IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 138

Admiralty in Rem No 170 of 2014
(Summons No 4072 of 2015)

Between

PIRAEUS BANK SA

… *Plaintiff*

And

OWNERS OF THE VESSEL "POSIDON"

… *Defendant*

And

(1) WORLD FUEL SERVICES (SINGAPORE) PTE LTD
(2) WORLD FUEL SERVICES EUROPE LTD
(3) WORLD FUEL SERVICES TRADING DMCC

… *Interveners*

Admiralty in Rem No 171 of 2014
(Summons No 4073 of 2015)

Between

PIRAEUS BANK SA

… *Plaintiff*

And

OWNERS OF THE VESSEL "PEGASUS"

… Defendant

And

(1) WORLD FUEL SERVICES (SINGAPORE) PTE LTD
(2) WORLD FUEL SERVICES TRADING DMCC

… Interveners

JUDGMENT

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30 November 2016; 20 February 2017

7 June 2017 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Piraeus Bank SA ("the bank"), filed both Summons No 4072 of 2015 ("SUM 4072") in Admiralty in Rem No 170 of 2014 ("ADM 170") and Summons No 4073 of 2015 ("SUM 4073") in Admiralty in Rem No 171 of 2014 ("ADM 171") on 20 August 2015. The summonses are routine applications that are made to, *inter alia*, determine the order of priorities of various *in rem* claims against the proceeds paid into court following the judicial sale of two vessels, the *Posidon* and the *Pegasus*. The bank also seeks payment out of the balance sale proceeds in partial satisfaction of *in rem* judgments in its favour. World Fuel Services (Singapore) Pte Ltd, World Fuel Services Europe Ltd and World Fuel Services Trading DMCC (hereafter collectively referred to as "the interveners") intervened in ADM 170 and ADM 171 to oppose the summonses. It is not disputed that the interveners,

who are necessaries providers with a statutory right of action *in rem* under the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed) ("HCAJA"), had over a considerable period of time, supplied bunkers to the *Posidon* and the *Pegasus*. It is common ground that after deducting Sheriff's commission and expenses in and about the arrest, appraisement and sale of the vessels and her bunkers, as well as the bank's legal costs and disbursements incurred in and about the arrest, appraisement and sale of the vessels, the entire collective net funds in court are insufficient to meet the *in rem* judgments obtained by both the bank and the interveners respectively unless the interveners' necessaries claims have priority over the bank's mortgage claims.

2 The question before this court is whether, in the distribution of the sale proceeds of the vessels, the bank's claims as second preferred mortgagee of the vessels should take priority over the interveners' claims for bunkers supplied given the particular circumstances of the present case. The interveners' position is that the bank's claims should be subordinated to theirs. The interveners' contentions, based on the circumstances of the case as they see it, are that firstly, the bank was in *de facto* control and management of the finances for the operational needs of the vessels from June/July 2014,[1] or from 11 July 2014 at least,[2] and had authorised and approved of the bunker purchases.[3] In making this contention, the interveners went so far as to boldly allege that the bank had been "disguising its involvement by ordering… bunker supplies for the [vessels], through the [shipowners], so as to circumvent any responsibility for [those] trade debts".[4] Secondly and in the

1 Interveners' Written Submissions ("IWS") at para 163.

2 IWS at para 214.

3 IWS at paras 163 and 165.

alternative, the interveners contend that the bank had, with knowledge of the shipowners' insolvency, acquiesced in the procurement of bunkers supplied, knowing that the bank and/or its security interest would "benefit" from the bunkers supplied. The basic premise of the interveners' argument on "benefit" is that the bunkers supplied provided motive power to the vessels, thereby ensuring the physical safety of the bank's security whilst the vessels were operational and enabling the vessels to trade and generate income to the benefit of the bank ("the benefit argument").[5]

3 To evaluate the interveners' contentions, this judgment will discuss the central question of when and in what circumstances will the court permit a departure from the recognised order of priorities so that necessaries claims take precedence over mortgage claims.

Background

4 On 16 February 2012, the bank entered into a loan facility agreement (the "2012 LFA") with the registered owners of the *Posidon* and the *Pegasus* as joint and several borrowers ("the borrowers"). The loan facility was for a sum of US$17.1 million, and it was secured by way of second preferred Liberian Ship Mortgages over the two vessels ("the Mortgages").

5 The loan amount was drawn down on 21 February 2012 ("the Drawdown Date"). Subsequently, the 2012 LFA was amended by a supplemental agreement dated 21 August 2013. On the borrowers' request, the

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4 IWS at para 162.

5 IWS at paras 4 and 10.

loan interest margin was lowered by one percentage point for the period until and including 31 December 2013.

6 Under cl 6.1 of the 2012 LFA, the loan was to be repaid in one bullet repayment on the final maturity date, 31 December 2015. Interest payments under the 2012 LFA were due in 6-month intervals for the first 24 months beginning from the Drawdown Date, and every 3 months thereafter, subject to the parties' agreement (see cl 1.2). However, during the 24-month period after the Drawdown Date ("the Grace Period"), any non-payment of interest in whole or part would *no*t be considered as an Event of Default; instead, any unpaid interest would be capitalised and added to the principal amount of the loan (see cl 7.4). Contractually, the Grace Period would cover four six-monthly interest payments that would fall due in the 24-month period beginning 21 February 2012 and ending 21 February 2014.

7 It transpired that all instalments of interest that fell due prior to February 2014 and during the Grace Period were not paid but capitalised instead. The subsequent interest for the period from 21 March to 21 August 2014 was not paid. By then, the Grace Period was over and, the bank treated the unpaid interest due and owing on 21 August 2014 as an "Event of Default" under the 2012 LFA which entitled the bank to terminate the 2012 LFA and enforce the Mortgages. On 11 September 2014, the bank communicated its decision to enforce the Mortgages and the borrowers agreed to sail the vessels to Singapore for their arrests. A Notice of Default and Acceleration of Loan was issued on 29 September 2014. On 3 October 2014, *in rem* writs were issued against the *Posidon* and the *Pegasus* in Singapore where they were

arrested: the *Posidon* on 4 October 2014 and the *Pegasus* on 5 October 2014. No appearance was entered by the borrowers to the *in rem* writs.

8 On 5 December 2014, the bank obtained default judgments in the sum of US$19,366,909.97. In the subsequent judicial sale of the *Posidon,* she was sold for S$8,000,000 and her bunkers were sold for S$70,060. In the case of the *Pegasus,* she was sold for S$5,350,000 and her bunkers were sold for S$75,500.

9 The interveners obtained judgment in default of appearance against the *Posidon* in Admiralty in Rem No 188 of 2014 on 9 March 2015. Judgment in default of appearance against the *Pegasus* in Admiralty in Rem No 189 of 2014 was obtained on 9 March 2015.

10 The interveners obtained leave to intervene in ADM 170 and ADM 171 on 18 September 2015. In addition to an order for the discovery and/or inspection of documents on 10 December 2015 and answers to Interrogatories on 31 July 2016, the interveners also obtained an order to cross-examine Mr Konstantinos Petropoulos ("Mr Petropoulos"), who was the deponent of affidavits filed on behalf of the bank on 17 November 2015. Mr Petropoulos was the person in charge of the bank's claim against the borrowers. At all material times, Mr Petropoulos was the bank's Director of Shipping Finance and Wholesale Financial Solution. Cross-examination of Mr Petropoulos via video conferencing took place on 30 November 2016.

11 I pause here to note that at no time did the interveners attempt to set aside the bank's default judgments that were for the principal sum and interest due under the 2012 LFA and the supplemental agreement, and secured by the

Mortgages. It is therefore too late, at this stage, to seek to undermine the bank's default judgments by questioning the registration of the Mortgages and the bank's computation of the due date of interest payment.

The law on priorities in relation to *in rem* claims

Order of priorities are determined by the lex fori

12 The order of priorities and the distribution of the sale proceeds of a vessel in an action *in rem* between competing claimants against the same fund is a question governed by the law of the forum. The Court of Appeal in *The "Andres Bonifacio"* [1993] 3 SLR(R) 71 at [35] approved the majority's observations at [26]-[27] in *The "Halcyon Isle"* [1979-1980] SLR(R) 538, a decision of the Privy Council on an appeal from Singapore, that the question as to the right to proceed *in rem* against a ship as well as the question of priorities in the distribution of the sale proceeds are to be determined by the *lex fori* as if the events that gave rise to the claim had occurred in Singapore.

13 The present case does not concern the characterisation of the nature of the claims of the bank and that of the interveners as there was no contest that both claims fell within the provisions of the HCAJA. That is to say, the parties did not dispute the bank's status as mortgagee of the vessels in respect of the loan principal and interest owed by the borrowers, nor did they dispute the interveners' status as necessaries men who had supplied bunkers to the vessels.

