonable disbursements (“Costs of the Action”).

4 The intervener, Songa Offshore SE (“Songa Offshore”), commenced a separate *in rem* action against the Vessel for sums outstanding under a seller’s credit agreement which was secured by a second preferred mortgage over the Vessel. Songa Offshore obtained final judgment in default of appearance for the sum of US\$34,200,000.

The present application

5 Keppel FELS then filed the present application for determination of the priority of the relevant claims and payment out of the proceeds of sale. The only other party that appeared at the hearing of the application was Songa Offshore.

6 The parties were not in dispute that the priority of claims should be in the following order:

(a) Sheriff's commission, costs and expenses.

(b) Costs of the producer of the fund (*ie*, Keppel FELS' costs of and incidental to the arrest, appraisalment and sale of the Vessel and bunkers on board, as well as the costs of the present application).

(c) Keppel FELS' judgment debt in respect of the portion of its claim for which it had a possessory lien, amounting to US\$328,723.

(d) Songa Offshore's judgment debt of US\$34,200,000 in respect of its claim as mortgagee.

(e) The remainder of Keppel FELS' judgment debt in respect of the portion of its claim for which it had no possessory lien.

7 The dispute between the parties was over the treatment of the Costs of the Action.

8 Keppel FELS submitted that the Costs of the Action should be prioritised in the following manner:

(a) costs attributable to the portion of Keppel FELS' claim for which Keppel FELS had a possessory lien should be accorded the same priority as limb (c) of [6] above ("the Disputed Costs");

(b) costs attributable to the portion of Keppel FELS' claim for which there was no possessory lien should be accorded the same priority as limb (e) of [6] above; and

(c) an appropriate apportionment would be 40-60, with the result that 40% of the Costs of the Action should be accorded the same priority as limb (c) of [6] above, while the remaining 60% of the Costs of the Action should be accorded the same priority as limb (e) of [6] above.

9 Songa Offshore objected to the Costs of the Action being prioritised in this manner. Instead, Songa Offshore submitted that all of the Costs of the Action should be accorded the same priority as limb (e) of [6] above. Since Songa Offshore's judgment debt (limb (d) of [6] above) exceeded the amount that would remain from the sale proceeds after payment out of Keppel FELS' judgment debt in respect of the portion of its claim for which it had a possessory lien (limb (c) of [6] above), the practical effect of giving all of the Costs of the Action the same priority as limb (e) of [6] above was that Keppel FELS would not receive a single cent of the Costs of the Action.

10 As for the quantum of apportionment, Songa Offshore accepted that, if the court were to find in favour of Keppel FELS on the issue of priority as set out at [8(a)–8(b)] above, the 40-60 apportionment proposed by Keppel FELS at [8(c)] above would be reasonable.

Parties' submissions

11 Keppel FELS referred to Nigel Meeson & John A Kimbell, *Admiralty Jurisdiction and Practice*

(Informa, 4th Ed, 2011) ("*Meeson & Kimbell*"), which contained the following passage (at para 6.78):

The costs of the action will normally be afforded the same priority as the substantive claim out of which they arise, except in so far as they have priority as being the costs of the producer of the fund.

12 The authority cited in *Meeson & Kimbell* for the foregoing proposition was *The "Margaret"* (1835) 3 Hag Adm 238 ("*The Margaret*"), a decision of the High Court of Admiralty of England concerning a claim for crew's wages, where the court held, at 240, that:

The ship is liable for wages and costs. The costs are as much due as the *sors principalis*.

13 Although *The Margaret* did not involve competing claimants with claims of different priorities, it was cited and followed by the Federal Court of Australia in *Patrick Stevedores No 2 Pty Ltd and others v Proceeds of Sale of the Vessel MV Skulptor Konenkov* (1997) 144 ALR 394, which was a case involving competing claims of different priorities. In that case, after dealing with the validity and priority of various claims, Sheppard J remarked, at 404, that:

There is a question in relation to costs. Although costs are discretionary, the general rule is that in actions against the proceeds of sale of property arrested in rem, *costs have the same priority as the claim in respect of which they have been incurred*: see *The Margaret* (1835) 3 Hag Adm 238 and *The William F Safford* (1860) Lush 69 and also Meeson, supra, p 167. I propose to treat costs in accordance with the ordinary rule. There was no submission that I should do otherwise. [emphasis added]

14 The case of *The "William F Safford"* (1860) Lush 69 referred to in the above quotation was a decision of the Right Honourable Dr Lushington in the High Court of Admiralty of England. After dealing with the priorities of various claims against the arrested ship, Dr Lushington held, at 71, that:

The costs in each action will be paid with the principal sums in the order I have named.

