FEDERAL COURT OF AUSTRALIA

Bank of China v Ship “Hai Shi” (No 3)
[2013] FCA 660

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| Citation: | Bank of China v Ship “Hai Shi” (No 3) [2013] FCA 660 |
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| Parties: | **BANK OF CHINA LIMITED v THE SHIP "HAI SHI"** |
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| File number: |  |
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| Judges: |  |
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| Date of judgment: | 25 June 2013 |
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| Catchwords: | **ADMIRALTY** – Marshal’s costs – application for taxation of Marshal’s costs under r 78B *Admiralty Rules 1988* (Cth) – whether *prima facie* position that Marshal’s costs and expenses are not to be taxed displaced – where costs and expenses incurred from Court ordered sale of ship – where several events created difficulties for Marshal in effecting sale including unseaworthiness, lapsing of insurances and P & I cover for ship – where difficulties arose during arrest justifying Marshal seeking legal advice and assistance **Held:** interlocutory application dismissed – evidence did not raise concern that costs or expenses incurred unreasonably or such to warrant an order for taxation  |
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| Legislation: | *Admiralty Rules 1988* (Cth) rr 41(1), 53(1), 69(4), 78B *Legal Profession Act 2004* (NSW)*Native Title Act 1993* (Cth) s 85A(1)  |
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| Cases cited: | *Daebo Shipping Company Ltd v The Ship “Go Star”* (2012) 207 FCR 220 applied *De Rose v State of South Australia (No 2)* [2005] FCAFC 137 referred to*EMAS Offshore Pte Ltd v The Ship APC Aussie 1 (No 2)* (2009) 194 FCR 484 referred to*International Bunker Services KK v The Ship “Hai Shi”* [2013] FCA 524 referred to*The* *Hoop* (1801) 4 C. Rob. 145 (165 ER 566) applied  |
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| Date of hearing: | 25 June 2013 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 29 |
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| Counsel for the Plaintiff: | Dr S C Derington |
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| Solicitor for the Plaintiff: | HWL Ebsworth Lawyers |
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| Counsel for the Marshal: | Ms J A Soars |
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| Solicitor for the Marshal: | Norton Rose Fulbright Australia |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 141 of 2013 |

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| BETWEEN: | BANK OF CHINA LIMITEDPlaintiff |
| AND: | THE SHIP "HAI SHI"Defendant |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 25 JUNE 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The interlocutory application filed by the plaintiff on 5 June 2013 be dismissed.
2. The Marshal’s costs of the application be paid out of the fund as costs of the sale.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
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| BETWEEN: | BANK OF CHINA LIMITEDPlaintiff |
| AND: | THE SHIP "HAI SHI"Defendant |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 25 JUNE 2013 |
| WHERE MADE: | SYDNEY |

THE CONSENT THE COURT DECLARES THAT:

1. The applicant, STX Pan Ocean Co Ltd (**STX**), was the owner of all of the Fuel Oil (IFO) and Diesel Oil (MDO) on board the ship *Hai Shi* at the time of the completion of her sale pursuant to orders made on 22 February 2013 and 14 March 2013 (**the bunkers**).
2. STX is entitled to be paid that portion of the proceeds of the sale of the ship “*Hai Shi*” pursuant to orders made on 22 February 2013 and 14 March 2013 which is referrable to the proceeds of sale of the bunkers referred to in order 1 hereof (**the proceeds of sale of the bunkers**).
3. STX is entitled to be paid the value of the bunkers consumed by the ship *Hai Shi* in the period following her arrest on 25 January 2013 until the completion of her sale pursuant to orders made on 22 February 2013 and 14 March 2013 (**the value of the consumed bunkers**):
	* + 1. in the sum of USD 251,794.80; and
			2. as a cost and expense of the sale of the ship.