14 The question of priority as between the parties in the present case starts with the established position that the mortgagee bank's mortgage claim has priority over the interveners' necessaries claim for bunkers supplied. That a

mortgage claim takes precedence over a claim for necessaries supplied is an established priority ranking that is usually adhered to, but the interveners' point here is that the order of priorities is not immutable since distribution of the sale proceeds of the vessels by the court is a matter of procedure and practice that takes into account considerations of equity. The interveners' main contention is that the equities of the case (derived from the particular features of the case) justify an alteration of the order of priorities such that their various necessaries claims would rank ahead of the bank's mortgage claims.

Discretion to alter the order of priorities between different classes of claims

15 I begin with the proposition that the established order of priorities is well-recognised, and that the ranking of different classes of claims should be followed and not be readily departed from. As observed by Professor William Tetley QC, the order of priorities should not be lightly overturned if there is to be any uniformity and certainty in the law (see William Tetley QC, *Maritime Liens and Claims* (1st Ed, Business Law Communications Ltd, 1985) at p 405). Similarly, in *The Ship "Sam Hawk" v Reiter Petroleum Inc* [2016] FCAFC 26 at [79], the majority members of the Federal Court of Australia made the following comments which I accept to be applicable in Singapore as well:

> … The order for the ranking of maritime claims in a fund (such as from the sale of a ship) will be a matter for the law of the forum – of the place of the fund. In Australia, there is a well-recognised order for ranking, but it is one that is capable of flexible variation by reference to equity, public policy, commercial expediency and justice: see Thomas *op cit* at 234 [418]; *The Ruta* [2000] 1 Lloyd's Rep 359; Davies and Dickey *op cit* at 114; and Derrington and Turner *op cit* at 187-204 [8.01]-[8.54]. See also *Patrick Stevedores No 2 Pty Ltd v The proceeds of sale of vessel MV 'Skulptor Konenkov'* [1997] FCA 361; 75 FCR 47. Yet as Thomas observes (at 234 [418]) this

> flexibility of values "is not however to suggest that the law is capricious, erratic or unpredictable. Arising from the 'value' framework within which the Courts operate there have emerged various principles which are capable of providing reliable signposts to the likely attitude of the Courts". Similarly in *ABC Shipbrokers v The Ship 'Offi Gloria'* [1993] 3 NZLR 576 at 582, Holland J said that although the priority rules are not immutable they "should not be varied or not applied unless the circumstances are exceptional and equity demands such course to be taken".

16 The parties cited various cases from England, Australia, New Zealand and Canada. The common thread that runs through these cases is that in spite of the established order of priorities, equity shall be done to the parties based on the circumstances of each particular case and where the demands of justice warrant a departure from the usual order of priorities.

17 Two local cases, *The "Eastern Lotus"* [1979-1980] SLR(R) 389 ("*The Eastern Lotus*") and *Keppel Corp Ltd v Chemical Bank* [1994] 1 SLR(R) 54 ("*Keppel Corp*"), did not specifically address the question whether the established order of priorities for the payment of claims in admiralty *in rem* actions could be altered. The facts of both cases are distinguishable from the present in that the two cases were concerned with payments made to preserve the *res* and assist the Sheriff in the sale of the vessel under arrest. In *Keppel Corp*, the foreign crew refused to leave the vessel until their wages were paid and the crew also sought repatriation expenses. It was accepted that the longer the vessel remained unsold, the smaller the net proceeds of sale left for distribution to the *in rem* claimants would be. Thus, the vessel lay wasting until Chemical Bank applied to court to be allowed to advance the necessary funds for the crew's wages and repatriation expenses, provided that all such expenditures were to be treated as Sheriff's expenses. Keppel Corp Ltd ("Keppel"), who was the ship repairer, objected. Keppel argued that the

application was an attempt to alter the established order of priorities. In that case, Keppel's possessory lien for repairs done to the vessel had precedence over the crew's wages and repatriation expenses as well as Chemical Bank's claim as mortgagees.

18 Likewise, in *The Eastern Lotus,* the mortgagees of the vessel obtained an order of court permitting them to advance sums of money to the Sheriff for the crew's wages, repatriation expenses and premium for port risk insurance, and all monies advanced were to rank as Sheriff's expenses against the proceeds of sale so that the mortgagees would be entitled to payment thereof accordingly. The damage claimant applied for a court order to delete the directions for payment out to the mortgagee and for a declaration that the said directions did not apply to them in the alternative. The damage claimant argued that based on the established order of priorities, the damage claimant's claim would have precedence over the crew's claim, the mortgagee's claim and the agent's claim. The appellate court in *The Eastern Lotus* was mindful that the mortgagee had advanced monies pursuant to a court order and for the purpose of preserving the *res* and halting the drain on the proceeds of sale.

19 M Karthigesu JA in *Keppel Corp* (at [24]) noted that *The Eastern Lotus* is not authority supporting an alteration of the established order of priorities but is good authority for the proposition that where the equities of a particular case demand it, expenses incurred by the Sheriff in connection with the arrest, detention, appraisement and sale of the *res* and for the preservation and good management of the *res* could justifiably be treated as Sheriff's expenses and be paid out as such in priority to all other claims upon the vessel. The main issue before the appellate court in *Keppel Corp* was the question

whether the payment of crew wages could be treated as part of the Sheriff's expenses in priority to all other claims. In determining that question, which involved broadening the scope of what Sheriff's expenses entail, the appellate court considered "the equities" of the particular case as an English court would when addressing the question whether the order of priorities could be altered in any particular case. The principle stated in *Keppel Corp*, as observed by Prakash J in *The "Makassar Caraka Jaya Niaga 111-39"* [2012] SGHC 175 at [20] is that the court had a wide discretion in balancing the equities in a proper case and the category of Sheriff's expenses was not a closed category, but could be enlarged where, in the opinion of the court, the expenses incurred would necessarily be incurred by the Sheriff in carrying out his duties in connection with the arrest, detention, appraisement and sale and for the preservation and good management of the *res*.

20 Wee Chong Jin CJ in *The Eastern Lotus* actually asked the question whether the order of priorities could be altered in any particular case, but Wee CJ was able to come to a decision by treating the expenditure in question as Sheriff's expenses without altering the ranking of different classes of claims. It was possible to sidestep the question asked because the appellate court was dealing with a vessel that was under arrest and the expenditure that was incurred was to preserve and maintain the vessel in *custodia legis*.

21 Wee CJ examined two English cases *The Linda Flor* (1857) 166 ER 1150 and *The Elin* [1883] P 129 ("*The Elin*") where the English courts did not allow crew wages to take precedence over damage claims for to do so would give relief to the wrongdoer whose crew had somehow been the cause of the damage. The appellate court in Singapore was similarly asked by the damage

claimant to allow its claim to take precedence over the crew's wages and repatriation expenses. Dr Lushington in *The Elin* (as first instance judge) did not deal with the competing claims to a limited fund by altering the order of priorities but came to his decision independent of the question of priority. This was made clear by Brett MR in approving the decision of Dr Lushington on appeal:

> … Dr Lushington in exercising the wide equitable maritime jurisdiction of the admiralty court, came to the conclusion that it would be unjust to the owner of the injured ship if he allowed the fund against which the lien for damage has priority to be diminished by a payment of wages. This he did quite independently of any mere questions of priority. He did on the principle of acting justly to the owner of the injured ship.

22 Wee CJ at [6] cited and accepted Brett MR's proposition that the court's equitable maritime jurisdiction could be exercised independently of the question of priority and that resulted in the appellate court's holding at [7] that a court, in the exercise of its admiralty jurisdiction, is entitled, in spite of the general order of priorities, to have regard to the equities in any particular case before it and this discretion can be exercised without actually altering the usual order of priorities. Consequently, Wee CJ (delivering the judgment of the appellate court) allowed the mortgagee's payment of the crew's wages and repatriation expenses to rank as Sheriff's expenses, thereby allowing the expenses to enjoy priority above all other claims against the sale proceeds of the ship without having to upset the usual order of priorities by allowing crew wages to take precedence over a damage claim. The equities in that case permitted the crew's wages and repatriation expenses to be considered and classified as Sheriff's expenses for a number of reasons: (a) it was conceded that the owners of the vessel was insolvent; (b) the Sheriff could not sell the

ship without repatriating the foreign crew that was on board the arrested vessel; (c) the damage claim did not surface until after the court made the order allowing the mortgagee to advance funds to the Sheriff to pay the crew's wages and repatriation expenses; and (d) the mortgagee had made full disclosure of all the facts and it was reasonable for the mortgagee to obtain the court order to protect its interest in the *res*. Wee CJ had earlier observed that the mortgagee's payment would preserve the *res* and it halted the drain on the proceeds of sale. Finally, there would be injustice if the mortgagee was not reimbursed for the monies it had advanced pursuant to the earlier court order.