15 Songa Offshore did not dispute that the foregoing cases stood for the general rule that costs incurred in enforcing a particular maritime claim should enjoy the same priority as the substantive claim. Instead, Songa Offshore submitted that the proper application of this rule should result in the Disputed Costs being afforded only the priority of a statutory lien. Songa Offshore put forward two lines of arguments in support of this submission.

16 First, the common law possessory lien is a passive remedy which confers no right of action. There is no legal provision that permits the invocation of the admiralty jurisdiction of the High Court for the purpose of enforcing a possessory lien. Where a maritime claimant who enjoys a possessory lien wishes to invoke the admiralty jurisdiction of the court to enforce his claim, he would need to commence an action to enforce the underlying maritime claim by invoking a statutory right of action *in rem*. Therefore, Songa Offshore submitted that any costs incurred in such an action should be classified as costs incurred to enforce a statutory lien, and not as costs incurred to enforce a possessory lien. Consequently, such costs should only be afforded the priority of a statutory lien, and not the priority of a possessory lien.

17 Secondly, the common law possessory lien is accorded a high priority by the admiralty court as part of the admiralty court's undertaking to protect the possessory lien in return for the possessory lien holder giving up possession of the vessel. This is so that a judicial sale can be conducted for the benefit of all parties having *in rem* claims against the vessel. This undertaking extends only to claims

properly coming within the scope of the possessory lien and no more. The courts have been strict about what claims come within the scope of a possessory lien. For example, in *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338, dock charges incurred by a shipwright did not fall within the scope of the shipwright's possessory lien over the vessel, even though they were reasonably incurred to keep the vessel under the shipwright's detention to safeguard his possessory lien. In this regard, Songa Offshore submitted that costs incurred in invoking a statutory right of action *in rem* in respect of a claim over which a possessory lien also subsists do not come within the scope of the possessory lien.

18 Songa Offshore also pointed out that none of the three cases cited at [12]–[14] above concerned claims protected by possessory liens. Against this, Keppel FELS cited *The "Honey I"* [1987] SLR(R) 239 (*"The Honey I"*), a case involving possessory liens. In that case, Singapore Slipway & Engineering Co (*"Singapore Slipway"*) commenced an *in rem* action to arrest the vessel *Honey I* to recover the sum of \$24,000 for repair works (*"ADM 676/1984"*). The vessel was arrested while she was in the possession of Singmarine Shipyard (Pte) Ltd (*"Singmarine Shipyard"*), who claimed a possessory lien over the vessel in respect of its repair bills totalling \$1,681,768. After the vessel was arrested, Singmarine Shipyard commenced a separate *in rem* action against the vessel (*"ADM 774/1985"*) and obtained judgment in default of appearance with costs. There were also other claimants, such as Robina Credit Ltd who held a mortgage over the vessel and Hutton (Plant and Spares) Ltd who had supplied necessaries to the vessel.

19 The vessel was sold by the court for the sum of \$518,586. Singmarine Shipyard, as plaintiff in ADM 774/1985 and intervener in ADM 676/1984, applied in ADM 676/1984 for, and obtained, the following orders (*The Honey I* at [2]; [14]):

1 That the priorities of the various claimants against the balance of the proceeds of sale of the ship 'HONEY I' ex 'CASSIO' amounting to \$518,586 be determined in the following order:

(a) The abovenamed plaintiffs' taxed costs until the date of sale of the vessel in this action.

(b) The taxed costs of Singmarine Shipyard (Pte) Ltd and their claim in [ADM 774/1985].

2 That a sum of \$40,000 estimated to cover the aforesaid taxed costs be retained pending taxation.

3 That there be payment out to the interveners, Singmarine Shipyard (Pte) Ltd, the balance sum of \$478,586 in accordance with the aforesaid order for priority.

4 That the costs of and incidental to this motion be taxed and paid out of the proceeds of sale to the interveners, Singmarine Shipyard (Pte) Ltd, in priority to all other claims.

20 Keppel FELS highlighted that Prayer 1(b) combined Singmarine Shipyard's costs in ADM 774/1985 with its substantive claim and accorded the same priority to both the costs and the claim. Since an order in terms was granted for Prayer 1(b), Keppel FELS submitted that *The Honey I* supported its position.

21 Songa Offshore submitted that the issue in dispute in *The Honey I* was Singmarine Shipyard's entitlement to a possessory lien, and not the priority to be accorded to Singmarine Shipyard's costs. As Singmarine Shipyard's claim far exceeded the available proceeds of sale, there would be nothing left to pay either Singmarine Shipyard's costs or the claims of the other claimants which ranked lower

in priority than Singmarine Shipyard. Therefore, the issue of Singmarine Shipyard's costs simply did not arise for consideration. *The Honey I* therefore could not be regarded as authority supporting Keppel FELS' position.

