

[1991–92 Gib LR 282]

**BARBER SHIP MANAGEMENT LIMITED v. OWNERS OF
THE M.V. “DEER KEY”**

SUPREME COURT (Kneller, C.J.): April 30th, 1992

Shipping—forced sale of ship—competing claims to proceeds—claim for costs of first arrest by plaintiff in first of two actions in rem may take priority over mortgagee’s claim to proceeds of subsequent sale ordered in second action, if plaintiff’s expenditure preserved ship to benefit of mortgagee—not preserved by costs of first arrest if lapse of time between release and second arrest

Shipping—forced sale of ship—competing claims to proceeds—parties’ conduct and availability of other remedies relevant to discretion to depart from usual order of priorities—inequitable to postpone plaintiff’s bona fide claim for costs of earlier arrest to mortgagee’s claim under second arrest if mortgagee knew of costs incurred in preserving ship and aware that shipowners insolvent

The applicant arrested a ship to obtain payment of an invoice for necessities.

The applicant arrested a ship and made a deposit to cover the Admiralty Marshal’s expenses of the arrest. Its solicitors gave an undertaking to cover any further costs. The applicant then negotiated with the shipowners’ mortgagee for the payment of its claim in exchange for the release of the ship, but failed to agree a sum. The applicant failed to put its solicitors in funds to meet the Admiralty Marshal’s demands for the continuing costs of the arrest, and the vessel was released. The ship remained in Gibraltar because it had no fuel. The applicant later obtained judgment against the owners for its claim for necessities.

A caveator in the first arrest then arrested the ship and obtained an order for her sale. In respect of the £4.5m. proceeds of the sale, the applicant, the mortgagee, and the various caveators agreed that the priorities should be listed by the court as follows: (a) the Admiralty Marshal’s expenses of the second arrest and the costs of repatriation and payment of its crew (already paid by the caveator) in accordance with the court’s order for sale; (b) the fees of the arresting party’s solicitors, already approved by the taxing master; (c) £50,000 retained by the Admiralty Marshal for the expenses of the first arrest, of which the Marshal claimed nearly £14,000 for outstanding bills—the remainder to be paid to the applicant and the mortgagee in the order of priority

determined by the court; (d) the sum required by the Admiralty Marshal to close the account for the ship; and (e) the balance to be paid to the mortgagee.

The applicant claimed almost £23,000 of more than £36,000 remaining from the £50,000 retained by the Admiralty Marshal. The mortgagee claimed the whole sum under the mortgage.

The applicant claimed that it was entitled to recover its costs of the first arrest already paid to the Admiralty Marshal, in priority to the mortgagee's claim, notwithstanding that the mortgagee's maritime lien took priority over its own claim for necessaries. It submitted that (a) it had, in incurring that expenditure, benefited the mortgagee and other claimants by preserving the ship within the jurisdiction and enabling the caveator to re-arrest her; (b) the mortgagee had not entered a caveat or applied for the appraisal and sale of the ship during the first arrest, and had allowed the applicant to expend money in the knowledge that the shipowners were insolvent; and (c) there was no time-limit for its claim for expenses, and if the Admiralty Marshal had paid them herself, her claim for reimbursement would now have taken priority.

The mortgagee submitted in reply that its maritime lien should take priority over all claims by the applicant, since (a) the applicant had incurred the expenses of the first arrest for its own ends, namely, to negotiate the payment of its claims by the mortgagee or the ship's owners, and that arrest had in fact reduced the value of the ship by interrupting a charterparty; (b) the ship had remained within the jurisdiction for 25 days between her release and the second arrest because of lack of fuel, not because the applicant had preserved her; and (c) the applicant itself had not applied for the vessel to be appraised and sold during the first arrest, and the mortgagee had not entered a caveat because there was no order for sale.