23 Though there are no local cases on point, the proposition that the established order of priorities may be altered if the equities in any particular case demand it is a statement of principle that is part of Singapore law which basically follows English law in this regard. Likewise other jurisdictions like Australia, New Zealand, Canada and Hong Kong have generally adopted the English position (see [16] above).

24 The position in these jurisdictions is clear. The established order of priorities should only be disturbed if there is a "powerful reason" to do so. There must be truly exceptional or special circumstances and the departure must be essential to prevent an obvious injustice (see generally *The "Pickaninny"* [1960] 1 Lloyd's Rep 533 ("*The Pickaninny*") at 537; *Scott Steel Ltd v "The Alarissa"* [1997] FCJ No 139 at [15]; *Fournier v The "Margaret Z"* [1999] 3 NZLR 111 ("*The Margaret Z*") at 117; *Royal Bank of Scotland v The "Golden Trinity"* [2004] FCJ No 992 ("*The Golden Trinity*") at [118]).

25 It is convenient at this juncture to amplify on what can constitute "exceptional" or "special" circumstances. Both phrases are used interchangeably. Foreign cases on "special circumstances" are varied. For instance, a tardy mortgagee who puts forward his claim only after the priorities of competing claimants have been determined by the court may find himself unable to assert his usual priority over a statutory lien holder (see *The "Fortune Founder"* [1987] HKLR 156). A departure may also be warranted where a maritime lienee assumes personal liability towards a statutory lienee or a mortgagee. Where a shipowner who is also the master of the ship obtains the supply of necessaries for the use of his ship or seeks financing for his ship, the master's claim for wages and disbursements may be postponed to that of the statutory lienee or mortgagee (see *The "Jenny Lind"* (1872) LR 3 A & E 529).

26 Another example of "special circumstances" is the situation where a mortgagee, knowing the mortgagor to be insolvent, stands by and allows the supply of necessaries that directly accrue to the benefit of the mortgagee and/or the mortgagee's security interest in the ship. It is convenient to now examine the line of cases with such particular features because the interveners are relying on them.

27 The short point in summary is that the cases draw out three main factors that cumulatively go to the equities of the particular case to warrant a departure from the established order of priorities such that a mortgagee's claim is ordered to rank behind that of a necessaries man. First, knowledge that the mortgagor was insolvent has to be shown; next, the mortgagee must be fully aware, in advance, of the nature and extent of the expenditure incurred

by the competing claimant; and finally, any such expenditure must bring about some benefit to the mortgagee – these three factors are not listed in order of importance. Ultimately, the overarching consideration is the justice of the case that calls for an alteration to the order of priorities.

28 I begin discussions with the oft-cited decision of *The Pickaninny*. In *The Pickaninny*, there were two competing claims for the proceeds of a court-ordered sale of a vessel – that of the mortgagee and that of the necessaries men who also acted as ship agents. The necessaries men had given an undertaking to ship repairers to be personally liable for the costs of repairs done to the vessel, the *Pickaninny*, in Dover following a collision. The court placed the burden on the necessaries men to show that the mortgagee knew and was fully informed of the necessaries men's undertaking. On the facts of *The Pickaninny*, the court found that there was insufficient evidence that the mortgagee had knowledge of the undertaking, and that there was also no evidence whatsoever of the mortgagor's insolvency at the material time. In short, there were no special circumstances to justify a change in the usual order of priorities.

29 *The Pickaninny* was relied upon in *Canadian Imperial Bank of Commerce (CIBC) v The "Orion Expeditor"* [1990] FCJ No 1160 ("*The Orion Expeditor*"), which also concerned competing claims between a mortgagee and a necessaries man who effected repairs to a ship. Mackay J in *The Orion Expeditor* held that:

> … it can be inferred from the cases cited that where a mortgagee is fully aware, in advance, of arrangements made for repair of a vessel, the repairer, who supplies necessaries for the vessel, may rank in priority to the claim of the mortgagee to proceeds from sale of a vessel. Yet as Hewson J

> emphasizes in The "Pickaninny" the evidence of knowledge on the part of the mortgagee must be clear in order to vary the usual order of priorities…

30 The mortgagee must have full knowledge of the nature and extent of the supplies that resulted in the claims brought by the necessaries man. In *The Orion Expeditor*, the repairs were effected on the ship's stern tube and housing parts. Bearings were supplied and remanufactured where required as well. The bank officer in charge was expecting repairs to be done, but only to the stern tube seal on the propeller shaft. The vessel was otherwise considered to be in a good condition. The court found the evidence to be insufficient to support a finding that the plaintiff bank knew and was fully aware of arrangements made for the repair work upon the vessel by the repairers.

31 In *The Orion Expeditor*, the court also discussed corporate control as an offshoot of the requirement of knowledge – the argument being that knowledge of the shipowner's insolvency and the scope of repair work required would be established if the mortgagee was effectively in control of the operations of the shipowner. Such control was found to be absent in *The Orion Expeditor* because the shipowner continued to have access to the funds in its bank accounts, and were expected to continue to meet all its operating expenses.

32 Both *The Pickaninny* and *The Orion Expeditor* were then considered in *The Atlantis Two*. Consolidating both authorities, Prothonotary Hargrave set out the particular features that were needed to postpone a mortgagee's claim, and explained the level of knowledge needed in respect of the mortgagor's insolvency (at [179]):

> The elements here, needed to postpone a mortgagee's claim, are strong and reliable evidence of knowledge of money being spent on the ship which would be of direct benefit to the mortgagee and, concurrently, knowledge that the mortgagor was insolvent. But I do not think the law goes so far as either to require a mortgagee to be so intimately involved with the affairs of the mortgagor as to know of its day to day operational matters, or of financial problems the mortgagor keeps hidden in the short run, or to require that a mortgagee owe any independent duty to advise a necessaries supplier in other situations.

33 In *The Atlantis Two*, the mortgagee bank learnt of the repairs whilst the repairs were underway, but was never fully apprised of the scale of the repairs, expecting it to be more minor than it actually was. Further, the court found that the mortgagee bank had no knowledge of the true financial situation of the mortgagor. It had earlier agreed to a financial package which was intended to be paid out to the mortgagor's trade creditor – an arrangement it would not have consented to if it was under the impression that it was dealing with an insolvent customer.

34 Besides knowledge, another factor is the element of benefit to the mortgagee. This requirement might not pose much difficulty to a ship repairer bringing a competing claim as compared to a necessaries man who had provided bunkers (see also [38] below). In the context of bunker suppliers, much would depend on the circumstances under which the bunker supplies were provided. In *The Margaret Z*, competing claimants to proceeds of the sale of an American fishing vessel, the *Margaret Z*, include a bunker supplier, crew members (bringing personal injury claims), and the mortgagee of the ship. After sister ships were arrested in Guam, the Guam courts had made orders allowing continued fishing by the *Margaret Z* subject to certain protections to the mortgagee. However, the oil had been provided to facilitate

a fresh fishing expedition prior to the vessel's arrest and the Guam court orders. Fisher J held that the mortgagee's claim should not be subordinated to that of the supplier's because the fuel "was not supplied for the benefit of creditors in general by preserving a vessel under seizure. No benefit to any creditor accrued from the supply, nor was it supplied in the belief that it was protected by an extant Court order" (at 118). Accordingly, there was no sufficiently compelling reason warranting a departure from the usual order of priorities.

35 This requirement to show that the mortgagee had been enriched from the supply of necessaries was also recognised in *JPMorgan Chase Bank v Mystras Maritime Corporation* [2006] FC 409 ("*The Lanner"*). *The Lanner* similarly concerned necessaries men (suppliers of fuel, oil and combustion catalysts) outranked by a mortgagee. Gauthier J held that the usual order of priorities should not be altered because there was no evidence that the mortgagee was able to receive additional payments from the shipowner or that the ship value had increased because of the services rendered by the necessaries men (at [100] and [101]).

36 With the authorities outlined above in mind, I turn now to the facts and arguments canvassed before this court. As to whether there are special circumstances with the attendant element of equity justifying an alteration to the well-recognised order of priorities will turn on the facts of each case. Normally, the inquiry will look into whether the conduct of the party in relation to the other competing claimant(s) in context makes it inequitable to allow his claim to take precedence over the other. The interveners, who are seeking to depart from the established order of priorities, bear the burden of

proof and will have to adduce cogent evidence of the existence of special circumstances. Hewson J's remarks on the requisite quality of the evidence in *The Pickaninny* are apposite (at 537):

> It seems to me that there would have to be very strong reliable evidence before a Court could upset the normal run of priorities established by judgments over many years in the Admiralty Courts.

Hewson J's remarks were similarly adopted in *Fraser Shipyard and Industrial Centre Ltd v Expedient Maritime Co* [1999] FCJ No 947 ("*The Atlantis Two*") (see [32] above).