Analysis

22 It is well settled that, *as a general rule*, in actions against the proceeds of sale of property arrested *in rem*, costs have the same priority as the claim in respect of which they have been incurred. This general rule is supported by the authorities cited at [11]–[14] above. Neither party disputed the correctness of this general rule. The dispute between the parties was whether the proper application of this general rule should result in the Disputed Costs being accorded the same priority as a possessory lien or a statutory lien.

23 In this regard, I agreed with Songa Offshore that the three cases cited by Keppel FELS at [12]–[14] above threw no light on this issue in so far as none of them dealt with a claim protected by a possessory lien. As for *The Honey I*, while it provided some support for Keppel FELS' position given that it was a case concerning possessory liens, I agreed with Songa Offshore that it was not a strong authority for present purposes because the issue of the priority of the possessory lien holder's costs was not argued and did not arise for consideration. But *The Honey I* was not alone in according the costs of a possessory lien holder the same priority as the possessory lien.

24 In *The Immacolata Concezione* (1883) 9 PD 37 ("*The Immacolata Concezione*"), besides the crew claiming a wage maritime lien, there were three parties claiming to be entitled to possessory liens:

(a) Alfred Carter ("Carter"), who was a shipwright and the owner of the dock where the vessel was arrested. His entitlement to a possessory lien over the vessel was not disputed.

(b) Seaward & Co, who was engaged by the shipowner to undertake part of the ship repair together with Carter. Seaward & Co claimed that it had an agreement with Carter that Carter would protect Seaward & Co's possessory lien such that both their claims would rank equally.

(c) Robertson & Co, who claimed a possessory lien over certain sails.

25 Butt J held, at 42–43, that he would:

... give priority to Carter over all the other claimants, except the mariners, so far as regards the claim of the latter for wages up to the 2nd of April ... With regard to the rest of the wages claim it will rank after Carter's claim, and also after that of Seaward & Co., if on a reference back of the special case it is shewn that the latter are by arrangement entitled to rank equally with Carter. ... As regards Robertson & Co., the sailmakers, if they had the sails in their possession and were deprived of them by the marshal, their rights must be protected, and they must rank before Carter and Seaward & Co. *As regards the costs of these claims, in each action the decree will include costs, and in each case, also, they must rank with the claim*, and in the wages action they must rank with what I may term the best part of the claim, that is, for wages dues to the 2nd of April. I will now only add that Seaward & Co.'s claim must be referred back to the registrar, and it must be found whether there was an arrangement between [the shipowner], Seaward & Co., and Carter that Carter was to protect Seaward & Co.'s lien. If he was to do so, then the decree will be that Seaward & Co. are to rank with Carter, and if not, then they must be postponed to Carter. [emphasis added]

Thus, when Butt J issued the foregoing judgment, it was still unclear if Seaward & Co and Robertson & Co had possessory liens. These questions were referred back to the registrar by Butt J for fact-finding. Yet, in spite of this uncertainty, Butt J held that the costs of each claim "must rank with the claim".

26 The implications of this holding were as follows. If Seaward & Co succeeded in establishing its entitlement to a possessory lien, its costs would be accorded the priority of a possessory lien to rank together with Carter's costs. Otherwise, Seaward & Co's claim would have priority only as a statutory lien and its costs would also rank accordingly. Similarly, if Robertson & Co were to succeed in establishing its possessory lien, its costs would rank ahead of Carter's and Seaward & Co's claims. In other words, *The Immacolata Concezione* supports Keppel FELS's position that the existence of a possessory lien in respect of a claim would affect the priority to be given to the costs incurred in enforcing that claim in an admiralty action *in rem*. Had Songa Offshore's submission at [16]–[17] above been correct, Butt J would not have held that costs must rank with the respective claims. Instead, he would have held that the costs of Carter, Seaward & Co and Robertson & Co should be accorded only the priority of a statutory lien, to rank *pari passu inter se* irrespective of whether any of them succeeded in establishing a possessory lien.

27 For the foregoing reasons, I accepted that the authorities support Keppel FELS' position. Moreover, quite apart from the foregoing authorities, Keppel FELS' position is also supported by reference to first principles. In this regard, a key principle is that the determination of priority is an equitable jurisdiction. Consequently, the admiralty court has adopted a broad discretionary approach by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of each case (D R Thomas, *Maritime Liens* (Stevens & Sons, 1980) at para 418, cited with approval in *The Ruta* [2000] 1 Lloyd's Rep 359 at [21]).