Held, making the following order:

(1) The court had a discretion to depart from the usual order of priorities on equitable grounds if there was strong reliable evidence that it should do so. Where there had been two actions *in rem* against a ship, and the ship was sold pursuant to the second action, the plaintiff in the first action could apply to the court for reimbursement of the costs of the earlier arrest (after payment of the Admiralty Marshal's expenses of the second arrest) if it had incurred expense in preserving the ship which benefited the claimants to the proceeds of the sale. In deciding whether to depart from the usual order of priorities giving precedence (after payment of the Admiralty Marshal's expenses) to mortgages over unsecured claims, the court would consider whether either party had an alternative remedy, and could take account of their conduct. It would, for example, be inequitable to postpone a claim by a party who had, in good faith, expended money in arresting the ship, to the benefit of a mortgagee who was aware that such money was being spent and that the shipowners were insolvent (paras. 14–17).

(2) In this case, however, the applicant's claim for the costs of the first arrest would not be given priority over the mortgagee's claim. It had an alternative remedy against the shipowners if they proved to be solvent (and there was insufficient evidence to the contrary). It had not acted in bad faith, but its expenditure had not been directly to the benefit of the mortgagee and other caveators, since the ship could have been refuelled and removed from the jurisdiction during the three weeks between its release and re-arrest. The applicant had been obliged to pay the expenses of the first arrest as a condition of that arrest, and there was no evidence that the mortgagee had known that the applicant's claim for necessities would not be met. The court would not depart from the usual order of priorities (para. 21).

Cases cited:

- (1) *Elin, The* (1882), 8 P.D. 39; on appeal, (1883), 8 P.D. 129; 52 L.J.P. 55, applied.
- (2) *Falcon, The*, [1981] 1 Lloyd's Rep. 13, applied.
- (3) *Jogoo, The*, [1981] 1 W.L.R. 1376; [1981] 3 All E.R. 634, referred to.
- (4) *Linda Flor, The* (1857), Sw. 309; 166 E.R. 1150; 4 Jur. N.S. 172, applied.
- (5) *Pickaninny, The*, [1960] 1 Lloyd's Rep. 533, *dictum* of Hewson, J. applied.
- (6) *Rubi Sea, The*, [1992] 1 Lloyd's Rep. 634; [1992] F.T.R. 23, distinguished.

Legislation construed:

Rules of the Supreme Court, O.75, r.10(3):

“A warrant of arrest shall not be executed until an undertaking to pay on demand the fees of the marshal and all expenses incurred by him or on his behalf in respect of the arrest of the property and the care and custody of it while under arrest has been lodged in the marshal's office . . .”

O.75, r.35(1): The relevant terms of this paragraph are set out at para. 11.

L.W.G.J. Culatto for the interveners;

R.A. Triay for the applicant.

1 **KNELLER, C.J.:** Compagnie Marseillaise de Réparations (“CMR”) claims £22,769.55, the costs of its arrest of the *Deer Key*, in priority to BNE Swedbank S.A. (“the intervener”), which is the mortgagee of the vessel. The intervener opposes CMR's application and cross-claims for priority.

2 The vessel was arrested on July 11th, 1991 on the instructions of CMR, which deposited £5,000 with the Admiralty Marshal to cover the expenses of the arrest. CMR's solicitors, Triay & Triay, gave the Admiralty Marshal the undertaking to cover the costs of the arrest

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required of solicitors acting for an arresting party: see the Rules of the Supreme Court, O.75, r.10(3). CMR's French lawyers, Renard, Allemand & Tassy of Marseilles, negotiated with the intervener, who on July 20th offered CMR 50% out of the outstanding amount, together with the expenses of the Admiralty Marshal and the shipkeepers and CMR's legal fees, in return for her release. CMR did not accept.

3 The intervener acknowledged that CMR had arrested the vessel "in order to safeguard an invoice for Fr. 248,302" and that CMR "claims on the vessel" but went on to add that "these claims are not maritime liens with priority over the Bank [the intervener]." CMR's French lawyers and the intervener continued their negotiations.