Whether there are special circumstances

Benefit to the mortgagee

37 Benefit to the mortgagee is an important factor without which the balance of equities favours the bank's mortgage claim taking precedence over the interveners' necessaries claim against the sale proceeds of the vessels that were paid into court. The interveners' contention is that priority should be given to their default judgments because the bunkers supplied had benefitted the bank and/or the bank's security interest in the vessels. It is therefore worthwhile examining at the outset the nature of the benefit alleged to have accrued to the bank as a result of the bunkers supplied but not paid by the borrowers.

38 The benefit that allegedly accrued to the mortgagee in *The Pickaninny* was the repairs to the vessel that the necessaries men undertook to pay. Repairs to the mortgaged vessel, depending on the nature and extent of the repairs, may conceivably help to improve, increase and maintain the intrinsic

value of the *res*. From this perspective, repairs to the mortgaged vessel do result in something that is physical, tangible and capable of deriving benefit from. Hence, it is understandable why repairs are said to be of direct benefit to the mortgagee if it can be established on the evidence that the mortgagee knew and was fully informed as to what repairs were being carried out to the mortgaged vessel. As stated, Hewson J in *The Pickaninny* was not satisfied on the evidence that the mortgagees were aware that the agents had given an undertaking to be personally responsible for the collision repairs in Dover and there was also no evidence that the mortgagor was insolvent at the relevant times.

39 In contrast, the interveners' benefit argument here is quite different, having been stretched at least in terms of how their arguments are articulated, to make out some kind of "benefit" to the mortgagee. I repeat the interveners' argument outlined above: their challenge is founded on the basic premise that the bunkers supplied provided motive power to the vessels, thereby ensuring the physical safety of the bank's security (enabling the vessels to move out of harm's way and avoid physical hazards at sea) whilst the vessels were operational, and enabling the vessels to trade and generate earnings like freight or charter hire to the benefit of the bank.

40 In the present case, the bank has taken security over two ships. A ship is an income generating asset that is habitually used for trading. As a mobile asset used for trade, it is exposed to a variety of risks like adventure risks and perils of the sea besides the usual attendant business and operator's risks. Apart from physical hazards, there are legal hazards which Dr Aleka

Mandaraka-Sheppard explains in *Modern Maritime Law, Volume 2: Managing Risks and Liabilities,* (Informa Law, 3rd Ed, 2013) at p 218:

> The risks are inherent to the mobility of the mortgaged property and, hence, its exposure, not only to perils that it may encounter on the sea, but also to being exposed to the law and jurisdiction of other nations, which may apply a wide range of maritime liens, or submit the ship to political or war risks, or cause the detention of the ship for any reason.

41 All these points go towards the first limb of the interveners' benefit argument. It would be too simplistic to say that the bank's security interests were protected because the bunkers gave the vessels motive power. To the contrary, a highly mobile ship as a trading asset exposes itself to a wider spectrum of risks.

42 On a separate note, so long as the security is in the possession of the mortgagor (who as operator of the vessel employs the vessel under a name and flag that is identifiable with the mortgagor), the mortgagor exercises complete control over the vessel, and may freely use the vessel without regard to the interest of the mortgagee, save that the mortgagor's employment of the vessel must not impair the security (see *The "Myrto"* [1977] 2 Lloyd's Rep 243 at 253). Since the borrowers retained possession of the *Posidon* and the *Pegasus*, the earnings generated by the vessels would be of direct benefit to the borrowers as shipowners and vessel operators, not the mortgagee bank.

43 The interveners' argument is also that on the particular facts of the present case, the bank directly benefitted from the earnings of the vessels because it had been in the thick of the vessels' operations, and because the 2012 LFA provided for all income earned by the vessels to be paid into the borrowers' Operating Account (which was a bank account pledged to the

bank) and assigned to the bank. However, the bank took the position that the monies in the Operating Account would only be available to the bank after an Event of Default is declared. This was repeatedly affirmed by Mr Petropoulos during cross-examination.[6] The interveners have no dispute with the bank's position, save for the date of the Event of Default, which they say is much earlier than 21 August 2014 (see [68] below). To be clear, although there is a Retention Account mentioned in the 2012 LFA, this judgment will only make reference to the Operating Account as nothing turns on the Retention Account.

44 Mr Petropoulos's evidence is corroborated by other objective evidence pointing to the borrowers' exclusive use of the Operating Account in the relevant period, such as the e-mail dated 20 August 2014, where the borrowers informed (and not sought permission from) the bank that it had used earnings from charters to settle overdue liabilities.[7]

45 Finally, I note the interveners' submission that the bunkers supplied in Yemen on 8 September 2014 were intended for the *Posidon*'s arrest voyage to Singapore. If established to be true, this could conceivably be benefit to the bank. However, the bank disputes this, and I am with the bank on this point. According to the bank, the bunkers required for the *Posidon* to set sail for the arrest voyage from Fujairah to Singapore was purchased on 15 September 2014 instead. The bank further avers that the *Posidon* sailed from Mukalla to Fujairah on the borrowers' instruction to seek employment in Fujairah, not as part of its arrest voyage to Singapore. This was not refuted by the interveners. Exhibited in Mr Petropoulos's affidavit is a payment confirmation slip dated

6 Transcript dated 30 November 2016 ("Transcript") at pp 104, 107, 108 and 110.

7 ICB, Tab 21.

16 September 2014, indicating that bunkers were delivered to "M/V POSIDON AT FUJAIRAH"[8] – according to the bank, this was the purchase of bunkers intended for the arrest voyage. It was funded by the bank and this purchase was not part of the bunker claims made by the interveners in the challenge to the summonses before me. In my view, the evidence patently supports the bank's version of the events instead.

46 It is plain, therefore, that the interveners' benefit argument as described in [39] above is ill-founded. For the reasons stated, the interveners have not shown that benefit had accrued to the bank and/or its security because of the supply of bunkers by the interveners.

Knowledge of the borrowers' insolvency

47 There is no evidence that the borrowers have been liquidated or subjected to winding up proceedings. The interveners raised three broad arguments in support of their contention that the borrowers were insolvent at the time the bunkers were purchased and that the bank was aware of the borrowers' insolvency. First, the interveners submit that the borrowers had fallen behind repeatedly in its interest payment obligations, and there was clear indication to the bank that by 22 February 2014, the borrowers were insolvent ("the interest payments argument"). Alternatively, the bank would have known of the borrowers' insolvency by 21 May 2014, three months after the Grace Period, and the date on which the fifth interest payment ought to have fallen due, but was unpaid (see cl 1.2 at [50] below). Further, the interveners argue that the bank, having exercised control over the borrowers'

[8] 4th affidavit of Konstantinos Petropoulos dated 12 November 2015 (ADM 170) at p 9.

financials at the material time, should be taken to have knowledge of the borrowers' dire financial situation ("the control argument"). Overlapping somewhat with the control argument is the interveners' argument that the bank had been so involved and apprised of the borrowers' finances that it ought to have known that the borrowers were insolvent between June 2014 and September 2014 ("the involvement argument").

48 The bank rejects all these arguments. It points to the absence of evidence to show: (a) that the borrowers were insolvent during the period between 21 February 2014 and 21 August 2014; or (b) that the bank knew of the insolvency.

49 A useful starting point is to determine when a company is considered to be insolvent. Our local cases do not regard the quick assets, balance sheet or cash flow tests as helpful. Instead, the question to be asked is "when was the company unable to pay its debts as they fell due?" This is an enquiry to be answered by focusing on the company's financial position taken as a whole by reference to whether a person would expect that at some point the company would be unable to meet a liability: *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo* [2004] 1 SLR 434 at [19]. A temporary lack of liquidity does not amount to insolvency: *Tong Tien See Construction Pte Ltd v Tong Tien See* [2001] 3 SLR(R) 887 at [55]. Regard is to be given to all evidence that appears relevant to the question of insolvency. Such evidence would include loans from financial institutions or shareholders.

The interest payments argument

50 The material provisions of the 2012 LFA are as follows:

1. PURPOSE AND DEFINITIONS

…

1.2 **"Interest Payment Date"** means the last day of an Interest Period;

"Interest Period" means each period in respect of any part of the Loan in respect of which the Interest Rate is computed commencing in the case of the first Interest Period on the Drawdown Date and, in the case of any subsequent Interest Period, on the date of expiration of the immediately preceding Interest Period and ending on a day which is (i) six (6) months for the first twenty four (24) months from the Drawdown Date and (ii) three (3) months thereafter, ***or such other period to be agreed between the Borrowers and the Lender***

…

(iii) the last Interest Period shall end on the Final Repayment Date.

…

7. INTEREST AND INTEREST PERIODS

7.1 Subject to the terms of this Agreement, the Borrowers shall pay interest on the amount of the Loan or any part thereof at the Interest Rate applicable for each Interest Period in relation thereto. Subject to the terms of this Agreement, the Borrowers shall pay interest in respect of the Loan for each Interest Period relating thereto in arrears on each Interest Payment Date.

