

The “Swiber Concorde”
[2018] SGHC 197

Case Number : Admiralty in Rem No 47 of 2017 (Summons No 3077 of 2018)
Decision Date : 07 September 2018
Tribunal/Court : High Court
Coram : Pang Khang Chau JC
Counsel Name(s) : Song Swee Lian Corina and Parveen Kaur (Allen & Gledhill LLP) for the plaintiff;
James Low for the Sheriff.
Parties : United Overseas Bank Limited — Owner of the vessel "SWIBER CONCORDE"

Admiralty and Shipping – practice and procedure of action in rem – payment out of proceeds of sale

7 September 2018

Pang Khang Chau JC:

Introduction

1 Where an arrested vessel is sold successfully by the Sheriff following an earlier abortive sale, should the deposit forfeited by the Sheriff in the earlier abortive sale be treated as part of the proceeds of sale of the vessel and be paid out to claimants together with the proceeds of sale? In the present case, I held that it should. I now provide my reasons.

Background

2 The Plaintiff is the mortgagee of the vessel “Swiber Concorde” (“the Vessel”). To recover the loan secured over the Vessel, the Plaintiff commenced admiralty *in rem* proceedings against the Vessel, caused the Vessel to be arrested, obtained judgment in default of appearance, and obtained an order for appraisal and sale of the Vessel and her bunkers. Pursuant to the said order for appraisal and sale, the Sheriff conducted two rounds of bidding at which all bids received were below the appraised value of the Vessel. The Plaintiff then obtained the court’s leave on 1 November 2017 for the Vessel to be sold below its appraised value and on the Sheriff’s usual terms and conditions of sale (“the Conditions of Sale”) to Valentine Maritime Ltd (“VML”), who submitted the highest bid in the second round of bidding.

Forfeiture of bid deposit

3 On 3 November 2017, the Sheriff wrote to VML to accept its bid of USD 5,000,100 for the Vessel. In accordance with the Conditions of Sale, VML was required to pay the balance of the 10% deposit of the purchase price (*less the USD 50,000 deposit already paid to the Sheriff by VML when submitting its bid*) by 8 November 2017, and pay the balance 90% of the purchase price plus the value of the bunkers by 14 November 2017. As VML failed to make the said payments, reminders to VML were sent on 10 November 2017 and 15 November 2017. On 20 November 2017, VML informed the Sheriff that it had decided not to proceed with the purchase of the Vessel, and requested the Sheriff to cancel the sale and return the USD 50,000 deposit. The Sheriff replied on 28 November 2017 to accept VML’s repudiation of the sale contract and inform VML that its deposit had been forfeited pursuant to cl 16 of the Conditions of Sale.

Completion of judicial sale of the Vessel

4 A third round of bidding was then conducted, pursuant to which the Vessel was sold to Thien Nam Offshore Services Joint Stock Company ("Thien Nam") for USD 4,599,769 after the court discharged the earlier order for sale to VML and granted leave for the Vessel to be sold below its appraised value to Thien Nam. The sale was completed on 31 January 2018 with the proceeds of sale paid into court on the same day.

Application for payment out of proceeds of sale

5 Following the expiry of the 90-day moratorium for determination of priority or validity of claims (imposed by the court order for appraisalment and sale of the Vessel), the Plaintiff applied to court for

a determination of priorities and payment out against the fund, including interest earned thereon, representing the *proceeds of sale* of the ship or vessel "SWIBER CONCORDE" (the "**Vessel**") and the bunkers lying on board, and held in Court to the credit of these proceedings ...

[**emphasis in original**; *emphasis added*]

6 At the hearing of the application, I observed that the Sheriff's final statement of account distinguished between:

(a) the "proceeds of sale" of USD 4,599,769 for the Vessel and USD 11,683 for the bunkers paid by the buyer, Thien Nam, which was paid into court and held by the Account-General of Singapore; and

(b) the deposit of USD 50,000 furnished by VML, which was held by the Sheriff's office.

I therefore asked for submissions on whether the deposit furnished by VML should be paid out together with the proceeds of sale. One issue I wanted addressed was, having regard to the Sheriff's position as a public officer, whether the Sheriff's forfeiture of the deposit had the effect of forfeiting it to the State (as opposed to forfeiting it to the benefit of persons having a claim to the proceeds of sale).

7 Both the Plaintiff and the Sheriff highlighted to me that the High Court had in *The "LCT Maadhooni"* Admiralty *in Rem* No 111 of 2015 (23 November 2015) also agreed to treat the forfeited deposit from an earlier abortive sale as part of the proceeds of sale of the arrested vessel. However, no written grounds were issued in that case. Neither the Plaintiff nor the Sheriff was able to point to any published decisions, local or foreign, which dealt directly with the point arising in the present case.

Analysis

8 VML paid the deposit of USD 50,000 pursuant to cl 8 of the Conditions of Sale, which provides for the purchase price for the Vessel to be paid in three tranches as follows:

(a) a deposit of USD 50,000 at the time of submission of bid;

(b) 10% of the purchase price (less the USD 50,000 deposit referred to above) within three working days after the formation of the sale contract; and

- (c) the balance 90% of the purchase price within five working days thereafter.