**BY CONSENT, THE COURT ORDERS THAT:**

1. STX be paid forthwith from the fun entitled “Admiralty Marshal – sale of the ship *Hai Shi*” at the Commonwealth Bank of Australia the sum of USD352,134.80 in satisfaction of STX’s entitlement to the proceeds of sale of the bunkers (referred to in order 2 hereof).
2. STX be paid forthwith from the fund entitled “Admiralty Marshal – sale of the ship *Hai Shi*” at the Commonwealth Bank of Australia the sum of USD251,794.80 in satisfaction of STX’s entitlement to the value of the consumed bunkers (referred to in order 3 hereof).
3. STX be paid from the fund entitled “Admiralty Marshal – sale of the ship *Hai Shi*” at the Commonwealth Bank of Australia its costs of its Interlocutory Application dated 10 May 2013 in the United States dollar equivalent (as at the date of payment) of AUD$22,000.
4. The sum of the United States dollar equivalent (as at the date of payment) of AU$20,366.38 be paid forthwith out of the fund entitled “Admiralty Marshal – sale of the ship *Hai Shi*” at the Commonwealth Bank of Australia to International Bunker Services K.K., or at the direction of their solicitors, Norton White, in full and final satisfaction of International Bunker Services K.K.’s claim on the fund.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| IN ADMIRALTY |  |
|  DISTRICT REGISTRY |  |
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| --- | --- |
| BETWEEN: | BANK OF CHINA LIMITEDPlaintiff |
| AND: | THE SHIP "HAI SHI"Defendant |

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| : |  |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

**(REVISED FROM THE TRANSCRIPT)**

1. This is an application by the plaintiff, the **Bank** of China Limited, under r 78B of the *Admiralty Rules 1988* (Cth) for an order that the Marshal’s costs and expenses of the sale of *Hai Shi* should be taxed. It is also necessary to deal with a question of priorities, by consent, concerning the entitlements of **STX** Pan Ocean Ltd to be paid for its interests in the ship’s bunkers.
2. The Bank seeks a taxation because it contends that issues in respect of one or more categories within the significant legal costs incurred by the Marshal in respect of *Hai Shi* while she was under arrest raised sufficient concern to justify an order for taxation. Rule 78B provides:

“**78B Taxation of Marshal’s costs and expenses**

(1) Unless the court orders otherwise, the Marshal’s costs and expenses are not subject to taxation.

(2) If the Marshal’s costs and expenses are taxed under an order, the taxing officer must allow all the Marshal’s costs and expenses other than those costs and expenses that the taxing officer considers have been incurred unreasonably or otherwise than in good faith.”