…

7.3 In the event of failure of the Borrowers to pay on the due date any sum due under this Agreement or any of the Security Documents, the Borrowers shall, without prejudice to the provisions of Clause 7.2 and without affecting any other remedy of the Lender, pay on demand interest on all sums overdue from and including the due date therefor to the date of actual payment (as well after as before judgment) accruing on a daily basis at the rate per annum determined by the Lender to be the Interest Rate increased by two per centum (2%) per annum, for such periods as the Lender may determine at its absolute discretion and for amounts equivalent to the unpaid amount. Any unpaid interest (interest, default interest) accruing on

such unpaid amount hereunder shall be compounded semi-annually thereto or if the period fixed by the Lender as aforesaid is longer at the end of such longer period (both before and after any notice of demand by the Lender under Clause 9) and shall be payable at the end of each such period.

7.4 Notwithstanding the provisions of Clause 7.2 and 7.3 and following specific request of the Borrowers, the failure of the Borrowers to pay the whole or any part of interest accrued in relation to the Loan whether pursuant to Clause 6.1 or Clause 6.5 or otherwise provided in this Agreement on an Interest Payment date up to twenty four (24) months from the Drawdown Date *will not be deemed as an Event of Default* and Clause 7.3 will not apply and *any such unpaid interest will be deemed as part of the principal amount of the Loan (as the case may be) and* ***capitalised*** *on such Interest Payment Date*.

9. EVENTS OF DEFAULT

9.1 Each of the following events shall constitute an Event of Default (whether such event shall occur or come about voluntarily or involuntarily or by operation of law or regulation or pursuant to, or in compliance with any judgement, decree or order of any court or other authority):

(a) any of the Borrowers or the other parties to any of the Security Document fails to pay when due any sum payable pursuant to this Agreement or any of the Security Documents (or any agreement entered into in connection with this Agreement or any of the Security Documents); or

…

[emphasis added in italics and bold italics]

51 The 2012 LFA clearly stipulates that interest payments were due in six-month intervals for the first 24 months beginning from the Drawdown Date, and every three months thereafter, subject to the parties' agreement (see cl 1.2). The Grace Period is the 24-month period after the Drawdown Date.

During the Grace Period, interest payment is allowed to be capitalised and added to the principal amount of the loan (see cl 7.4).

52 One pillar of the interest payment argument is that no interest was ever paid over to the bank. According to the interveners, "[the bank] must have been acutely aware that the [borrowers] were in such financial dire straits that they could not muster a single interest repayment during the 'Grace Period', and on its expiry".[9] In fact, the borrowers took advantage of cl 7.4 in order to capitalise the first four instalments of interest that fell due after the Drawdown date. The bank's position is that the 2012 LFA executed in 2012 was designed to allow the borrowers to capitalise interest that fell due during the Grace Period (including the one due on 21 February 2014) and cl 7.4 was commercially negotiated in light of the downturn in the shipping market. I refer to and accept as plausible the explanation provided by Mr Petropoulos:[10]

> Q: So you will be borrowing on a higher capital sum?
>
> A: Exactly. But the cost of it as a rate, as an interest rate, is the same. It is being applied on a higher amount. And when we will allow these kind of arrangements to a borrower, we take that into account. We give these grace periods. That's why it's called grace. We allow this for two years in expectation that a cyclical market like shipping will have higher cash flows in the period after to repay the increased capital.
>
> So this is an instrument that is very important in shipping where you have a difficult year, and 2012 was a very difficult year. So many banks did these arrangements with customers to allow them so that they would be in a stronger financial position to operate their vessels.

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9 IWS at para 39.

10 Transcript at pp 52 and 53.

> We do that to strengthen the borrower, not to penalise them or penalise ourselves. We are strengthening the borrower so they can operate, they can meet their operating obligations, and be there when the market improves. Because the market in shipping is about to improve eventually. It is a cyclical market. It has down markets and it has better up cycles. So in down cycles we allow this in expectation that we are going to have repayment of this at a later stage.

53 Mr Petropoulos confirmed that the interest payments that fell due have been capitalised:[11]

> Q: … [T]his borrower did not pay any interest despite the loan facility agreement obligations throughout the entire grace period, I suggest to you, you would have internally documented these failures to pay in your credit reports. Do you agree?
>
> A: No, because there was no failure to pay. Interest was paid by capitalisation as agreed and as approved. And the bank and the credit unit were aware of this. So there was nothing to report internally.
>
> This is also clearly stated in the loan agreement in clause 7.4…

54 Under the circumstances, the fact that the four interest payments due during the Grace Period were capitalised would not have caused any alarm. Mr Petropoulos testified to that and the bank also produced rollover faxes dated 3 September 2013 and 25 February 2014. The borrowers' failure to pay the fifth interest payment due on 21 August 2014 was later treated as an Event of Default (see [7] above).

55 Given the clear wording of cl 7.4, it is perplexing why the interveners contend that the bank's case on capitalisation is "illogical and misconceived".[12]

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[11] Transcript at pp 58 and 59.

Contrary to what the interveners aver, there was no inconsistency in the positions taken by the bank at different stages of the determination of priorities and payment out applications. Clause 7.4 and the capitalisation of interest payments were referred to consistently in the affidavits of Mr Petropoulos. The interveners' assertion that "[Mr Petropoulos] was unable to point to any provision in the [2012] LFA… that allowed the [borrowers] to pay interest by 'capitalising' the interest arrears"[13] is plainly incorrect.[14] The interveners also argue that the "theory" behind capitalisation is "preposterous" for it heightens the bank's credit exposure.[15] It is not for the interveners to question the wisdom of cl 7.4. As Mr Petropoulos explained, the availability of the mechanism of capitalisation was a thoroughly considered commercial decision made by the bank in 2012[16] and this arrangement was intended to adapt to the customer's needs in a volatile and cyclical shipping market.[17]

56 The interveners' other point of contention is that the fourth interest payment was due at the stroke of midnight on 22 February 2014, the day after the expiry of the Grace Period.[18] Since the Grace Period had elapsed, the interest payment could not be capitalised, and the borrowers, having not paid interest to the bank, were insolvent by 22 February 2014. Their reliance on the general proposition that "where a thing is to be done on a certain day, it may

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12 IWS at para 68.

13 IWS at para 66.

14 Transcript at p 59.

15 IWS at paras 15 and 16.

16 Transcript at p 54.

17 Transcript at pp 50–52.

18 IWS at para 51.

be done at any time before twelve o'clock at night, unless there be any particular usage [to the contrary]" set out in *The "Afoyos"* [1982] 1 Lloyd's Rep 562 at 565 is misplaced. The scheme of the 2012 LFA envisages that interest payments would be made during business hours. The definition of "Interest Period" in cl 1.2 of the LFA makes reference to "Banking Day[s]", and provides that the Interest Period would extend to the following Banking Day (a day on which banks or exchange markets at which any act is required to be done under the 2012 LFA are open for the transaction of business of the nature concerned) if the last day of the Interest Period falls on a day that is not a Banking Day. The interveners' interpretation of the interest payment deadline does not sit well with the provisions of the 2012 LFA. Indeed, Mr Petropoulos had taken the view that interest payments had to be made by the end of business hours in his oral evidence.[19] The bank's fax dated 25 February 2014 also demonstrates that the interest accrued between 21 August 2013 and 21 February 2014 had been capitalised and added to the principal amount.

57 The alternative strand of the interveners' interest payments argument is that by 21 May 2014, the bank would have learnt of the borrowers' insolvency for the fifth interest payment had fallen due, no interest monies were paid, and the Grace Period had elapsed. Clause 1.2 of the 2012 LFA provides that an "Interest Period" is defined as a period of six months for the first 24 months from the Drawdown Date and three months thereafter, "*or such other period to be agreed between the Borrowers and the Lender*". The bank's explanation is that there was an agreement that extended the period of the fifth interest payment to *six months* after the expiry of the Grace Period.

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[19] Transcript at 67.

58 Even though no evidence directly substantiating this agreement was adduced, there were two faxes dated 25 February 2014[20] and 22 August 2014[21] that referred to payment for interest *accrued* "for the period 21/02/14 – 21/08/14". The bank submits that verbal discussions took place at some point. Mr Petropoulos testified on this point based on his "interpretation of the document". In his view, it was implicit from the message conveyed in the document that oral discussions had taken place. Even though he was not personally involved in such oral discussions (another unit in the bank handled the rollovers), one would arrive at the same conclusion upon reading the same material.

