The “Long Bright”
[2018] SGHC 216

Case Number	: Admiralty in Rem No 31 of 2018 (Summons No 3828 of 2018)
Decision Date	: 03 October 2018
Tribunal/Court	: High Court
Coram	: Pang Khang Chau JC
Counsel Name(s)	: Alvin Ong Chee Keong and Mohan s/o Ramamirtha Subbaraman (Resource Law LLC) for the plaintiff; Song Swee Lian Corina and Parveen Kaur (Allen & Gledhill LLP) for the 1st intervener; V Bala (Rajah & Tann Singapore LLP) for the 2nd to 11th interveners; Tan Thye Hoe Timothy (AsiaLegal LLC) for the caveator; Paul Tan for the Sheriff.
Parties	: DP Shipbuilding and Engineering Pte Ltd — Owner and/or Demise Charterer of the vessel "LONG BRIGHT" — Hangzhou Chuantao Investment Management Partnership (Limited Partnership) — Wu Hao and 9 others — SAL Shipping Pte Ltd

Admiralty and Shipping – practice and procedure of action in rem – judicial sale of vessel – sale pendente lite

Admiralty and Shipping – practice and procedure of action in rem – release

3 October 2018

Pang Khang Chau JC:

1 After the court has ordered the sale of an arrested vessel and after bids from potential buyers have been received by the Sheriff, is a plaintiff entitled to release the vessel and stop the judicial sale as a matter of right? I held that a plaintiff is not entitled to do so *as of right*, and must apply to the court for a discharge of the order of sale before releasing the vessel. Nevertheless, on the facts of the present case, I found that it was appropriate to exercise my discretion to discharge the sale order. I now provide my reasons.

The parties

2 The plaintiff’s claim against the owner of the vessel “Long Bright” (“the Vessel”) was for wharfage and related charges incurred by the Vessel at the plaintiff’s shipyard amounting to approximately S$ 300,000. The 1st intervener is the mortgagee of the Vessel. Its claim against the Vessel is for an outstanding loan of RMB 200 million. The 2nd to 11th interveners are members of the crew of the Vessel. They claim unpaid wages amounting to approximately USD 295,000. There were two other caveators - SAL Shipping Pte Ltd (“SAL Shipping”) and Transatlantica Commodities S.A. (“Transatlantica”). SAL Shipping is the local agent for the Vessel. Its claim is in the region of S$ 50,000. I have no information concerning Transatlantica’s claim as it had withdrawn its caveat and was not present at the hearing before me. The defendant did not enter appearance in the present action.

Procedural history

3 After issuing the present proceedings and arresting the Vessel, the plaintiff applied for judgment in default of appearance and an order for appraisement and sale of the Vessel. At the

hearing on 25 June 2018 before Belinda Ang J, the plaintiff informed the court that, as the 1st intervener planned to file a defence to challenge the plaintiff's claim, the plaintiff would withdraw its application for judgment in default and seek only an order for sale *pendente lite*. The 1st intervener informed the court that, while it supported the application for sale *pendente lite*, it was disputing the plaintiff's claim that it had a possessory lien (which would have ranked in priority over the 1st intervener's claim). The 1st intervener may therefore be applying to strike out the plaintiff's claim and take up a claim of wrongful arrest against the plaintiff.

4 After the court pointed out that it would be inconsistent for the 1st intervener to claim wrongful arrest while supporting the sale *pendente lite*, the 1st intervener sought a one-week adjournment to take instructions. The adjournment was granted on the condition that the costs and expenses of keeping the Vessel under arrest during the one-week adjournment were to be borne by the 1st intervener.

5 At the resumed hearing on 2 July 2018 before Belinda Ang J, parties informed the court that the 1st intervener no longer wished to set aside the arrest. The 1st intervener also did not object to the plaintiff's application for sale *pendente lite.* The court proceeded to grant the order for sale of the Vessel *pendente lite*. The plaintiff filed the commission for appraisement and sale on 9 July 2018, pursuant to which the Sheriff advertised the Vessel for sale on 6 August 2018. The deadline for submission of bids was set at 3:00 pm on Monday 20 August 2018.