4 On July 31st, the Admiralty Marshal called upon Triay & Triay for £2,000 more funds because their deposit of £5,000 was almost exhausted. Triay & Triay told Renard, Allemand & Tassy of this demand and explained how Triay & Triay had given their undertaking in the matter to the Admiralty Marshal. These calls were repeated and duly relayed to CMR's French lawyers. They replied on August 14th, asking Triay & Triay for a complete list of Triay & Triay's disbursements because the intervener had said it would pay them by the end of the week.

5 On August 20th, the vessel could not move because she had insufficient diesel to run her generators. The Admiralty Marshal was anxious about this and Triay & Triay were worried about the likely cost of their undertaking. They passed all this on to CMR by facsimile and telephone on August 20th and 21st, respectively. CMR told them to have the vessel released and they obtained such an order on August 22nd. They warned all the caveators but none had her re-arrested immediately.

6 The Admiralty Marshal called upon Triay & Triay to fulfil their undertaking, on August 27th for £17,664.25, and on October 17th for prescriptions fees incurred by the Admiralty Marshal during the arrest of the vessel. CMR has not repaid Triay & Triay any sum because it is waiting for the result of this application. Meanwhile, on August 30th CMR obtained an order for judgment and costs in default of acknowledgment of service.

7 After she was released from arrest on August 22nd the vessel did not sail, and on September 16th, Barber Ship Management (UK) Ltd., a caveator in the original arrest of CMR, arrested the vessel. On the same day it filed and issued a motion for her appraisal and sale, and the order was made as prayed on September 19th. The proceeds of that sale are the subject-matter of this hearing.

8 Renard, Allemand & Tassy faxed Triay & Triay on September 20th that the vessel-owners' Luxembourg bank was trying to charter the vessel and if it succeeded it would settle CMR's claims against her owners and

also Triay & Triay's fees, so would the latter send details of them? Nothing came of all that.

9 So, in those circumstances, the court was asked to exercise its inherent discretion to make an order listing the priorities thus:

(a) The Admiralty Marshal's expenses: (i) the sum of £37,164.99, being the funds advanced by Barber Ship Management (UK) Ltd. to the Admiralty Marshal in connection with the expenses of arrest and the repatriation of the crew pursuant to the Supreme Court's order on September 18th; and (ii) the sum of US\$104,853.12, being the funds advanced by Barber Ship Management (UK) Ltd. to the Admiralty Marshal for the crew's wages in accordance with the same order.

(b) The legal fees of the arresting party, as approved by the taxing master, namely £14,314.60 to Triay & Triay for their fees incurred in connection with the vessel's arrest according to the same order.

(c) Out of the sum in US dollars equivalent to £50,000 retained by the Admiralty Marshal for the expenses of arrest, £22,769.55 for CMR/Triay & Triay and the balance to Isola & Isola, the solicitors for the intervener on its behalf.

(d) The sum the Admiralty Marshal required to close the account in connection with the vessel's arrest.

(e) The balance to be paid to Isola & Isola on behalf of the interveners.

10 On December 24th the solicitors for CMR, the intervener, Barber Ship Management (UK) Ltd., Drew Ameroid Corp., Ship Supply Inc., World Shipping Supply Inc., Exxon Co. International and Golten Services B.V., all of whom had claims to the proceeds, wrote to the Admiralty Marshal declaring that they consented and agreed that the proceeds of the sale of the vessel should be paid out to the following in this order of priority:

(a) The Admiralty Marshal's expenses: (i) the sum of £37,164.99, being funds advanced by Barber Ship Management (UK) Ltd. to the Admiralty Marshal for the expenses of the arrest and repatriation of the crew pursuant to the order of the Supreme Court made on September 18th; and (ii) the sum of US\$104,853.12, being the funds advanced by Barber Ship Management (UK) Ltd. to the Admiralty Marshal in connection with the payment of the crew's wages in accordance with the same order.