Unlike the second and third payments, which are payable only by the successful bidder and only *after* the sale contract is awarded, the USD 50,000 deposit is paid by every bidder and is paid *before* the award of the sale contract. Once the sale contract is awarded to the successful bidder (hereinafter "the Buyer"), the Sheriff will return to each unsuccessful bidder the USD 50,000 deposit it had previously paid. In relation to the Buyer, its USD 50,000 deposit will be deployed towards defraying part of the purchase price.

9 Where a Buyer decides not to proceed with the purchase of the vessel after the sale contract has been awarded to it, this would constitute a breach of the sale contract by the Buyer. In this situation, cl 16 of the Conditions of Sale provides:

DEFAULT OF BUYER

16 If the Buyer fails to or does not promptly make any one of the payments referred to in Clause 8 or in any other respect whatsoever breaches any terms or conditions herein, the Buyer shall be deemed to be in default and the Sheriff, his successors or assigns, may exercise any of all of the following rights –

- (a) rescind or accept the Buyer's repudiation of the sale by notice in writing;
- (b) forfeit all payments made by the Buyer pursuant to Clause 8;
- (c) resell the Vessel;
- (d) recover from the Buyer all claims, losses, damages, costs and expenses whatsoever resulting or arising from the Buyer's default including, in the event of any resale, any loss, costs and expenses whatsoever thereby suffered or incurred. It is expressly provided that in addition to the Sheriff, his successors or assigns, Claimants in rem and/or the owner of the Vessel may, in their own right, enforce and seek the remedies under this Clause 16(d); and/or
- (e) retain the whole or any part of any further payments made by the Buyer in addition to that referred to in Clause 8 in satisfaction or part satisfaction of the right of recovery pursuant to Clause 16(d) above without prejudice to any other means of enforcing such right.

Nothing contained herein shall restrict limit or prejudice any right power or remedy in law or equity of the Sheriff, his successors or assigns in respect of such default by the Buyer.

10 According to cl 16(b):

- (a) if the Buyer backs out after the award of the sale contract but before paying the 10% of the purchase price referred to at [8(b)] above, the Sheriff may forfeit the USD 50,000 deposit paid at the time the bid was submitted; and
- (b) if the Buyer backs out after paying the 10% of the purchase price referred to at [8(b)] above but before paying the balance 90% of the purchase price, the Sheriff may forfeit the 10% of the purchase price already paid by the Buyer.

11 How should the sums forfeited pursuant to cl 16(b) of the Conditions of Sale be applied by the Sheriff? Since the power to forfeit the said sums are conferred by the Conditions of Sale, the natural starting point would be to seek the answer in the Conditions of Sale. However, an examination of the Conditions of Sale reveals that there are no express provisions on how the Sheriff should deal with the forfeited sums or on what the purpose of the USD 50,000 deposit is.

12 Since cl 16(b) is a term of the sale contract made *between the Sheriff and the Buyer*, can it be argued that the forfeited sums are to be retained by the Sheriff for the benefit of the Sheriff's office or, for that matter, for the benefit of the State? I do not think so.

13 First, although the Sheriff is a public officer, the Sheriff does not contract on behalf of the State when he enters into a contract for the sale of an arrested vessel. This is because title to an arrested vessel does not vest in the State upon arrest, but remains with the owner of the vessel until the completion of any judicial sale by the Sheriff. This is implicit in the observation in *Elinoil-Hellenic Petroleum Co SA v Wee Ramayah & Partners* [1999] 1 SLR(R) 977 at [41] – [44] that a private sale by the owner of an arrested vessel after the court has ordered the sale of the vessel is not necessarily invalid even though it could amount to a contempt of court (*per* Chao Hick Tin J (as he then was)).

14 Secondly, in conducting the judicial sale of an arrested vessel, the Sheriff acts under the court's commission for appraisalment and sale, which provides for the Sheriff to sell the vessel for the highest price that can be obtained and, upon completion of the sale, to pay the proceeds into court. This commission is to be carried out for the benefit of all parties interested in the arrested vessel, which would include persons having *in rem* claims against the vessel as well as the owner of the vessel ("the Interested Parties") - see *The "Turtle Bay"* [2013] 4 SLR 615 at [17] and [19]. It therefore follows that, when the Sheriff forfeits any sums from the Buyer in the course of carrying out a judicial sale, this is done for the benefit of the Interested Parties.

15 Further support for this view may be found in cl 16(d) of the Conditions of Sale which provides that claimants *in rem* and the vessel owner may, in their own right, enforce and seek the remedies provided for under the said clause. In my opinion, this lends support to the view that the remedies available to the Sheriff under cl 16 in the event the Buyer defaults are there for the benefit of the Interested Parties.

Conclusion

16 For the foregoing reasons, I conclude that sums forfeited under cl 16(b) of the Conditions of Sale are forfeited by the Sheriff for the benefit of the Interested Parties.

17 I therefore ordered that the deposit forfeited in the present case by the Sheriff from the earlier abortive sale of the Vessel to VML should be treated as part of the proceeds of sale of the Vessel. As there were no other claimants before the court other than the Plaintiff, and as the judgment sum exceeded the aggregate of the said proceeds of sale and the forfeited deposit, I ordered that the forfeited deposit be paid out to the Plaintiff in the same manner as the said proceeds of sale.