6 On Saturday 18 August 2018, the plaintiff filed an application for discharge of the sale order and for release of the Vessel. The supporting affidavit for the application explained that:

(a) the plaintiff wished to release the Vessel and discontinue the present action as it had reached a settlement with the 1st intervener on 17 August 2018; and

(b) the 1st intervener supported the application as it planned to commence a separate *in rem* action to arrest the Vessel for the 1st intervener's claim.

7 By the time the application was accepted by the Registry for filing, the deadline for submission of bids had passed, and five potential buyers had submitted bids for the Vessel. The bids remained unopened pending the disposal of the application.

8 I heard the application on 3 September 2018 and gave my decision on 4 September 2018.

Parties' submissions

The plaintiff's submissions

9 In summary, the plaintiff's submissions were:

(a) Following the settlement of the plaintiff's claim by the 1st intervener, the plaintiff no longer had any claim against the Vessel or the defendant, or any interest in the Vessel's continued arrest;

(b) Where a plaintiff, as opposed to a defendant shipowner, seeks the release of an arrested vessel following the settlement of its claim, the release must issue as of right. There was no explicit requirement for a plaintiff to apply for a discharge of the order for sale of the vessel as a condition for release of the vessel;

(c) The considerations discussed in *The "Sahand" and other applications* [2011] 2 SLR 1093 ("*The "Sahand""*) at [17] and *The "Acrux"* [1961] 1 Lloyd's Rep 471 (at 472) did not apply here as those cases involved applications for discharge of sale orders and release of vessels by defendant shipowners without the plaintiffs' consent. There would be a critical difference if release was sought by the plaintiffs instead. *Therefore, the **only** concern in the present case was whether the plaintiff's claim has been settled, following which the Vessel **must** be released*;

(d) Since the plaintiff was entitled to discontinue the present action without leave (given that no defence had yet been filed), it followed that the sale order could no longer operate and the sale process could no longer continue once the plaintiff filed a notice of discontinuance. By logical extension, as long as the execution of the sale order had not been completed, the release of the Vessel could not be subject to or be conditional upon the sale order being discharged;

(e) In any event, even if the discharge of the sale order was a necessary condition for release of the Vessel, the sale order *had* to be discharged as the plaintiff no longer had a valid *in rem* claim against the Vessel or the defendant;

(f) Granting the plaintiff's application would not prejudice the rights of other creditors. As the 1st intervener planned to re-arrest the Vessel, the Vessel would remain within jurisdiction, which meant the rights of the remaining claimants would be protected as they could file caveats and intervene in the action under which the 1st intervener's re-arrest was effected;

(g) Conversely, dismissal of the application would result in severe prejudice to the plaintiff as it would be effectively compelled to bear the costs and risks involved in the completion of the sale process for the benefit of the other creditors even though it no longer had any interest in the Vessel; and

(h) The plaintiff was also concerned that its inability to release the Vessel despite not having any basis for maintaining the arrest could expose the plaintiff to a claim for wrongful continuation of arrest or abuse of process of court.

The 1st intervener's submission

10 The 1st intervener supported the application because it was concerned that the highest price may not be obtained in the present circumstances. The 1st intervener explained that, after the plaintiff filed the commission for appraisement and sale, it tried to help drum up interest in the sale of the Vessel, in order to increase the chances of obtaining a higher sale price. It even wrote to the Sheriff to request that the advertisement period be extended to six weeks (from the usual two weeks), to allow sufficient time for three potential buyers whom the 1st intervener was in talks with to put in a bid. The Sheriff turned down this request because no details of the "alleged potential bidders" were provided by the 1st intervener to the Sheriff. The 1st intervener subsequently explained to the court that it was not at liberty to disclose the identities of the potential buyers due to commercial confidentiality. As a result, the three potential buyers were not able to bid on the Vessel within the two-week advertisement period.

11 The 1st intervener also discovered after the commission for appraisement and sale had been filed that the Vessel was out of class. As a vessel which is retained in class is likely to fetch a higher price, the 1st intervener would like to have the opportunity to conduct a cost-benefit analysis of putting the Vessel back in class before the Vessel was advertised again for the sale.

