Bhagwan Marine Pty Ltd v The Ship “Teras Bandicoot” (No 2) [2020] FCA 1481

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| File number: |  |
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| Judgment of: | **MCKERRACHER J** |
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| Date of judgment: | 13 October 2020 |
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| Date of publication of reasons: | 14 October 2020 |
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| Catchwords: | **ADMIRALTY** – judicial sale of ship – application for valuation and sale of arrested ship *pendente lite* – where application is unopposed – where owner of ship does not intend to file a defence – where ship is not crewed and in dead-ship status **Held:** Application granted  |
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| Legislation: | *Admiralty Rules 1988* (Cth) rr 69(1), 70  |
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| Cases cited: | *Bank of China Limited v The Ship “Hai Shi” (No 2)* [2013] FCA 225*Bayside Air Conditioning Pty Ltd v The Owners of the Ship Cape Don* [1997] FCA 690*Bhagwan Marine Pty Ltd v The Ship “Lauren Hansen”* [2020] FCA 1225 *Bhagwan Marine Pty Ltd v The Ship “Lauren Hansen” (No 2)* [2020] FCA 1482*Bhagwan Marine Pty Ltd v The Ship “Teras Bandicoot”* [2020] FCA 1224*Marinis Ship Suppliers (Pty) Ltd v The Ship “Ionian Mariner”* (1995) 59 FCR 245 *Norddeutsche Landesbank Girozentrale v The Ship “Beluga Notification” (No 2)* [2011] FCA 665 *The “Myrto”* [1977] 2 Lloyd’s Rep 243  |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Admiralty and Maritime |
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| Number of paragraphs: | 25 |
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| Date of last submissions: | 8 October 2020 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Plaintiff: | Mr P Graham |
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| Solicitor for the Plaintiff: | Clyde & Co |
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| Counsel for the Owner of the Defendant Ship: | Mr JA Hurley |
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| Solicitor for the Owner of the Defendant Ship: | HWL Ebsworth Lawyers |

ORDERS

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|  | WAD 191 of 2020 |
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| BETWEEN: | BHAGWAN MARINE PTY LTD ABN 81 009 154 349Plaintiff |
| AND: | THE SHIP “TERAS BANDICOOT”Defendant |

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| order made by: | MCKERRACHER J |
| DATE OF ORDER: | 13 OCTOBER 2020 |

THE COURT ORDERS THAT:

1. The Marshal have the Defendant Ship “*Teras Bandicoot*” (“**the Ship**”) valued in writing.
2. The Marshal sell the Ship under the *Admiralty Rules 1988* (Cth).
3. The method of sale is to be determined by the Court.
4. The Marshal engage a shipbroker to value the ship in writing and advise as to the method sale.
5. The Marshal give notice of the shipbroker’s recommendations as to the method of selling the ship to the solicitors for the parties.
6. The Marshal retain a solicitor experienced in the judicial sale of ships to act on the sale of the Ship.
7. Until further order, the Marshal and the shipbroker are not to disclose the valuation referred to in Order 1 to the parties or anyone else apart from the Marshal’s delegates.
8. There be liberty to the parties to apply for further directions or orders as to the valuation and sale of the Ship.
9. The costs and expenses incurred in the appraisement, and in the sale of the Ship be paid out of the proceeds of sale of the Ship as part of the Marshal’s costs and expenses in this proceeding.
10. The costs of this application be in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

1. On 20 August 2020, I directed the Admiralty **Marshal** to arrest the defendant **Ship** *Teras Bandicoot* on an urgent *ex parte* application brought by the plaintiff: *Bhagwan Marine Pty Ltd v The Ship “Teras Bandicoot”* [2020] FCA 1224 (***Teras Bandicoot (No 1)***). On 10 September 2020, an appearance was entered for the owner of the Ship, **Teras Maritime** Proprietary Limited. On the basis that the Ship’s owner does not intend to file a defence to the plaintiff’s claim for unpaid mooring fees, and has not proposed any security to secure the release of the Ship from arrest, the plaintiff now applies for appraisal and sale of the Ship. For the reasons that follow, I consider that the relief sought should be granted.
2. The arrest of this Ship, and the present application for valuation and sale, has been case managed and determined together with the proceeding WAD 192 of 2020 which concerns the ship *Lauren Hansen* and for which separate judgments have been delivered: *Bhagwan Marine Pty Ltd v The Ship “Lauren Hansen”* [2020] FCA 1225 and *Bhagwan Marine Pty Ltd v The Ship “Lauren Hansen” (No 2)* [2020] FCA 1482.