59 On this note, the interveners submit that the faxes alone cannot suffice as proof of an "agreement". The fax dated 25 February 2014 instructed the borrowers to fax over a duly signed copy of the letter sent in acceptance of the terms contained therein; unless a reply was received the following working day, the bank would consider that the terms contained within the fax have been agreed upon. It is undisputed that no replies were ever made. The interveners argue that no agreement was ever made since acceptance of an offer cannot be inferred from silence save in the most exceptional circumstances: *Allied Marine Transport Ltd v Vale Do Rio Doce Navegacao SA* [1985] 1 WLR 925 at 937.

60 Whether there is a valid and binding agreement for the fifth interest payment tranche to be payable on 21 August 2014 instead of 21 May 2014 is a point that cannot be taken without setting aside the default judgments which

[20] ICB, Tab 8.

[21] Agreed Bundle of Documents ("ABOD") at p 417.

proceeded on the basis that the fifth interest payment tranche was due on 21 August 2014. Besides, the point is tangential to the real inquiry as to the bank's knowledge of the borrowers' insolvency. Assuming that no verbal discussions ever took place, and focusing solely on the fax dated 25 February 2014, it would appear that right after the Grace Period expired, the bank extended the Interest Period from the stipulated three months to six months. From the bank's perspective, there would have been no reason for the borrowers to refuse this extension of Interest Period – a longer Interest Period would afford the borrowers greater flexibility in repaying the interest on the loan. Given the instructions set out in the fax dated 25 February 2014, the bank would not have found the borrowers' lack of response amiss. The bank proceeded as if the next interest payment would only have fallen due on 21 August 2014; up until that date, the bank would not have been expecting to receive interest payment from the borrowers.

61 Before moving on to the control argument, I ought to mention that the interveners' reference to how the following interest payment was calculated on a three-month basis (from 21 August 2014 to 21 November 2014) is unhelpful since it relates to a subsequent Interest Period.

The control argument

62 In brief, the control argument is that the bank effectively controlled the borrowers' finances at the material time, and was therefore fully aware of the borrowers' insolvency. The interveners argue that the bank had *de facto* control and management of the interveners' finances for the operational needs of the vessels. The interveners' assertion was derived from two matters: the borrowers were so low on operational funding (funds in their Operating

Account were running low) and bunkers were so expensive (they were at a historic high) during the material time that the borrowers "had to remonstrate with [the bank] for assistance and approval in making payments for bunker supplies for the [vessels]".[22] The interveners also aver that the bank was controlling the borrowers' finances from behind the scenes – it was "disguising its involvement by ordering necessaries, such as bunker supplies for the [vessels], through the [borrowers] so as to circumvent any responsibility for these trade debts."[23] As a corollary to bank's behind the scene purchases, the interveners go on to conclude that the bank had approved the bunkers supplied during June and July 2014.

63 At the outset, the allegation of the bank's *de facto* control was a bald assertion. In particular, the charge of disguising what were the bank's orders for bunkers by using the insolvent borrowers to front the purchases so as to avoid paying for the bunkers is a serious charge of dishonesty made without evidence. If the serious allegation is capable of being made out, the interveners as trade creditors of the bank should be claiming directly from the bank instead. All the interveners adduced was information as to the financial health of the borrowers (discussed at [72] below) and correspondences between the borrowers and the bank.

64 The interveners chiefly rely on an e-mail dated 20 August 2014 in which the borrowers provided the bank with information regarding its short-term liabilities (including overdue payments for bunker supplies), as well as its financial situation.[24] It is plain from the contents of the e-mail that it was sent

22 IWS at para 80.

23 IWS at para 162.

by the borrowers to inform the bank of their financial status, and to seek assistance in tiding over the cashflow issues they were encountering. Nowhere in the e-mail was the bank's approval sought. Additionally, as the bank points out, this e-mail was never responded to, suggesting that it was only meant to be updates. It bears repeating that in *The Orion Expeditor*, Mackay J had taken the view that the mortgagees were not in control of the shipowners, partly because the shipowners were expected to continue to meet all its operating expenses. The tenour of the e-mail reveals this to be the case here for the borrowers as well. In the e-mail, the borrowers informed the bank that it had used the charter earnings to pay "overdue liabilities of July". The borrowers had also informed the bank that they had "no cash availability for bunker payments" but instead of merely asking the bank to disburse funds, the borrowers expressed unease with how they had not "received any definite news from [the bank's] side" and a desire to expeditiously find "a concrete solution". Looked at in context, the borrowers were at that time seeking a loan of US$160,000 and the bank was not responding fast enough for the borrowers. This is vastly different from the version of events put forth by the interveners – *ie*, that the bank was controlling the borrowers' finances behind the scene.

65 As Mr Petropoulos had consistently maintained in his oral testimony, the bank was only monitoring the activities of the borrowers. It had never interfered with the borrowers' operation or management decisions:[25]

> Q: Mr Petropoulos, yes, that's precisely the point. Our point is that the payments were actually with your

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24 ICB, Tab 21.

25 Transcript at pp 120–122.

> approval. Only payments with your approval were processed out of those accounts.
>
> A: We don't approve or disapprove payments. We just want to get -- to have information of the payments. We don't give them approval. We overview the payments made. The instructions are freely made by the borrowers as long as there is no default, and we monitor these payments to have a better information of what is being paid. We don't instruct on the payments.
>
> …
>
> Q: Essentially, Mr Petropoulos, your borrowers were telling the bank that they needed your approval to pay for these expenses; correct?
>
> A: No. There is no approval expected. They are just telling us what is urgent.

I would add that as a matter of commercial prudence, the bank would not wish to be involved in the borrowers' business for it might compromise its own interests by stepping into the shoes of the borrowers as ship operator and exposing itself to the attendant risk and liabilities.

66 The interveners' other argument is that the bank was holding onto the purse strings of the borrowers. Under cl 11.3 of the 2012 LFA, income earned by the vessels would have to be paid into the borrower's Operating Account (defined in cl 1.2 of the 2012 LFA to be a bank account with the bank), or as Mr Petropoulos testified, "assigned" to the bank.[26] Failure to do so would constitute an Event of Default under cl 9.1(p) of the 2012 LFA. Further, under cl 12.3 of the 2012 LFA, Operating Accounts were pledged to the bank. Pursuant to cl 12.5 of the 2012 LFA, if there is an Event of Default, monies in

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[26] Transcript at pp 105 and 106.

the Operating Accounts would be applied to satisfy debts owed (principal, interest or other arrears) under the 2012 LFA.

67 The bank roundly rejected the interveners' interpretation of the borrowers' state of affairs. Mr Petropoulos's evidence is that factually the borrowers retained control of the Operating Accounts, and that management or operation of the mortgaged vessels were left entirely to the borrowers.[27] This is consistent with the fact that the bank as mortgagee did not take possession of the vessels.

68 That the bank would exercise control over the borrowers' Operating Account after an Event of Default was declared was a position that the interveners themselves accept:[28]

> Q: Mr Petropoulos, is it correct for me to understand that the monies that went into the operating accounts and/or the retention accounts can only be used by the borrowers with your approval, with the approval of the bank?
>
> A: No, this is not – I do not agree. Before event of default, there is no need for an approval.
>
> Q: Mr Petropoulos, I disagree with you on that position because you insist that the event of default occurred only on 31 [*sic*] August 2014. Our case is that it's very clear on the loan agreement that the default occurred much earlier.
>
> Do you agree with me that in the event of default, the bank is entitled to block the accounts and to control the usage of the money in the accounts?

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27 Transcript at p 104; 4th affidavit of Konstantinos Petropoulos dated 12 November 2015 (ADM 171) at paras 8–10; Answer to Interrogatories dated 31 July 2016 at para 10; 5th affidavit of Konstantinos Petropoulos dated 21 October 2016 (ADM 171) at paras 22 and 54.

28 Transcript at p 110.

A: I agree. In the event of default, the bank may do so.

As set out in the preceding sections, there was no "event of default" until 21 August 2014.

69 All things considered, the interveners' assertion that the borrowers' finances were under the control of the bank does not comport with the language used in the communications between the parties, and it is an attempt to contradict Mr Petropoulos's evidence without introducing countervailing evidence. In my view, the control argument does not stand up to scrutiny and is untenable.

The involvement argument

70 The interveners' final argument, which was interwoven with its other arguments, is that the bank was intimately aware of the borrowers' deteriorating financial circumstances because it was privy to the borrowers' financial information, and because the borrowers had to repeatedly approach the bank for financial support.

71 Again, the involvement argument does not stand up to scrutiny. I deal first with the interveners' point that the bank was apprised of the borrowers' financial information. The bank had been, as is customary for lender banks, closely monitoring the borrower's financials, including the borrower's financial reports, employment status, trade debts and charter earnings, etc.