12 The 1st intervener explained that, as the value of the plaintiff's claim was only a small fraction

of the value of the Vessel while the value of 1st intervener's claim exceeded the value of the Vessel, the 1st Intervener would suffer prejudice if the Vessel was not sold at the highest price which could be obtained while the plaintiff would not. This was because, given its relatively small value, it was clear that the plaintiff's claim could be satisfied in full from the proceeds of sale of the Vessel even if the Vessel is not sold at a good price (assuming the plaintiff was right that it had a possessory lien which ranked in priority over the 1st intervener's claim). For this reason, while it may not have been important to the plaintiff whether the sale process it initiated would obtain the highest price, it is a matter of great importance to the 1st intervener. To the extent that the 2nd to 11th interveners were opposed to the discharge of the sale order, the same points may be made in relation to the 2nd to 11th interveners' claims, which were relatively small in value and ranked in priority to the 1st intervener's claim.

13 For the foregoing reasons, the 1st intervener supported the discharge of the existing sale order so that the Vessel could be re-advertised for sale after it was re-arrested in the 1st intervener's own *in rem* action against the Vessel. This would have given other potential buyers the time and opportunity to put in a bid and also given the 1st intervener the time and opportunity to consider whether to put the Vessel back in class before it was re-advertised for sale.

14 In terms of legal submissions, the 1st intervener relied on *The "Sahand"* for the proposition that, once a plaintiff's claim was settled, there was no further cause for the vessel to be sold, and this would by itself be sufficient reason for the discharge of the sale order.

The 2nd to 11th interveners' submissions

15 The 2nd to 11th interveners' claim, being for unpaid crew wages, rank higher in priority than the 1st intervener's claim as mortgagee. In summary, the 2nd to 11th interveners' submissions were:

(a) In *The "Sahand"*, there were no other claimants aside from the plaintiff. In the present case, there were other claimants besides the plaintiff, and the 1st intervener had settled only the plaintiff's claim. The present case was therefore more akin to *The "Acrux"* where the court declined to discharge the sale order and release the vessel because the amount which the defendant offered as security could only meet the claims of some but not all of the claimants.

(b) The settlement of the plaintiff's claim by the 1st intervener (as opposed to the settlement of the plaintiff's claim by the defendant) did not extinguish the plaintiff's claim against the defendant. Therefore, the plaintiff's and 1st intervener's submissions, insofar as they were grounded in the extinguishment of the plaintiff's claim against the defendant, were invalid.

(c) The 2nd to 11th interveners would be prejudiced by the significant delay in payment out as the judicial sale process would have to restart all over again after the 1st intervener's re-arrest of the Vessel, and there may be further wasting of the Vessel.

SAL Shipping's submissions

16 In order to obtain a more complete picture of the various claimants' interests, I allowed SAL Shipping to address the court even though it had not applied to intervene in the present action. SAL Shipping's claim ranks lower in priority than the 1st intervener's claim. It submitted that:

(a) The sale order would need to be discharged before the plaintiff could release the Vessel.

(b) It was not clear that settlement of the plaintiff's claim by the 1st intervener would have

the effect of extinguishing the plaintiff's claim against the defendant.

(c) It would be appropriate to discharge the sale order as it did not appear that the caveators and interveners had the right to insist on the completion of the existing sale process.

Analysis

Preliminary points

17 As a preliminary point, I questioned the plaintiff's assertion that a settlement between the plaintiff and the 1st intervener extinguishes the plaintiff's claim against the defendant. As the plaintiff and 1st intervener chose not to put the terms of the settlement in evidence, my remarks are made without the benefit of knowing what the terms of the settlement are. I will therefore keep my remarks on this issue at the level of general observations.

18 It would appear to me that a settlement agreement between the plaintiff and the 1st intervener is binding only as between the plaintiff and the 1st intervener, and not binding as between the plaintiff and the defendant. At most, it amounts to a promise by the plaintiff to the 1st intervener that the plaintiff would no longer pursue its claim against the defendant. If the defendant is not a party to the settlement agreement and thus cannot enforce it, it is difficult to see how such an agreement would extinguish the plaintiff's claim against the defendant.

