

C A T C H W O R D S

ADMIRALTY - action in rem - ship mortgage - unpaid instalments - summary judgment - motion for stay - construction of mortgage - pending action in foreign jurisdiction - allegation of fraud - speculative - no arguable defence - summary judgment granted - stay dismissed - crew wages and repatriation expenses - lien - conditional order.

Admiralty Act 1988

Fancourt v Mercantile Credits (1983) 154 CLR 87

CREDIT SUISSE v THE OWNERS OF THE SHIP SATOUF 1

No. WAG 83 of 1990

FRENCH J.

PERTH

21 AUGUST 1990



IN THE FEDERAL COURT)
OF AUSTRALIA)
WESTERN AUSTRALIA)
DISTRICT REGISTRY)
GENERAL DIVISION)

No. WAG 83 of 1990

B E T W E E N:

CREDIT SUISSE

Plaintiff

and

THE OWNERS OF THE SHIP
SATOUF 1

Defendant

MINUTE OF ORDER

JUDGE MAKING ORDER: French J.

DATE OF ORDER: 21 August 1990

WHERE MADE: Perth

THE COURT ORDERS THAT:

1. There be judgment for the plaintiff in the sum of \$US2,236,607.40 and 5,719.90 pounds sterling.
2. That subject to the plaintiff making arrangements satisfactory to the Marshal for repatriation of the crew and Master of the Ship Satouf 1 and the payment of their outstanding wages, the ship be appraised and sold and the proceeds paid into Court for disbursement in accordance with this judgment.
3. There be liberty to the parties and the Marshal to apply generally as to the mode of appraisal and sale of the vessel and the disposition of any proceeds.
4. The motion for a stay of proceedings and the motion for a sale of the vessel pendente lite be dismissed.

5. There be liberty to apply on the correctness of the arthimetical calculations underlying the money judgment.
6. The defendant to pay the plaintiff's costs of the action to be taxed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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CREDIT SUISSE

Plaintiff

and

THE OWNERS OF THE SHIP
SATOUF 1

Defendant

CORAM: FRENCH J.
21 August 1990

REASONS FOR JUDGMENT ON MOTION FOR SUMMARY JUDGMENT
AND FOR STAY AND FOR SALE OF VESSEL PENDENTE LITE

Introduction

Credit Suisse, a Swiss Bank, claims against the owner of the Panamanian ship, Satouf 1, possession of the ship and in the alternative payment of \$US2,220,198.03. The claim is based upon a registered first mortgage over the ship. The owner, a company incorporated in Panama under the name Sathof Marine and Trading Inc. ("Sathof Marine"), is said to be in default.

A writ claiming the relief was issued out of the Perth Registry on 27 July and on the same day the District Registrar issued an Arrest Warrant. A copy of the writ was served by being affixed to the ship on 30 July while it was anchored at Gage Roads, outside Fremantle Harbour. At the same

time the Deputy Sheriff of the Court, authorised by direction of the Chief Justice dated 22 December 1988 to perform the duties and functions of a Marshal under the Admiralty Act 1988, arrested the ship. On 31 July, on the Marshal's application for directions, orders were made for provisioning so that the crew, comprising some 43 persons, might have adequate supplies of food and water. Sathof Marine filed a notice of conditional appearance on 3 August and an unconditional appearance on 9 August. On 3 August directions were given to enable Credit Suisse to proceed to apply for summary judgment and Sathof Marine to seek a stay or dismissal of the proceedings on the basis of pending cognate litigation in Dubai. Following a further approach by the Marshal, directions were given on 13 August for onshore accommodation for the crew and for the ship to be maintained with a rotating skeleton crew.

The summary judgment and stay applications came on for hearing on Thursday, 16 August together with an application by the plaintiff for valuation and sale of the ship pendente lite.

The Statement of Claim

By its statement of claim Credit Suisse alleges that Sathof Marine, as the registered owner of the ship, Satouf 1, was at all material times managed by Loyal Transport and Shipping Co. of Sharjah in the United Arab Emirates. The ship is described as a livestock carrier having a gross weight

of 8,628.3 tonnes. On 19 October 1989, it is said, the defendant executed a first preferred mortgage over the ship in favour of the plaintiff. The mortgage, in English, was allegedly registered initially with the Panamanian Consul and subsequently in Spanish translation, by the Ministry of Government and Justice for the Republic of Panama on 6 February 1990. A certificate of encumbrance issued on 8 February 1990.