## Background

1. *Hai Shi* was a capesize ship of 290 metres LOA and had deadweight of 172,000 tonnes. The Bank has a ship’s mortgage over *Hai Shi* registered on the Singapore Register. She was first arrested on 14 January 2013 in separate proceedings commenced by **International Bunker** Services KK while anchored at Hay Point near Mackay in Queensland. In late January 2013, International Bunker made arrangements with the relevant person, Yuan Sheng Shipping (SGP) Pte Ltd, and they agreed to the ship being released from that arrest. In the meantime, the Bank commenced these proceedings. A cyclone was then in progress and this delayed the Marshal in having access to the ship to release her from arrest in the earlier proceedings and rearresting her in these proceedings. Subsequently, I entered default judgment in favour of International Bunker: *International Bunker Services KK v The Ship “Hai Shi”* [2013] FCA 524.
2. While *Hai Shi* was underarrest, a number of events occurred that created a most unusual situation for the Marshal. As a result of those difficulties, the Deputy Registrar, Admiralty and Maritime, Anthony Tesoriero, became a Marshal for the purposes of the arrest of the vessel. I made orders on 22 February 2013 providing for the sale of the ship. The Registrar has made an affidavit to explain the course of events that led to the Marshal incurring a substantial amount of the legal costs in relation to the sale that are the subject of the Bank’s concerns. He said that throughout March 2013, it became apparent that the sale of this ship was like no other that he had experienced.
3. The Registrar has had over 20 years experience in the conduct of the Court’s Admiralty and maritime work, including extensive experience in dealing with many aspects of arrests and judicial sales, as a registrar and Marshal. He said it was one of the hardest and most complicated judicial sales that he has had to deal with and it required the Marshal to consider, and make decisions on, novel issues, many of which he had never previously encountered. Having had the role of judge principally responsible for supervising the arrest, in my opinion, the Registrar’s comments were entirely accurate. Among the difficulties that arose during the arrest were the following:
* the ship was found to be unseaworthy because its gyrocompass was broken; that meant she could not be moved even though she was anchored at Hay Point in the midst of the cyclone season;
* it then transpired that she had no P&I or hull and machinery cover in the name of her owners. Those covers had lapsed because of the owners’ insolvency;
* the two above factors raised concerns about the Marshal’s potential exposure to liability much greater than what would be expected in an ordinary judicial sale. This was because the ship could not be moved while unseaworthy, she was in an area of proximity to the Great Barrier Reef in the middle of the cyclone season and she was not insured;
* the ship’s bunker oil certificate had expired;
* senior officers of Commonwealth and Queensland, including from the Australian Maritime Safety Authority, and State Port authorities at Hay Point were expressing concerns about the ship, but, for some time they had not been able to inspect her. When such inspection occurred, a number of other deficiencies with the vessel were identified;
* the Marshal felt pressured by the Bank and its lawyers to keep the costs of the sale as low as possible. The ship ultimately realised USD9,227,273 on sale after GST. It was clear that the Bank was likely to suffer a very significant shortfall in whatever was later realised as the value of its security. No doubt those concerns provided a legitimate commercial reasons for it to seek to have some oversight as to the amount of costs incurred by the Marshal;
* the crew had not been paid for some time but were being required to remain on board the ship. They were not allowed to have any shore leave because the Bank did not consent and expressed its desire for some of the crew to be repatriated, provided that there were enough crew members left for safe manning of the ship.
1. I am of opinion that those matters raised legitimate and appropriate concerns for the Marshal, as an officer of the Court having custody of the ship, that justified him in seeking legal advice and assistance.
2. On 22 February 2013, I had ordered that *Hai Shi* be valued and sold, and she sail to Brisbane for the purposes of the sale. That movement to Brisbane was because of advice that the broker appointed for the sale gave to the Marshal. However, at that time the Marshal was not aware that the ship was unseaworthy and effectively uninsured. Subsequently, on 11 April 2013, Buchanan J discharged the order to sail *Hai Shi* to Brisbane because, for among other reasons, the ship was unseaworthy and could not be moved.
3. The sale process was one that necessarily took time. It required proper advertising, and the formalities of inspection by potential purchasers so as to realise a proper price. The Marshal was concerned that no assurance could be given prospectively that the arrest or sale would be completed quickly. In the event that the ship has been sold.
4. This was the context in which the Marshal incurred a number of items of legal expense of which the Bank complains. I will deal with each of the significant items below.
5. **The insurance related costs:** The Bank questioned the Marshal’s use of his appointed solicitors to investigate and deal with the ship’s insurance position. This was the major item of expense of which the Bank complained. The Marshal’s solicitors were experienced in Admiralty work, including in dealing with wreck removal claims. They advised and assisted the Marshal, at his request, on the insurance issues that arose. Those included investigating the existing lack of cover, liaising with Commonwealth and State authorities and brokers, and obtaining quotations. The total cost charged for that work was in the order of about $24,400, in respect of about 63.5 hours of solicitors’ time.
6. **The incorrect fee disclosure charge:** The Bank also complained that the solicitors had initially billed the cost of their fee disclosures to the Marshal in the sum of $479.60. However, that was not a cost able to be claimed by a lawyer. In any event, the Bank did not suggest that this charge was a deliberate act. When that error was discovered, the Marshal’s solicitors immediately gave credit and reversed the charge.
7. **The costs of the dispute over the provisions of the solicitors’ invoices:** A dispute arose as to whether or not the Marshal’s solicitors’ invoices should be provided to the Bank. On 11 April 2013, Buchanan J refused to make an order that those invoices be provided. Subsequently, after further discussions between the parties, the Marshal provided those invoices voluntarily. The Bank argued that it had been entitled to receive those invoices under the provisions of the *Legal Profession Act 2004* (NSW). However, during the course of argument today, it did not further press that submission. There may have been an issue as to how any requirement in that State Act could apply to a person in the Marshal’s position or that of his solicitors’ when acting under an order of this Court in the conduct of a sale under the *Admiralty Act 1988* (Cth) and the Rules.
8. The Marshal’s solicitors’ costs incurred under an order of this Court or another court exercising jurisdiction under the *Admiralty Act* are, *prima facie*, subject to the control of the Court by which the Marshal was appointed to act. That Court has power to deal with and control over those costs under r 78B. There is a question as to whether those costs can be subjected, without leave of the Court, to assessment by a method outside a taxation pursuant to r 78B under the *Legal Profession Act*. Because of the possibility that question also could involve a constitutional issue, the Bank did not press this matter today.
9. **Other costs complained of:** The Bank also complained that the solicitors for the Marshal had incurred costs for:
* about 13 hours liaison with State and Commonwealth authorities;
* about 6.5 hours advising on claims by International Bunkers, the plaintiff in the other proceedings, and STX in respect of the cost of bunkers supplied to the ship both prior to her arrest and consumed while she was under arrest. I will make orders today by consent allowing STX to be paid from sale proceeds as a cost of the arrest, the value of the bunkers consumed while the vessel was under arrest and, as a priority, the value of the bunkers at the time of the sale;
* about 14 hours advising on matters relating to the repatriation of the crew and its impact on the Marshal and another 3 hours on issues relating to the crew’s wages;
* the Marshal’s solicitors communicating with the Bank through the lawyers once the sale process was under way.