19 The 1st intervener submitted that the role of an intervener in an *in rem* action allows it to set up any defence against the plaintiff's claim which the defendant shipowner could have raised. In my view, that is not the same as the ability to compromise claims on the defendant's behalf. If the intervener were to pursue its defence to judgment, the court could either grant judgment in favour of the intervener and dismiss the plaintiff's claim, or grant judgment in favour of the plaintiff and allow the plaintiff's claim to be paid from the proceeds of sale of the arrested vessel. In neither case would the intervener need to pay the plaintiff's claim from its own pocket. (The intervener may be liable for costs if the court upholds the plaintiff's claim, but that is not the same as making the intervener pay the plaintiff's entire claim personally.)

20 A relevant point to note is that neither the plaintiff nor the 1st intervener had asked the court to record a judgment dismissing the plaintiff's claim as a consequence of the settlement they had reached.

21 An intervener who pays off the plaintiff out of its own pocket in consideration of the plaintiff not pursuing its claim does so as a third party, and not as someone stepping into the shoes of the defendant. This in turn raises the question whether there would be a subrogation or assignment of the plaintiff's claim with the consequence that the plaintiff's claim against the defendant remains alive and enforceable by the intervener against the defendant. As the terms of the settlement were not in evidence before me, I am not able to say anything more on the issue of subrogation or assignment.

22 In a similar vein, the 1st intervener's reliance (at [14] above) on *The "Sahand"* ignores the difference between (*a*) a settlement between a plaintiff and a defendant shipowner, and (*b*) a settlement between a plaintiff and an intervener. *The "Sahand"* involved a defendant shipowner paying a claim or providing security to obtain the release of its property. It goes without saying that, as a general rule, once the owner of an arrested vessel satisfies all the creditors' claims or secures them adequately, it is entitled to the return of its property. In the present case, the settlement was not the result of the defendant turning up to secure the release of the Vessel. On the contrary, the 1st intervener informed the court that it had paid off the plaintiff, not to secure the release of the

Vessel, but with the intention of keeping the Vessel under arrest in a separate *in rem* action.

23 I would caveat the foregoing general observations by stating that I make no pronouncements on whether the plaintiff's claim had been extinguished. First, I am not able to do so. I have not been provided with evidence concerning the terms of the settlement between the plaintiff and the 1st intervener, and have not heard full submissions from the parties on the issue. Secondly, there is no need to do so. As explained below, even if I were to agree that the plaintiff's claim had been extinguished, I would *not* accept the plaintiff's submission that the *only* concern is whether the plaintiff's claim has been settled, following which the Vessel *must* be released.

The limits to a plaintiff's freedom to release an arrested vessel

24 A fundamental difference between an action *in rem* and an action *in personam* is that a plaintiff's ability to arrest the *res* in an action *in rem* affects not only the rights of the plaintiff and the defendant shipowner, but also the rights of all other parties having an *in rem* claim against the *res*. What this means is that, once a plaintiff invokes the court's *in rem* jurisdiction to bring the *res* under arrest, it ceases to be fully *dominus litis*, at least as regards the disposal of the arrested *res*.

25 For this reason, the Rules of Court (Cap 322, Section 80, 2014 Rev Ed) ("ROC") provides for a system of caveats against release, and specifies in Order 70, rule 12(2) that where a caveat against release is in force, there can be no release without order of court (unless the *res* is concurrently under arrest in another action). The court hearing an application under O 70 r 12(2) is not obliged to release the arrested *res* merely because the applicant is the arresting party. Having regard to the nature of an action *in rem*, the court has a duty to take into account the rights and interests of the caveators before ordering the release of the *res*.

A sale order in force would have to be discharged before the vessel may be released

26 The plaintiff did not dispute that, as a general rule, an order for the sale of an arrested vessel would have to be first discharged by an order of court before the vessel may be released. The plaintiff's submission was that, where the party applying for release of the vessel under O 70 r 12(2) is the arresting party, this general rule would not apply. In other words, it is the plaintiff's position that discharge of the sale order is only required if the party applying for the release of the vessel is the defendant or an intervener. This is not a position shared by the Sheriff, the 1st to 11th interveners or SAL Shipping. It is a position I cannot endorse.