# BACKGROUND

1. By its statement of claim filed 29 September 2020, the plaintiff claims damages in the sum of $138,675 for unpaid mooring fees and daily mooring charges that have been incurred by the Ship’s continued use of the plaintiff’s cyclone mooring situated at Hudson Creek in Darwin Harbour. The Ship appears to have been present on the mooring, not crewed, and in dead-ship status since about February 2018 when Teras Maritime entered into an initial agreement with the plaintiff to moor the ship for a daily fee. The plaintiff terminated the agreement on 31 January 2020 however the Ship remained on the mooring. A new agreement was entered into in early April 2020 in which the plaintiff significantly increased the mooring fees payable for continued use of the mooring, presumably to encourage relocation of the Ship.
2. Following the arrest, the Marshal caused an Australian Maritime Safety Authority (**AMSA**) accredited Marine Surveyor to conduct a **Condition Survey** and report on the Ship’s seaworthiness, environmental risks, boarding arrangements and fitness for towage. Prior to this, very little was known about the condition of the Ship except that it had remained in dead-ship status since being placed on the mooring, without any preventative maintenance carried out during that time: *Teras Bandicoot (No 1)* (at [6]-[7]). The Ship’s class and statutory certificates had also expired.
3. The Condition Survey conducted on 3 September 2020 reported that the Ship was found in structurally sound condition as a laid up vessel with no obvious external damage. The engine and deck machineries, where examined, appeared to be satisfactory however no testing was carried out due to the Ship’s dead-ship condition. The lower bilges were found mostly dry and no signs of leakage were noted. In sum, the Ship was found to be fit for towage within Darwin Harbour although a number of defects were identified. These included concerns about the Ship’s mooring lines and mooring arrangements which require further assessment ahead of the incoming cyclone season. The Condition Survey recommended a fortnightly check of the Ship’s external condition, draft marks and mooring lines; and that in the next three months the Ship be lifted out of the water for hull coating and anode renewal or, at a minimum, an underwater hull diving survey be conducted.
4. On 23 September 2020, an external inspection of the Ship was carried out which reported no changes in the Ship’s condition compared to the previous attendance on 3 September 2020.
5. In accordance with consent orders made by Jackson J on 21 September 2020, the Ship was relocated to an alternative cyclone mooring in the Elizabeth River in Darwin Harbour on 30 September 2020. The relocation was conducted by the Marshal under contract with specialist maritime engineers and a tug subcontractor who facilitated the movement of the Ship via ‘tug and tow’ in dead-ship status. The Darwin Port Authority and AMSA were duly informed of the Ship’s movements. The relocation of the Ship to the alternative mooring has allowed:
6. The Marshal to reduce the daily mooring fee from $1000 a day on the plaintiff’s mooring to $230 on the alternative mooring, significantly reducing the expenses in the arrest;
7. The plaintiff to regain use of its cyclone mooring for its own operational needs; and
8. The plaintiff’s cyclone mooring to undergo both lift inspection and dive inspection before the beginning of the cyclone season on 1 November 2020.
9. Following the successful relocation of the Ship, a further external inspection report was carried out on 30 September 2020 which reported no change in the Ship’s condition from the previous attendance on 23 September 2020.

# THE APPLICATION FOR SALE

1. The plaintiff now seeks orders for appraisal and sale of the Ship pursuant to r 69(1) of the *Admiralty* ***Rules*** *1988* (Cth). The application was initially listed for hearing however once Teras Maritime indicated that it did not oppose the application, both parties consented to the matter proceeding to determination on the papers.
2. The plaintiff relies on the following evidence in support of its application:
3. The affidavit of **Mr** Jonathan Eric **Wyatt** sworn on 19 August in support of the application for arrest;
4. The affidavit of Mr Wyatt sworn on 5 October 2020 (**Sale Affidavit**); and
5. The affidavit of Susan Kate Ladlow, Admiralty Marshal, sworn on 9 September 2020.
6. In the Sale Affidavit, Mr Wyatt sets out correspondence between the parties and the Court which reveals the position of Teras Maritime with respect to the arrest and the claim brought by the plaintiff. In particular:
7. On 30 September 2020, **Mr** Joe **Hurley**, of Teras Maritime’s solicitors, informed the parties and the Court by email that no defence would be filed in response to the plaintiff’s statement of claim;
8. On 1 October 2020, **Mr** Paul **Graham**, of the plaintiff’s solicitors, informed the parties and the Court by email that the plaintiff intended to shortly file the present application for sale of the Ship and that ‘no programming orders are otherwise required since the defendant does not oppose the applications.’ Mr Wyatt confirms in the Sale Affidavit that Mr Graham’s email was approved by Mr Hurley.
9. Further correspondence is annexed to the Sale Affidavit from the plaintiff to Teras Maritime inquiring as to whether it is intended that security be provided to secure the release of the Ship from arrest. At the time of swearing, Teras Maritime had not made any proposals concerning the putting up of security and the Court has not been made aware of any since that time.
10. The Sale Affidavit also details a search conducted by the plaintiff of the Personal Property Securities Register (**PPSR**) in relation to the Ship’s Australian General Shipping Register Official Number. The search records a security interest over the Ship in favour of Malayan Banking Berhad. Mr Wyatt deposes that the plaintiff does not know the extent of the security interest registered in respect of the Ship, nor is the plaintiff aware of any other creditors with an interest in the Ship. A search of the Admiralty Caveats **Register** on the day of swearing the Sale Affidavit revealed no caveats registered in relation to the Ship. A search of the Register was previously conducted by the plaintiff prior to the initial application for arrest, with that search also revealing no caveats registered in relation to the Ship*: Teras Bandicoot (No 1)* (at [4]).
11. Substantial cost has been incurred in the arrest of the Ship to date. The Sale Affidavit annexes a copy of the Marshal’s Receipt and Expenditure Record as at 25 September 2020 which estimates the costs of the arrest up to 30 September (including relocation of the vessel) will total approximately $57,716.20. In addition, the plaintiff submits that at a minimum, the Ship incurs ongoing costs of $3,220 in mooring fees per fortnight and $1074.15 per fortnight in external float inspections. Further, as the Ship is not crewed, no ongoing routine maintenance is being carried out. In these circumstances, the plaintiff submits that there is both ongoing depreciation in the value of the Ship through deterioration, and erosion of any equity that might be available in the Ship due to significant ongoing expenses.
12. The plaintiff contends that as the proceeding is not defended and the present application is not opposed, the circumstances outlined above are sufficiently compelling to justify orders for valuation and sale of the Ship.