## The Bank’s submissions

1. The Bank argued that whether the Court should make an order for taxation of the Marshal’s costs and expenses under r 78B(1) was to be approached from the standpoint that the parties were not in an adversarial position. The Marshal was acting as an officer of the Court. In such cases the plaintiff, or arresting party, must give an undertaking, in the case of a sale under r 69(4), to pay on demand to the Marshal an amount equal to the amount of the costs and expenses of the Marshal in complying with the order for the valuation and sale of the ship. Similarly, the plaintiff will have to give the undertaking to pay on demand an amount equal to the Marshal’s costs and expenses in relation to the arrest, including costs and expenses in relation to the ship while she is under arrest, under r 41(1) and correspondingly under r 53(1) to pay the costs and expenses in connection with the custody of the ship while she is under arrest when seeking a release, including the costs and expenses associated with the release of the ship from arrest. The Bank contended that the effect of those undertakings should lead the Court to adopt a different approach to the construction of the word “unreasonable” in r 78B(2) when considering whether to make an order for taxation.
2. The Bank did not suggest that the Marshal was not entitled to seek some advice about the insurance question. Rather, its argument was that in all the circumstances the Marshal’s incurring of those costs should be scrutinised on a taxation. That would ensure, so the argument ran, that the Bank did not have to pay all of the very significant solicitors’ costs and expenses of this particular arrest when there was reason to consider that some of those costs and expenses may be found on taxation not to have been reasonable.

## Consideration

1. In my opinion, r 78B(1) sets out a *prima facie* position that the Marshal’s costs and expenses are not to be taxed. The onus is on the party seeking to displace that *prima facie* position to establish a sufficient basis for doing so. The discretion under r 78B(1) must be approached having regard to the provisions of r 78B(2). The latter rule identifies the only costs and expenses that can be disallowed on a taxation, namely, costs or expenses that the taxing officer considers have been incurred unreasonably or otherwise than in good faith. There is no suggestion in this case of the latter situation. Thus, ordinarily the Marshal’s costs and expenses in such situations are not taxed. Likewise, ordinarily, those costs and expenses are not incurred in an adversarial context.
2. Part of the Marshal’s responsibility, as the Court’s officer, is to ensure that such costs or expenses as he or she incurs, or causes to be incurred, for which a party is liable under one of the undertakings given pursuant to rr 41(1), 53(1) or 69(4), are incurred reasonably and in good faith: cf *EMAS Offshore Pte Ltd v The Ship APC Aussie 1 (No 2)* (2009) 194 FCR 484 as to the operation and adjustment of the undertakings.
3. The Court retains a discretion in all circumstances under r 78B to order a taxation. Rule 78B replaced the previous rule that had as an ordinary requirement there would be a taxation of the Marshal’s costs and expenses. But the starting point now is the default position under r 78B(1) that no taxation will occur. That rule was intended to remove any ground for anticipation or expectation that unless cause was shown for another order, a taxation of costs would follow in the event the party liable did not agree to the quantum sought. Rule 78B(1) contemplated that some significant reason ought be established to justify the Court otherwise ordering. A similar position obtains under s 85A(1) of the *Native Title Act 1993* (Cth), which provides that unless the Court otherwise orders, each party to proceedings under that Act must bear his or her own costs. That discretion arises in the context of adversarial litigation, so that there some distinction between it and situations ordinarily applicable in matters arising under r 78B: see e.g. *De Rose v State of South Australia (No 2)* [2005] FCAFC 137, particularly at [6]-[10] per Wilcox, Sackville and Merkel JJ.
4. It has long been the law that the Marshal, as the Court’s officer, has responsibility for the safekeeping of the *res*. In *The* *Hoop* (1801) 4 C. Rob. 145 (165 ER 566), the Marshal was sued for the loss of property on a ship under arrest. Sir William Scott said (at 146):

“It is not proper, that such a complaint should be left, without an answer being returned to it on the part of the Marshal: **The credit of the Court is concerned in the safe keeping of the property under its protection.** If any such property is lost, it is at least the duty of the Marshal to be prepared to shew that it was not lost by any default of his. **If the fees of the Marshal's office are not sufficient to enable him to provide means of security, it should be represented to those who have authority to increase them**; but it is not a time to rely upon such a plea, when property under his keeping is alleged to have been already lost.” (emphasis added)

Sir William Scott ordered that the Marshal pay the claimant the value of the property lost.