27 Where the court has ordered the sale of an arrested vessel, the Sheriff is under a duty to carry out the sale order. In carrying out the sale order, the Sheriff is required to act for the benefit of all interested parties, and not act solely at the plaintiff's behest. Any suggestion that the sale order would automatically cease to have effect once the plaintiff decides to release the Vessel would be a suggestion that the plaintiff is entitled to unilaterally stop a judicial sale, and render it impossible for the Sheriff to carry out the court order for sale of the vessel, *without* going back to the court to seek a discharge of the order. Such a suggestion would be inconsistent with the notion that "[t]o protect the interests of all persons with *in rem* claims against the vessel including the defendant shipowner, the court has to have entire control over the sale process thereby safeguarding the propriety and integrity of the sale process…" (*The "Turtle Bay"* [2013] 4 SLR 615 at [17]).

28 In a similar vein, I held that, contrary to the plaintiff's submission at [9(d)] above, a judicial sale cannot be halted by the plaintiff filing a notice of discontinuance without seeking a discharge of the sale order. The filing of a notice of discontinuance does not cause the sale order to lapse. The sale order remains operative even after notice of discontinuance and will be carried out by the Sheriff

unless the sale order is discharged. In any event, the court may, if necessary, set aside a notice of discontinuance in such circumstances.

29 For the reasons given above, I held that the plaintiff was required to seek a discharge of the sale order before releasing the Vessel.

Considerations relevant to the discharge of the sale order

30 As for the considerations which are relevant to the court in an application to discharge a sale order, one thing is clear – the fact that the application is filed by the plaintiff or the arresting party does *not* mean that the discharge will be granted as a matter of course. This flows from the court's duty to protect the interests of all persons with *in rem* claims against the vessel, including the defendant shipowner. The court's power to order a judicial sale and, in particular, the power to order a sale *pendente lite* is not to be invoked lightly. An order of sale has far reaching consequences, both for the shipowner and for other claimants. Where a plaintiff takes the major step of obtaining an order for sale *pendente lite*, there is an expectation that the plaintiff intends to proceed to judgment and will not lightly abandon the sale process.

31 Therefore, notwithstanding the plaintiff's protestation in the present case that its claim has been extinguished, the court retains the power to let the existing sale process proceed to completion. The proceeds of such a sale may be paid out on the application of any intervener who has obtained judgment in its own *in rem* action against the Vessel (assuming the plaintiff declines to take any further steps in this action).

32 In the present case, if all the other claimants had been unanimous in opposing the discharge of the sale order, that would have weighed heavily with the court, and may very likely have led the court to conclude that the sale order should not be discharged. Should the court come to such a conclusion, it would be incumbent on the court to give appropriate directions to safeguard the interests of the plaintiff, such as making provisions for the costs and expense of keeping the Vessel under arrest until the completion of the sale.

33 In considering whether to discharge the sale order in the present case, one consideration is the delay and costs involved in restarting the sale process all over again. If the court were to discharge the existing sale order and release the Vessel so that the 1st intervener could re-arrest the Vessel and obtain default judgment and an order for sale in the 1st intervener's own *in rem* action, it will likely take another three months before the judicial sale in that action reaches the stage of closure of bidding period. The delay could be even longer if a decision is made to put the Vessel back into class. This translates to a delay of three months or more in payment out of proceeds of sale to claimants. However, the prejudice caused to claimants by this delay in payment out would be mitigated if the claimant is able to claim pre-judgment interest. The prejudice may be further ameliorated if the court ordering a judicial sale in the 1st intervener's *in rem* action decides to abridge the 90-day moratorium provided for in O 70 r 21(2)(*a*) of the ROC.

34 As for costs, it may appear at first blush that releasing and re-arresting the Vessel, and keeping her under arrest for an additional three months or more would result in a doubling of the costs associated with keeping the Vessel under arrest. However, that will not be the case – once the Vessel is released from arrest in the present action, the plaintiff will not be able to claim the costs and expenses incurred in respect of the arrest of the Vessel in the present action from the eventual proceeds of sale. Consequently, the proceeds of sale arising from the proposed sale in the 1st intervener's *in rem* action and arrest will be charged with only one set of costs associated with the Vessel's arrest, not two.

35 I also note that the Vessel was only six years old and therefore relatively new. There is no evidence that the condition of the Vessel was deteriorating so rapidly that the anticipated delay associated with restarting the sale process would result in a significant erosion of the value of the Vessel.