# THE PRINCIPLES

1. The principle on which the Court will order a valuation and sale of a ship under arrest before final judgment is well known. It was explained by Brandon J in *The* “*Myrto*” [1977] 2 Lloyd’s Rep 243 (at 260):

The question whether an order for the appraisement and sale of a ship under arrest in an action in rem should be made pendente lite arises normally only in a case where there is a default of appearance or defence. In such a case it has been a common practice for the Court to make such an order on the application of the plaintiffs on the ground that, unless such order is made, the security for their claim will be diminished by the continuing costs of maintaining the arrest, to the disadvantage of all those interested in the ship, including, if they have any residual interest, the defendants themselves.

(cited with approval in *Marinis Ship Suppliers (Pty) Ltd v The Ship “Ionian Mariner”* (1995) 59 FCR 245 per Ryan J (at 249B-C, 250C-D); *Norddeutsche Landesbank Girozentrale v The Ship “Beluga Notification” (No 2)* [2011] FCA 665 per Rares J (at [25]); *Bank of China Limited v The Ship “Hai Shi” (No 2)* [2013] FCA 225 per Rares J (at [8])).

1. Even in circumstances where an application for sale has been opposed, in *Bayside Air Conditioning Pty Ltd v The Owners of the Ship Cape Don* [1997] FCA 690 Cooper J, held that that the interests of creditors, the owner, and the claimants against the ship were best served by ordering appraisement and sale so that funds may be paid into the Court for the benefit of all parties interested in them.

# CONSIDERATION

1. The Ship has now been under arrest for some seven weeks. Teras Maritime has clearly articulated its intention not to defend the plaintiff’s claim or oppose the application for sale.
2. In addition to the ongoing costs of mooring fees and external inspections, there remains the need to conduct further maintenance work on the hull of the Ship which will require dry-docking, and an underwater diving survey in the coming weeks. Also of concern is the imminence of the cyclone season in Darwin which begins on 1 November 2020 and the need to assess the suitability of the Ship’s present mooring to withstand cyclone conditions.
3. Although the value of the Ship is presently unknown, the plaintiff, which carries on business as a marine services provider, estimates a likely value in the range of $800,000 to $900,000.
4. I accept the plaintiff’s submission that unless the Ship is sold, its claim will be diminished by the ongoing depreciation in value of the Ship and the continuing costs of maintaining the arrest, to the disadvantage of all those interested in the Ship including, if it has any residual interest, Teras Maritime itself. This is particularly so where a third party has registered an interest in relation to the Ship on the PPSR.
5. The plaintiff has signed the Form 26 required by it on the present application by which it undertakes to pay on demand the amount equal to the costs and expenses involved.
6. In these circumstances, the plaintiff’s application for appraisal and sale is compelling and should be granted.
7. I will not, at this preliminary stage, make an order directing the manner of sale pursuant to r 70 of the *Rules*. The advice of a shipbroker retained by the Marshal will be crucial to an efficient appraisal and sale of the Ship, particularly in the present circumstances where the events of this year have no doubt dramatically altered the character of the market for vessels such as this one.

# CONCLUSION

1. Orders are made in accordance with plaintiff’s application.

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| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McKerracher. |

Associate:

Dated: 14 October 2020