28 As for the admiralty court's approach towards the common law possessory lien, it is useful to start with the following observation by Phillimore J in *The Tergeste* [1903] P 26 ("*The Tergeste*") at 32–33:

The view which the Admiralty Court took with regard to conflicting claims by shipwrights having a possessory common law lien, and claims which have been sustained by process in the Admiralty Court, has been well established, and has been accepted by this Division of the High Court of Justice. It is that it is the duty of the material man not to contend with the Admiralty marshal; to surrender the ship to the officer of the Court, and let the officer of the Court, under the order of the Court, remove and sell her; but when he has done that, *the Court undertakes that he shall be protected, and that he shall be put exactly in the same position as if he had not surrendered the ship to the marshal.* [emphasis added]

The possessory lien holder thus surrenders the ship to the admiralty court in return for an undertaking from the admiralty court to put him "exactly in the same position as if he had not surrendered the ship". This raises the question of what the position of a possessory lien holder would have been if he had not surrendered the ship.

29 As noted in *Hammonds v Barclay* (1802) 2 East 227 at 235, the possessory lien is "a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied". In other words, a possessory lien holder may retain possession of the *res* until he has been paid what is due to him, in return for its release. Since the possessory lien holder need not initiate legal proceedings to enforce the possessory lien, such payment for the release of the *res* would be payment in full (*ie*, without deduction for legal costs and without the lien

holder incurring any legal costs to enforce the underlying claim protected by the possessory lien). However, once the possessory lien holder surrenders the *res* to the admiralty court, he would have to commence an *in rem* action against the *res*, in order to obtain a judgment so that he could participate in the distribution of the proceeds of the judicial sale of the *res*. It therefore stands to reason that, in order to make good the admiralty court's undertaking to put the possessory lien holder "exactly in the same position as if he had not surrendered the ship", the admiralty court ought also to protect the possessory lien holder's costs incurred in the said *in rem* action to the same extent as the possessory lien itself.

30 Therefore, reasoning from first principles, I decided that considerations of justice and equity required the court to accord the Disputed Costs the same priority as the portion of Keppel FELS' claim for which it had a possessory lien.

31 Finally, I was fortified in the foregoing conclusion by the fact that a similar result would obtain pursuant to another provision in the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") which similarly provides for the surrender of possession by a possessory lien holder in return for protection by the court of his possessory lien. O 29 r 6 of the ROC provides:

Recovery of movable property subject to lien, etc. (O. 29, r. 6)

6. Where the plaintiff, or the defendant by way of counterclaim, claims the recovery of specific movable property and the party from whom recovery is sought does not dispute the title of the party making the claim but *claims to be entitled to retain the property by virtue of a lien or otherwise as security for any sum of money*, the Court, at any time after the claim to be so entitled appears from the pleadings (if any) or by affidavit or otherwise to its satisfaction, may order that the party seeking to recover the property be at liberty to *pay into Court, to abide the event of the action, the amount of money in respect of which the security is claimed and such further sum (if any) for interest and costs* as the Court may direct and that, upon such payment being made, the property claimed be given up to the party claiming it, but subject to the provisions of the Exchange Control Act (Cap. 99).

[emphasis added]

Under this provision, the court may order a possessory lien holder to surrender the property in question to its owner, upon the owner paying into court the sum claimed by the possessory lien holder together with interest and costs. This situation is similar to that explained at [28] above, where the court requires a possessory lien holder to surrender possession while undertaking to put the possessory lien holder in the same position as if he had not surrendered possession. The differences between the two processes are:

- (a) in an admiralty *in rem* action, possession is surrendered to the Sheriff, while under O 29 r 6, possession is surrendered to the owner; and
- (b) in an admiralty *in rem* action, the interest of the possessory lien holder is protected by transferring the possessory lien to the proceeds of judicial sale, while under O 29 r 6, the interest of the possessory lien holder is protected by the owner paying the claimed amount into court.

32 Under O 29 r 6 of the ROC, the sum to be paid into court by the owner includes an amount to secure the possessory lien holder's costs of establishing his claim in the action. The rationale appears to be that, in order to put the possessory lien holder in the same position as if he had not surrendered possession, he must be made whole for costs he would not otherwise incur to establish his claim, had

the owner simply paid his claim in full to secure the surrender of the property. In my view, similar considerations apply to the treatment of the common law possessory lien in the context of maritime claims, and therefore similar results should obtain as a matter of justice and equity.

Conclusion

33 For the reasons given above, I considered it just and equitable, as well as principled, to accord the Disputed Costs the same priority as the portion of Keppel FELS' claim for which it had a possessory lien. Consequently, I ordered 40% of the Costs of the Action to rank in priority together with limb (c) of [6] above, and 60% of the Costs of the Action to rank in priority together with limb (e) of [6] above.

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