36 Finally, releasing the Vessel for re-arrest and restarting of the sale process would have no impact on the priorities and recovery prospects of the claims of the 2nd to 11th interveners and SAL Shipping.

37 In the circumstances, it does not appear that 2nd to 11th interveners and SAL Shipping will be significantly disadvantaged if the sale order were discharged and the sale process restarted.

38 The next factor to be examined is whether any advantages would be gained by discharging the sale order and restarting the sale process all over again. If there are none, the court will not be inclined to discharge the sale order for the sale process to be restarted, having regard to the time and effort already expended on the existing sale process by the Sheriff's office and the bidders.

39 The 1st intervener believes that the Vessel stands a better chance of obtaining a higher price if the sale process is restarted. If the 1st intervener is correct, this would be an advantage to the 1st intervener. Obtaining a higher price for the Vessel would, in theory, also benefit the defendant as the higher recovery from the proceeds of sale of the Vessel would reduce the residual *in personam* liability of the defendant.

40 The 1st intervener provided the court with detailed explanations as to why it believes the Vessel stands a better chance of obtaining a higher price if the sale process is restarted (see [10]-[11] above). While it is a matter of speculation whether restarting the sale process would result in a higher price, I do not find the 1st intervener's explanations fanciful or unreasonable. In the circumstances, I am prepared to accept that the 1st intervener is the best judge of its own interest on this issue, and proceed on the basis that some advantage would be gained by discharging the sale order and restarting the sale process.

41 There was one other matter which caused me some hesitation – the fact that the 1st intervener did not object to the plaintiff's application for sale *pendente lite* at the 2 July 2018 hearing (see [5] above). An argument could be made that, by acquiescing to the plaintiff's application, the 1st intervener should not subsequently be heard to complain about the disadvantages of the very sale process it had acquiesced to. When queried by me, counsel for the 1st intervener explained that, when the 1st intervener decided not to object to the application for sale *pendente lite*, it and the plaintiff were already exploring a settlement. Consequently, the plaintiff agreed that it would not set the sale process in motion by filing the commission for appraisement and sale without first notifying the 1st intervener. The 1st intervener was therefore taken by surprise when the plaintiff filed the commission for appraisement and sale on 9 July 2018 without notifying the 1st intervener. From the 1st intervener's perspective, the speed with which the sale process had been set in motion by the plaintiff had deprived the 1st intervener of the time and opportunity it needed to get other potential buyers to put in bids as well as the time and opportunity to consider whether the Vessel should be put back in class. In the light of this explanation, I was prepared to accept that, when the plaintiff filed the commission for appraisement and sale earlier than the 1st intervener had expected, the resulting sale process was qualitatively different from the sale process that the 1st intervener believed it had acquiesced to when it decided not to object to the plaintiff's application.

Conclusion

42 The following conclusions may be drawn from the matters discussed above:

(a) where a plaintiff's claim against a defendant shipowner who had not entered appearance is settled by an intervener instead of by the defendant, it is not entirely clear to me that such a settlement would extinguish the plaintiff's claim against the defendant;

(b) an order for the appraisement and sale of an arrested vessel would have to be first discharged before the arrested vessel may be released, even if the party seeking release of the vessel is the arresting party;

(c) in deciding whether to discharge an order for appraisement and sale, that court takes into account the interests of all persons with *in rem* claims against the vessel, including the defendant shipowner;

(d) even in a case where the plaintiff has no further claims against the defendant shipowner, the court retains the power to let an ongoing sale process proceed to completion, and allow any intervener who has obtained judgment in its own *in rem* action against the vessel to apply for payment out of the proceeds of sale; and

(e) where no advantages would be gained by discharging the sale order and restarting the sale process all over again, the court will be disinclined to do, having regard to the time and effort already expended on the existing sale process by the Sheriff's office and the bidders.

43 Having regard to the factors discussed at [33]–[41] above, I decided to discharge the order for appraisement and sale, and allowed the release of the Vessel, on condition that the plaintiff's solicitors file the usual release papers and undertaking to pay the Sheriff's expenses. This undertaking was to extend to reimbursing the Sheriff for his time and expenses incurred in respect of the abortive sale. I also ordered the Sheriff to return the sealed bids unopened along with the deposits received from the bidders.