72 The bank has disclosed two occasions on which the borrowers' financial information was sought: the e-mail exchanges on 11 and 17 July 2014; as well as the financial statements of 2013 sent in an e-mail dated 22

August 2014. The interveners allege that the bank had indulged in selective disclosure of documents in its possession. Mr Petropoulos's explanation is that "[they] had not received all the financial statements from the borrower"[29], or that the requests were made orally.[30] Be that as it may, on closer scrutiny, what had been disclosed thus far painted quite a full picture of the borrowers' financial health. Attached to the e-mail dated 22 August 2014 were financial reports of the borrowers for the period of 1 January 2013 to 30 December 2013. These reports contained information of the net income, expenses, and net profits of each vessel for the entire year. Both vessels, taken together, were operating at a loss of $891,995.80 (the data does not indicate what currency this figure is in). It also contained information relating to the borrowers' overdue liabilities, which amounted to $1,214,023.96.

73 The e-mail dated 11 July 2014 listed out the borrowers' "urgent liabilities" for the months of July 2014 and August 2014. The total trade debts up to 31 August 2014 amounted to some US$2,163,704.89. It also stated that the borrowers had US$87,612.39 in a Piraeus Bank account, and were expecting freight payments of US$858,000.

74 Finally, the borrowers' e-mail dated 17 July 2014 enclosed "vessel balances up to 17/7/2014". The document attached is stated to be a balance sheet, but it was basically just a compilation of invoices and pending orders. It stipulates that there were unpaid bunker invoices of up to US$1,301,242.75 and that there were pending orders of US$24,450.

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29 Transcript at p 75.

30 Transcript at p 79.

75 While the provision of more financial information would have provided more snapshots of the borrowers' financial health at different time points, I do not think that the bank is denying what the financial statements present anyway – which is that the borrowers had been operating at a loss from January 2013 to August 2014, and that it had been accumulating a substantial amount of trade debts. But a company is not insolvent merely because it was operating at a loss and was saddled with debts (see above at [49]). Given the cyclical nature of the shipping market, the bank was expecting an upturn in the market at some point, and until an Event of Default took place, the bank would not know for certain or have the unmitigated belief that the borrowers were insolvent. Indeed, it should be noted that on 4 June 2014, the borrowers had informed the bank of the upcoming fixtures they had secured for the vessels.[31] The indications were that the borrowers were still carrying on business and conveyed quite a positive outlook. There had been no instances where the charters had not been performed due to the borrowers' insolvency. If anything, the bank was under the impression that the borrowers were experiencing short liquidity in July 2014:[32]

> Q: By 11 July, your borrowers had no funds to be buying more bunkers, so that is why you had to step in to help them to pay for further bunker supplier. Do you accept that?
>
> A: Let me look into my notes.
>
> I have here in my notes that on 23 July, Posidon received a substantial freight of 450,000. So it was only a matter of days to receive incoming freight.

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31 ICB, Tab 11; Transcript at p 103; Answer to Interrogatories dated 31 July 2016 at para 33(e).

32 Transcript at p 144.

> So at that point, for us, it was only bridging – a question of bridging their needs until the next freight would come. *I mean, surely a company that expects this amount of incoming payments, you don't just consider them as having a huge problem. You expect to bridge a couple of days with a short liquidity, they receive the next freight payment, and you go on.*
>
> [emphasis added]

76 Ultimately, it was the borrowers who decided not to solider on anymore after 21 August 2014. Mr Petropoulos's answers to Interrogatories shed light on a meeting on 21 August 2014 where the borrowers and their manager expressed their inability to comply with loan obligations given the bad conditions of the freight market and the poor physical health of the borrowers' major shareholder.[33]

77 Another point in the involvement argument is that the bank ought to have known of the borrowers' insolvency because the borrowers were no longer able to pay for critical bunker supplies and had repeatedly approached the bank for financial support. The interveners base this contention on two things.

78 The first is a loan request of US$160,000 on 24 July 2014. The circumstances surrounding this loan request require further explanation. On 2 July 2014, the *Pegasus* reported a gas leakage 20 minutes before arriving at the port of Zhanjiang. From the evidence, it appears that the problem was quickly rectified but the Maritime Security Authorities of China requested the *Pegasus* to return to the dock for inspection and then asked for US$2,000,000 for offering salvage services. Eventually, this sum was reduced to

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[33] Answer to Interrogatories dated 31 July 2016 at para 41.

US$160,000. As the borrowers were facing short-term cash flows, they requested the bank to give them an advance, and the bank agreed.[34] I should note that the position of the interveners is slightly dissimilar. The interveners claim that US$110,000 had to be remitted for assistance at the Zhanjiang port and US$160,000 had to be remitted for the borrowers' other trade liabilities (including bunker fuel and port dues).[35] The dissimilarity is not very material though. The point made by the interveners is that the borrowers were "insolvent to the extent of being unable to pay modest sums for critical services to the [vessels]".[36]

79 According to the bank, the advance was to come from a separate existing loan facility agreement dated 10 July 2013 ("the Second LFA") with an undrawn sum of US$164,169 (the borrowers had only drawn out US$1,835,831 out of US$2,000,000 available under the Second LFA). Payment of the principal sum and interest under the Second LFA had been overdue since 11 July 2014, but on 23 July 2014, the parties entered into a separate agreement and amended the Second LFA. The US$160,000 loan (referred to at [78] above) was drawn from the undrawn loan amount under the Second LFA, and the final maturity date of the Second LFA was extended to 11 August 2014. I note also the interveners' complaint that the Second LFA was not disclosed to the parties until after the court gave directions on 30 November 2016. The bank's explanation, which is reasonable, is that these

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34 Answer to Interrogatories dated 31 July 2016 at para 19; 5th affidavit of Konstantinos Petropoulos dated 21 October 2016 (ADM 171) at paras 50–52.

35 IWS at para 84.

36 IWS at para 84.

documents were not caught under the discovery orders made by Assistant Registrar Nicholas Poon on 10 December 2015.

80 In my case, the Second LFA merely relates to the financial arrangement under which the loan of US$160,000 would be extended. More materially, I am not persuaded that knowledge of the cashflow problems encountered by the borrowers in July 2014 could be equated to knowledge that the borrowers were insolvent. This is also apparent from how the bank had construed the loan request:[37]

> Q: I see, Mr Petropoulos. So you confirm that you had to advance money of $160,000 to pay for bunkers to the vessel to avoid disruption to the vessel's operations; correct?
>
> A: We did not have. We were asked. We considered the request and we approved the request. *It was a good customer at that time operating. Despite a difficult situation, they were meeting their trading obligations. They had no default.* The bank processed the request and approved it.
>
> [emphasis added]

81 In my view, the bank had not considered the borrowers to be at the risk of becoming insolvent. There was no indication that the borrowers were not performing their charters. From the perspective of the bank, the borrowers were merely facing a short-term cashflow difficulty pending receipt of freight/hire, and the bank took a commercial decision to extend a bridging loan "to a good customer". As Mr Petropoulos explained, the bank was willing to extend further loans because the *Pegasus* was employed then and was carrying cargo.[38] The bank did not want to disrupt the borrowers' operations

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37 Transcript at p 129.

and was willing to accede to their requests so that the vessels could continue to be gainfully employed.[39] Any extension of credit offers some proof of a lender's belief in the prospects of the borrowers' ability to ride out cashflow difficulties and this same reasoning was employed by Prothonotary Hargrave in two of his decisions: *The Atlantis Two* at [182] and *The Golden Trinity* at [147].

82 The other set of communications relied on by the interveners is the request to the bank for assistance to purchase US$24,450 worth of bunker supplies. The interveners rely on the e-mail dated 17 July 2014 (see above at [74]) in which there is a box labelled "Bunker Orders" and "USD 24450" is indicated below. This argument is not free from ambiguity: first, the item of purchase in the Bunkers Orders was not clear. It could, as the bank submitted, be an order for lubricants instead as US$24,450 can only be used to purchase as little as four days' worth of fuel; and secondly, it was more probable that what the document was conveying was that the borrowers were placing orders costing US$24,450 and were informing the bank that such orders were being made rather than asking the bank to pay for the purchase. It should be emphasised that the covering e-mail simply states "[a]ttached please find requested vessels balances up to 17/7/2014".[40] There was no request that funds to be transferred. As Mr Petropoulos explained in his testimony, the information was provided to facilitate the bank's consideration of the borrowers' application for a loan advance of US$160,000 (see above at [78]).[41]

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38 5th affidavit of Konstantinos Petropoulos dated 21 October 2016 (ADM 171) at para 51.

39 Transcript at pp 128 and 129.

40 ICB, Tab 17.

83 For completeness, I note that the interveners had also argued, based on an e-mail on 4 June 2014 in which the bank was requesting information pertaining to the upcoming fixtures of the vessels, that the bank had "crystallised" its intention to enforce by arresting the vessels, for which the bank required the vessels to first complete their employment obligations and clear the cargoes from the vessels. There is nothing to this argument as the e-mail on 4 June 2014 appears to be a completely generic request from a mortgagee to the mortgagor for information. There is no basis to construe this e-mail like how the interveners have done.