(b) The legal fees of the arresting party, namely £14,314.60, to Triay & Triay for legal fees incurred in connection with the arrest of the vessel following the same order.

(c) A sum in US\$ equivalent to £50,000, to be retained by the Admiralty Marshal pending the determination of priorities.

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(d) Such sum as the Admiralty Marshal may require to close the account for the vessel.

(e) Any balance to be paid to Isola & Isola for the interveners.

11 If the Registrar has fiat that signed agreement it will have been filed and become an order of the court. The Registrar's fiat is a matter of discretion for the Registrar and depends on whether or not she "thinks it reasonable and such as a judge would under the circumstances allow": see the Rules of the Supreme Court, O.75, r.35(1). If the Registrar's fiat has not been given yet, it is, in my judgment, an agreement that I would allow under the circumstances.

12 The essential facts in the background to these applications are these: CMR's initial claim against the vessel's owners was for £24,000 worth of goods and materials supplied, or "necessaries." The intervener's claim was for US\$9m. for a loan and interest due to it secured by a mortgage on the vessel. CMR also claims £22,769.55 for the costs of its arrest of the vessel which it paid on behalf of the Admiralty Marshal. CMR caused her to be arrested, it will be recalled, on July 11th, which interrupted her charterparty. She was released 42 days later on August 22nd. Barber Ship Management (UK) Ltd. had her re-arrested 25 days later on September 16th. She was sold for US\$4.5m., and £50,000 of that was retained on deposit by the Admiralty Marshal, who is due to deduct from it £13,828.91 for outstanding bills, which leaves £37,000.

13 The intervener claims the whole sum under the mortgage and CMR claims £22,769.55 of it for paying, on behalf of the Admiralty Marshal, the costs of the first arrest of the vessel, so if CMR succeeds the intervener will get not £37,000 but only £13,402.44. The conundrum for the court to answer is: Which should have priority?

14 I shall deal with the relevant law next. This court has the same jurisdiction to hear and determine such claims as the Admiralty Court of the Queen's Bench Division of the High Court in England and Wales, according to s.12 of the Supreme Court Ordinance. No relevant decisions of a Gibraltar court have been cited and I cannot find one so I turn to those of the English Admiralty Court. Precedents there have established a *prima facie* order of priorities, but each case depends on its own facts and the court retains an overall discretion in assessing priorities. "The Court must be slow to depart from the usual order" and there must be strong reliable evidence before it should upset the normal run of priorities established by judgments over many years: see *The Pickaninny* (5) ([1960] 1 Lloyd's Rep. at 537, *per* Hewson, J.). Any order incompatible with what Sheen, J. called this "sound body of English law" must be rejected: see *The Jogoo* (3) ([1981] 3 All E.R. at 638).

15 The discretion to depart from the order is to be exercised judicially. There must be equitable grounds for doing so. One of those would be to

consider if either claimant had an alternative remedy: see *The Linda Flor* (4) and *The Elin* (1). Another would be to take account of their conduct. As a matter of natural justice, if you adopt the benefit of something you take the burden, so it is wholly inequitable to postpone a claimant who has expended his money directly to the benefit of the mortgagees, if at that time the mortgagees knew that the mortgagor was insolvent and also at that time had knowledge that the money had been so spent by the claimant: see *The Pickaninny* ([1960] 1 Lloyd's Rep. at 537).

16 Briefly, the proceeds of the sale of a ship sold by court order should be used, first, to pay the Admiralty Marshal's charges and expenses, and secondly, to reimburse the plaintiff, who has incurred expense in preserving the property by arresting the ship and maintaining that arrest. If there is more than one action, and if the ship is appraised and sold by an order made in a second or subsequent action, the party in the first action should apply to the court for reimbursement of the expenses of preserving the property. The court will so order unless he has acted in bad faith: see *The Falcon* (2).

