

[1999–00 Gib LR 278]

EGNATIA BANK S.A. v. OWNERS OF THE “MEGEVE”

SUPREME COURT (Pizzarello, Ag. C.J.): September 9th, 1999

Shipping—mortgage of ship—priorities—mortgagee not automatically given priority if court unaware of mortgage when judgment given assigning priorities between unsecured creditors, e.g. crew and necessities men—mortgagee not interested person within meaning of Rules of Supreme Court, O.75, r.24 before commencing proceedings to recover debt

The plaintiff bank applied to enforce a mortgage against the proceeds of sale of a ship.

The Supreme Court gave judgment on the same day in two separate actions against the owners of a ship, the first in favour of the vessel’s master and crew, for wages, *etc.* and costs, and the second for necessities and costs. The first judgment stated that subject to the claim by the necessities man, the order of priority of claims against the ship would be determined after a period of 90 days from the date of sale. The ship was sold and the Admiralty Marshal paid the master and crew their wages under the judgment.

The plaintiff bank then commenced proceedings to enforce a mortgage over the ship against the proceeds of sale. It submitted that notwithstanding the terms of the earlier judgment (which had been made in ignorance of the existence of the mortgage), its claim took priority over that of the necessaries man.

The plaintiffs in the two actions submitted in reply that the earlier judgment should stand, since (a) under O.75, r.24 of the Rules of the Supreme Court the court had had power to order payment to the necessaries man as one of the two parties before it; and (b) it would be inequitable for the court now to give priority to the mortgagee, when the necessaries man had conducted its business for several months on the expectation of recovering its debt.

Held, making the following ruling:

The plaintiff bank would be given a share of the proceeds of sale in payment of its debt only after the Admiralty Marshal's costs and expenses, the claim and costs of the necessaries man and the costs of the master and crew had been met. Although the court would not have made the earlier order if it had known of the existence of the mortgage, it had been entitled to do so, since there had then been only two interested parties before it. The mortgagee had not become an interested person for the purposes of the Rules of the Supreme Court, O.75, r.24 before submitting to the court's jurisdiction (paras. 8–12).

Legislation construed:

Rules of the Supreme Court, O.75, r.24(3):

"The registrar . . . may, with the consent of the parties interested in the money paid into court, order the money to be paid out to the person entitled thereto in the following cases, that is to say—

- (a) where a claim has been referred to the registrar for decision and all the parties to the reference have agreed to accept the registrar's decision and to the payment out of any money in court in accordance with that decision;
- (b) where property has been sold and the proceeds of sale thereof paid into court, and the parties are agreed as to the parties to whom the proceeds are to be paid and the amount to be paid to each of those persons;
- (c) where in any other case there is no dispute between the parties."

r.24(4): "Where in an Admiralty action money has been paid into court pursuant to an order made under Order 29, rule 12, the registrar . . . may make an order under rule 13(1) of that Order for the money to be paid out to the person entitled thereto."

A. Christodoulides for the plaintiff bank;

C.C. Hernandez for the plaintiffs in action 1999 A.J. No. 10;

M.X. Ellul for the plaintiff in action 1999 A.J. No. 19.

1 **PIZZARELLO, Ag. C.J.:** This matter came before me to settle priorities in respect of the claims against the *Megeve*. The master and crew of the vessel obtained judgment on April 19th, 1999 in action 1999 A.J. No. 10, for wages *etc.* and costs. The judgment has been paid pursuant to that order but it remains to ascertain the costs of that action to be taxed or agreed. Tarik Ship Agents & Bunkering Services Ltd. (“Tarik”) obtained judgment *in rem* in action 1999 A.J. No. 19, also on April 19th, 1999, for necessaries, interest on the amount due and costs. The *Megeve* was sold on May 8th, 1999, as were her bunkers, and after expenses have been deducted there is available for distribution among the interested parties the sum of just under £3,000 in the Admiralty Marshal’s Sterling deposit account and approximately US\$105,000.

2 Egnatia issued proceedings against the proceeds of sale on June 4th, 1999, after it had been alerted to the sale of the ship and the availability of funds as a result of the Admiralty Marshal’s notice published in Lloyds List, advising of the sale and making it known that the questions of payment out and priorities would be determined by the court on August 26th, 1999.

3 Mr. Ellul, for Tarik, points out that the judgments given on April 19th, 1999 conflict in that the order given in action No. 10 provides that: “subject to the said claim of Tarik, the order of priority against the proceeds of the sale of the *res* shall not be determined until after the expiration of 90 days beginning with the day on which the sale was completed,” whereas in the order made in action No. 19, which is in the usual form, there is no mention of Tarik’s priority. It is clear, he submits, that it is the former order which rules, as both matters were taken simultaneously on April 19th and the court, on the face of the order, was cognisant of Tarik’s claim and considered the matter pursuant to O.75, r.24.