84 In the light of the foregoing, I am not persuaded that the borrowers were insolvent at any point in time before the Event of Default on 21 August 2014. Up to the meeting on 21 August 2014, the bank was still willing to provide financial support to the borrowers. It follows that the non-payment of interest on 21 August 2014 is the point in time when the bank had knowledge that the borrowers were actually "unable to pay its debts as they fell due". By then, the bank was told about the ill health of the borrowers' major shareholder which meant that the borrowers were not going to soldier on. For present purposes, I would add that the date, 21 August 2014, is significant because the invoice for bunkers supplied to the *Posidon* at Mukalla, Yemen was on 8 September 2014. These bunkers were ordered on 28 August 2014. The other orders were made before 21 August 2014.

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[41] Transcript at p 131.

Knowledge of the bunker supplies

85 The last factor to consider is whether the bank had full knowledge of the necessaries supplied. The interveners raise as a preliminary point that "general knowledge" that bunkers were being supplied would suffice. They argue that ship repairs ought to be distinguished from bunker fuel. According to the interveners, this distinction is justifiable since vessels undergo repairs for a plethora of reasons and may be optional, whereas bunker fuel is essential to provide basic motive power for the vessels and is also generic in nature. The bank's response is that both *The Pickaninny* and *The Orion Expeditor* were on propositions of law that were generally applicable to suppliers of all sorts of necessaries.

86 It would be artificial and obfuscating to read into the authorities a different degree of knowledge depending on whether it is for repairs where the mortgagee must be apprised of the details of the repairs as compared to the supply of bunkers where knowledge can be non-specific. This would leave open the door for all sorts of necessaries claims that fall within s 3(1)(*l*) of the HCAJA to come in – *eg*, provision of food, water, etc. Furthermore, while the statutory provisions in relation to claims for supply of necessaries and claims for repairs are now separate under s 3(1) of the HCAJA (see s 3(1)(*l*) and (*m*)), it is not helpful to draw a distinction in the way argued for by the interveners since both repairs and supply of necessaries like bunkers are statutory liens under the HCAJA and are of the same class of claims that share *pari passu* in the distribution of sale proceeds of a ship that is the subject of a judicial sale. It bears emphasis that it would require exceptional or special circumstances to warrant an alteration of priorities (see [24] above). Hence, I take the view that it will not suffice to say that since all ships require bunker fuel to have motive

power, the mortgagee must be taken to have knowledge of the fuel supplies being procured. I stress that the authorities clearly state that the order of priorities should only be recalibrated if the mortgagee was "fully aware, in advance" of the arrangements made by the necessaries supplier (see *The Orion Expeditor*).

87 I now turn to what the interveners regard as indicia of knowledge. I begin first with their contention and reliance on how the borrowers were keeping the bank "informed about specific outstanding bunker invoices that were owing to the interveners, after the subject supplies were delivered to the vessels. In this regard, the interveners referred to the e-mail on 20 August 2014, which I discussed earlier. This e-mail, however, references "outstanding invoices" – that is, invoices for which supplies of bunker fuel have already been procured. The interveners also makes reference to six invoices that were faxed over to the bank on 20 August 2014. All of these invoices were for supplies that predated 20 August 2014. In my view, these indicators cannot be given any weight since the interveners must have been aware "in advance" of the arrangements made. Injustice warranting an alteration to the order of priorities is only present when the mortgagee stands by and allows such bunker arrangements to take place despite knowing that the mortgagors were insolvent and that the mortgagee would somehow be benefitting from the supplies at the expense of the bunker supplier.

88 Secondly, the interveners also refer to the fixture list sent via e-mail on 4 June 2014, which makes reference to upcoming fixtures at two discharge ports in China. Again, this falls far short of the knowledge required because there are no details on the date, amount and location of the bunker purchases.

89 Finally, the interveners refer to the bunker purchase on 8 September 2014, which the interveners aver to be bunkers purchased for purpose of the enabling the *Posidon* to sail to Singapore for its arrest. I have already discussed this above at [45]. I would add that Mr Petropoulos flatly denied knowledge of the supply of bunkers in Yemen on 8 September 2014 when cross-examined.[42] He testified instead that the decision to arrest the vessels was only made on 11 September 2014. As mentioned above, the bank's version of events, which I accept, is that the bunkers required for the *Posidon* to set sail for the arrest voyage from Fujairah to Singapore was purchased on 15 September 2014 instead.

90 To conclude, the interveners have not shown the existence of special circumstances to justify a departure from the established order of priorities so as to enable the interveners' claims to rank ahead of the bank's mortgage claims.

Other matters

Drawing of adverse inferences

91 I have not dealt with the issue of adverse inferences up to this point as I do not think it would be appropriate to draw any in the present case. The interveners have relied on a number of factors to ask for adverse inferences to be drawn: documents disclosed on a rolling basis; cursory answers to the interveners' Interrogatories; reference to undisclosed documents for the first time during cross-examination; and the fact that there are numerous other documents that remain undisclosed.

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[42] Transcript at p 167.

92 A party seeking to draw adverse inference must have a case to answer on the issue sought to be strengthened by the drawing of the inference: *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 at [20]. In other words, there must be a substratum of evidence that establishes a *prima facie* case because the court's ability to draw an adverse inference cannot displace a party's legal burden of proof: *Koh Bee Choo v Choo Chai Huah* [2007] SGCA 21 at [28]; *Chan Tin Sun v Fong Quay Sim* [2015] 2 SLR 195 at [62]. As the Court of Appeal had held in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 (at [50]):

> The regime for drawing adverse inferences is derived from s 116(g) of the Evidence Act (Cap 97). Whether or not in each case an adverse inference should be drawn depends on all the evidence adduced and the circumstances of the case. There is no fixed and immutable rule of law for drawing such inference. Where, as was the case here, the trial judge is of the view that the plaintiffs themselves had not made out their claim to the requisite standard, then no drawing of an adverse inference against the defendants is necessary. *The drawing of an adverse inference, at least in civil cases, should not be used as a mechanism to shore up glaring deficiencies in the opposite party's case, which on its own is unable to meet up to the requisite burden of proof.* Rather, the procedure exists in order to render the case of the party against whom the inference is drawn weaker and thus less credible of belief. [emphasis added]

Based on the reasons I have set out above, the interveners have not shown a *prima facie* case against the bank; their case does not cohere with the objective evidence before the court.

93 Even though the rollover faxes for the first two Interest Periods and the agreement on 11 September 2014 for US$2 million facility were not disclosed, they seem unrelated to the adverse inferences that the interveners were inviting this court to make. Much was also made of the bank's failure to

disclose communications relating to the borrowers' financial accounts and information, but as I have mentioned above at [72]–[75], the disclosed documents present a consistent and complete picture, and it does not seem that any purported non-disclosure of the borrowers' financials could be reasonable basis for drawing the inference that the bank was "fully aware" of the borrowers' insolvency. I am also unable to find any basis to make an adverse inference from the non-disclosure of bank statements that the borrowers were under the bank's *de facto* control, especially when the e-mail on 20 August 2014 (see above at [64]) suggests otherwise. Finally, I agree with the bank's submission that there is no general discovery obligation for the present applications and the interveners have not shown how the documents they claim to be undisclosed (such as bank statements) fall within the scope of the discovery order made on 10 December 2015.

Interveners' imprudence

94 On a completely separate note, the bank had made a point about the bunker suppliers being commercially imprudent. In this regard, Prothonotary Hargrave's observations at [115] of *The Golden Trinity* are pertinent:

> [M]ajor bunker suppliers are sophisticated and in all likelihood know as much about general conditions in the shipping industry and perhaps as much about the shipowner's finances as does a bank. Indeed, that sophistication runs from a high degree of general knowledge of economic conditions and outlook for the shipping industry to a high degree of specific knowledge gained from personal contacts with shipowners. Bunker suppliers also tailor their bunker supply terms to fit both the nature of the business generally and the specific circumstances that may develop from time to time…

Avenues open to the bunker suppliers to secure payment include selling on different payment terms like payment in advance or payment on delivery as well as incorporation of retention of title clauses in supply contracts. There is no satisfactory explanation as to why the interveners were happy to extend credit to the borrowers. The consequences of doing so is a business risk that the interveners were willing to assume.

Conclusion

95 For the reasons stated, there is nothing that the interveners have cogently shown to impress upon this court that there are equities in the present case that call for the court to intervene to do justice. Accordingly, the interveners' challenge to prayer 4 of both SUM 4072 and SUM 4073 fails. I will hear parties on costs including directions on orders to be made.

Belinda Ang Saw Ean
Judge

K Murali Pany and Ng Lip Kai (Joseph Tan Jude Benny LLP) for the plaintiff;
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