17 A plaintiff who arrests a ship in good faith in the first of two actions *in rem* preserves it within the jurisdiction for the benefit of all other claimants, and therefore has a priority claim, after the Admiralty Marshal, for payment of the costs of arrest out of the proceeds of sale of the ship sold by court order in the second action: see *The Rubi Sea* (6). That judgment was delivered on February 5th this year. The material facts in it were that on June 12th, 1991, the plaintiff bank re-arrested a ship in respect of a claim for a loan and interest due to it secured by a mortgage on *The Rubi Sea*. This was some hours only after a caveator had released her from its arrest in respect of its claim for goods and materials supplied.

18 The submissions of the claimants began with their agreement that the intervener had a maritime lien under its mortgage that ranked in priority to CMR's claims for necessaries. Mr. Triay, for CMR, urged the court to hold that its claim for its expenses in arresting the vessel should, in equity, rank prior to that of the intervener. CMR arrested the vessel, and its motive in doing so was immaterial. Its arrest preserved her within the jurisdiction for 42 days, which was "a knock-out blow" that brought no benefit to CMR. It caused her to be immobile and facilitated the intervener's re-arrest and sale of the vessel and so CMR had created a fund for the claimants. The investors knew her owners were insolvent. They were told by Renard, Allemand & Tassy the extent of her owners' obligations, and the investors were ready to pay half CMR's expenses. Her owners did not refuel and sail her out of the jurisdiction when CMR obtained the discharge of her arrest, and when she was under arrest for the first time the intervener did not enter a caveat or apply for her appraisal and sale. CMR had done everything in good faith. There was no time-limit to CMR's right to claim the expenses it had paid for the Admiralty Marshal's first arrest of the vessel, for which the Admiralty

Marshal would have had a prior claim if paid by her. They were payments to which the intervener was not entitled and CMR was.

19 Mr. Culatto, for the intervener, conceded that CMR had not acted in bad faith but asserted that it had arrested the vessel for its own ends, namely, to make the intervener or owners pay CMR's claim. She had not been preserved for their benefit. They might not have wanted her preserved in this way, and indeed CMR's arrest had interrupted her charterparty and reduced her value to the intervener. CMR had not applied for her to be appraised and sold during the 42 days when she was under arrest, but had instead negotiated with her owners' bank for its claims to be paid. CMR had not created a fund for the intervener. The intervener had not entered a caveat during the period of the first arrest because there was no order for sale and so there was no need to do so. The intervener knew that her owners were not meeting claims against them but did not know they were insolvent. They may have wanted her to undertake another particularly beneficial voyage.

20 The simple fact, according to Mr. Culatto, was that the vessel remained in the jurisdiction after her release from arrest because she had no diesel oil. CMR could not claim it had preserved her. It had decided it did not want to continue its action, or to preserve her or fund her arrest any more. The second arrest of *The Rubi Sea* followed the first and its discharge almost at once, and could qualify almost as a continuing arrest, or a nearly continuing one, but Barber Ship Management's arrest had occurred 25 days after CMR's arrest had been lifted. Both the intervener and CMR had an alternative remedy, namely, an action against the owners. The intervener was the innocent claimant and CMR was not, so it did not deserve priority, according to Mr. Culatto.

21 The court's findings are that CMR did not act in bad faith. It has a suitable alternative remedy if the vessel's owners are not insolvent and there is insufficient evidence to prove that they probably are. The intervener has not admitted that it knew they were. It knew that CMR had spent its money on the first arrest, but it was not directly to its benefit because CMR applied for its release, and there were 25 days in which she could have been refuelled and sailed away out of the jurisdiction. CMR had not maintained her arrest. She had not been preserved in the jurisdiction by CMR for the benefit of all other claimants after August 22nd, 1991. Any party requiring the Admiralty Marshal to arrest a vessel must pay the expenses incurred. The usual order of priorities, in my judgment, should not be departed from. So, in the exercise of the court's overall discretion, the claim of the intervener will rank in priority to that of CMR.

Order accordingly.