1. The Marshal was dealing here with a very difficult arrest for the reasons that he explained. It may be that it could be arguable that he, or his solicitors, took some steps for which costs may or may not be allowed were there an order for a taxation on an indemnity basis. Nonetheless, the Marshal was confronted with a situation in which a very large vessel, being a capesize, was unseaworthy and unable to be moved during the cyclone season. She was anchored near the Great Barrier Reef and uninsured. The Marshal had every reason to seek thorough legal advice to protect both the ship’s and the Marshal’s position, as the Court’s officer, were some disaster to occur. The costs of clean up, including wreck removal and the like, would not necessarily be covered by the $100 million insurance currently in place for arrested vessels under the insurance arrangements for courts exercising *in rem* jurisdiction in Australia that the Court has obtained in order to ensure that its officers and the Supreme Court’s officers are indemnified. That cover does not automatically extend to moving a ship while under arrest and requires a further premium to be paid.
2. This was a most unusual situation. The Marshal’s solicitor, Mr Ernest van Buuren, estimated that the costs of a taxation in this matter would be around $50,000. His estimate has not been challenged. In my opinion, the Bank has not shown that there is sufficient reason to displace the operation of r 78B(1). Ordinarily, it would be expected that a person seeking an order for taxation under r 78B(2) to be able to show that the circumstances warrant a conclusion that if a taxation were ordered, a taxing officer would find that costs had been incurred unreasonably or otherwise than in good faith, and depending on the circumstances, that some useful purpose would be served by the making of such an order, resulting, where no issue of good faith arose, in an overall saving to the estate.
3. There may be situations where it is important to order a taxation under r 78B(1) because that is necessary to maintain public confidence in the administration of his or her office by the Marshal in respect of the costs and expenses he or she incurred for what a party is liable under an undertaking or otherwise. The Court must be mindful to ensure that in an appropriate case it is possible for a person affected to seek such a taxation or to maintain the integrity and appearance of integrity in the Court’s officer’s conduct.
4. I am completely satisfied by the evidence of the Marshal and his solicitor that this case raises no concern that costs or expenses have been incurred unreasonably or in a way that would warrant an order that the Marshal’s costs and expenses be taxed.

## Conclusion

1. For these reasons, I dismiss the Bank’s interlocutory application. I will order that the Marshal’s costs of this application be paid out of the fund as a cost of the sale.

## STX’s claim for payment in respect of the bunkers

1. STX was granted leave to intervene in these proceedings. STX sought orders that it be paid for the value of the bunkers at the time when the ship was sold by the Court and also for the value of the bunkers consumed while she was under arrest, together with costs. The Bank, STX, International Bunker and the Marshal have consented to orders for that purpose. Because the orders seek declarations, I should briefly explain why I consider it appropriate that those declarations and orders be made.
2. STX time chartered *Hai Shi* on a New York Produce Exchange form of charter party entered into on 24 October 2012 for a time chartered trip via the East coast of Australia to China. Clauses 2 and 3 of that charter party were in the usual form and provided that the charterers would take over and pay for bunkers on board at the port of delivery, provide and pay for all fuel acquired during the charter, except as otherwise agreed, and that the owners would take over and pay for bunkers on board at the time of redelivery. On 17 December 2012, the parties made a second charter party, on back to back terms with the original one, for another voyage from the East coast of Australia to China. Thus, at the time the second charter party was entered into, the ship’s bunkers were either retained or again taken over by STX. When *Hai Shi* was arrested there were substantial bunkers on board.
3. The parties agreed that declarations should be made to the effect that I have stated and that orders for payment out of the fund in Court to STX of the value of the bunkers, *first*, when the vessel was sold and, *secondly*, consumed while she was under arrest. In my opinion, such declarations are appropriate: see *Daebo Shipping Company Ltd v The Ship “Go Star”* (2012) 207 FCR 220 at 236-239 [71]-[82] per Keane CJ, Rares and Besanko JJ. I will make orders in the form of those agreed by the parties with some minor variation.
4. Finally, and again by consent, International Bunker has sought an order for payment out of the fund of an amount from the sale proceeds in respect of its claim in the proceedings it brought. I will also make that order.

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| I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate: Dated: 25 July 2013