4 Mr. Hernandez’s recollection was the same. Under O.75, r.24, the provisions of which were drawn to the court’s attention, the court had power to order payment out to Tarik because the only parties interested at the time of the judgments were the master and crew and Tarik. (It is agreed by all parties that a claim by Cutlass Marine Bunkering S.A. is not sustainable, and Mr. Ellul, who acts for Cutlass, conceded this.)

5 Mr. Ellul submits that in the circumstances the court should exercise its discretion, this being an equitable matter, and confirm the priority of Tarik, which would be gravely disadvantaged in its commercial dealings, having dealt with its affairs in the expectation that the amount claimed and costs would find its way into its hands.

6 Mr. Christodoulides did not agree. It is not right, he said, for a necessaries man to take priority over a mortgagee. The order of priority is

undeniably that the mortgagee takes priority over the necessities man. The order by the court on April 19th, 1999 to jump Tarik into a position of advantage was made *per incuriam*. Order 75, r.24 refers to necessary parties and the court ought to have had its attention drawn to the probability of the existence of a mortgage. In fact, he submitted, the order has a flavour of that because payment out was not ordered forthwith. The matter was held over to be dealt with generally with priorities. In technical terms, the order in action No. 10 is not Tarik's action, and in its own action No. 19, the order is in the usual form, to be paid out subject to the Admiralty Marshal's expenses and the determination of priorities of claims, if any, and there is this one which has priority.

7 As to the equity of the matter, Mr. Christodoulides submitted that Egnatia has the right to rely on the Admiralty Marshal's notice, which gives no hint of any reserved priorities. The bank was entitled to assume that there was a considerable amount of money in balance to justify the issue of proceedings in Gibraltar and it has spent money, time and effort which is not recompensed if parties who ought not to get a penny are paid over and above it, leaving it with crumbs. Mr. Christodoulides acknowledges that there is some sympathy for Tarik but the law is against it and the equities should go in Egnatia's favour. The application of Tarik should be dismissed.

8 I made a preliminary ruling and expressed the view that the court would not have made an order in the terms made on April 19th had I known that a mortgage existed. The experience of the court is that where there is a mortgage involved the amount of the mortgage tends to exhaust the balance of the purchase price after the Admiralty Marshal's expenses have been paid, especially when, as in this case, the proceeds of sale are not, relatively speaking, considerable. However, that had not been the case and I was persuaded on April 19th that Tarik should have its money, as there were only two interested parties.

9 My preliminary view was that the priorities should be: (i) the Marshal's costs, (ii) the crew's action costs, (iii) Tarik's claim, and (iv) the remainder to Egnatia, and I indicated to counsel that that would be my decision, subject to reconsideration and a review of the state of the Marshal's account.

10 I have considered the Marshal's account. The vessel was under arrest from February 9th, 1999 to May 8th, 1999. There were 23 crew men, including the master, who were paid off by the Marshal before they were repatriated pursuant to my order. There were no shipkeepers aboard and the vessel was at the anchorage at minimal expense. The Admiralty Marshal's expenses were approximately £60,000, of which repatriation accounted for just under £20,000. A draft account is appended hereto E&OE, and this reflects a normal state of affairs and shows what a drain

an arrest can be. The net position is that there is a fund of approximately US\$105,000 and £3,000. The costs of the crew's action will take up US\$20,000 and Tarik's claim and costs will take up approximately US\$28,000.

11 I have considered the matter of Tarik's priority, given Mr. Christodoulides's strong submissions. I consider that I was justified to have made the order as expressed. The only interested parties at the time were before me. The question of who are interested parties is crucial. Can it be said that a mortgagee is an interested party before he submits to the jurisdiction of the court? On reflection, I think not. Mr. Christodoulides himself makes this plain when he refers to the commercial consideration of the bank on which would depend its issuing process. Had it not done so, it could hardly be said that it was an interested party in priorities. I think the point is made in 1 *The Supreme Court Practice 1999*, para. 75/24/6, at 1461, which states: "Exceptionally, payment out may be ordered to any person where the defendants and all other parties interested in the proceeds of sale (judgment holders, interveners and caveators) consent." I note the last sentence of that paragraph, but it is not, in my view, applicable to this case.

12 In my view, the order made on April 19th, 1999 was justified and, having heard all the arguments, I confirm the priority of Tarik and make the following order. Payment out of funds in court as follows:

- (a) Admiralty Marshal's costs and expenses;
- (b) the costs of action 1999 A.J. No. 19, taxed costs (unless otherwise agreed with the plaintiff herein) not to exceed £13,041.50 except for the extent of the costs of the taxation itself;
- (c) US\$19,999.83 judgment in action 1999 A.J. No. 10 and taxed costs (unless agreed with the plaintiff) not to exceed US\$7,800.91; and
- (d) the balance to the plaintiff.

This order shall come into effect within seven days of the date hereof unless any of the parties makes application to the court within that time.

Order accordingly.