Various terms of the mortgage are pleaded including:

1. A covenant to repay Credit Suisse \$US2,385,000 by eight consecutive quarterly instalments, the first seven being \$US300,000 and a final instalment of \$US285,000. The first payment was due on 31 December 1989.
2. A covenant to pay interest at 11% quarterly in arrears.
3. A covenant by the owners to insure the ship to Credit Suisse's satisfaction upon terms required by it with such insurers as it approved.
4. A covenant not to execute or register any other mortgage or charge on the ship or shares of the ship without the prior written consent of Credit Suisse.

Default provisions pleaded would give the Bank the right, in

the event of a breach of the terms of the mortgage, to treat the whole of the outstanding balance under the mortgage as due and payable and to exercise the mortgagee's powers. The statement of claim goes on to allege various breaches by the owner including:

1. Failure to pay two of the \$US300,000 instalments.
2. Failure to pay interest of \$US57,337.50 and \$US49,632.91.
3. Failure to insure the vessel in accordance with the bank's requirements.
4. Entering into a second preferred mortgage without the prior written consent of the bank.

The owner is also said to have failed to pay solicitor's fees incurred by the plaintiff in relation to the preparation of the mortgage document, namely the sum of £5,719.90p. owed to Messrs. Vincent, French & Browne of London.

The Summary Judgment Application

For the purpose of its summary judgment application, the bank does not seek an order for possession but judgment in the following terms:

1. There be judgment for the plaintiff in the sums of:

- (a) US\$2,233,458.30; and
 - (b) £5,719.90.
2. The ship Satouf 1 do be appraised and sold by the Marshal and the proceeds paid into court, alternatively invested by direction of the court;
 3. All parties and the Marshall be given liberty to apply in relation to the proceeds of sale of the vessel;
 4. The plaintiff have the costs of the application to be taxed.

The Evidence

The bank relied upon affidavits sworn by its First Vice President, Brunello Perucchi on 7 and 13 August and an affidavit of Mauro Balzarini, a resident of Italy, an unsworn copy of which was received by consent on the undertaking that a sworn copy would be filed. The owner, whose principals reside in Dubai, relied upon three affidavits sworn 9, 13 and 14 August by its solicitor, John Farquharson. One of those affidavits exhibited an affidavit sworn by David Silver, a partner in a firm of solicitors, Clyde & Co. of Dubai, who also act for the owner. It was said to be based upon instructions received from Mr Hassein Sakkani, the proprietor of Sathof Marine. A general objection was taken to the Farquharson affidavits because of their hearsay nature. I was satisfied however, given the difficulties of communication

between the owner and its Perth solicitors, that the affidavits should be admitted. The bank must show on this application that there is no real question to be tried - Fancourt v Mercantile Credits (1983) 154 CLR 87 at 99. It is open to the owner to rebut that contention and on a summary judgment application it is open to the court to receive hearsay evidence if practical considerations so require. To do otherwise in this case would have been to unfairly deprive the owner of the opportunity to show why the matter should go to trial. Having said all that, it may also be observed that, as appears from the affidavit material, the nature of the principal transaction underlying the claim was not in issue.

On 14 July 1989 Sathof Livestock Trading Co. of Dubai agreed to purchase from Cugado Shipping Co. of Panama a ship then called El Redil for \$US3,975,000. Ten per cent of the purchase price was to be deposited with Credit Suisse and held in a joint account for the buyers and the sellers. The balance was to be paid to the account of Cugado Shipping at the same Bank not more than three days after delivery. Clause 4 of the agreement provided:

"The Buyers have inspected and accepted vessel and her records, sale is definite."

The expected time of delivery was August 1989. An arbitration clause (cl.15) provided for disputes to be referred to arbitration in "London in accordance with English

law". There was no provision for payment by instalments. Some special clauses added to the standard form agreement included cl.16 which regulated payment of the purchase price in the following terms:

"90% on delivery by confirmed/irrevocable letter of credit from first class bank acceptable to Sellers against:

- A. Bill of Sale legalised by U.A.E. Embassy or other Embassy to be agreed.
- B. Deletion Certificate issued by Port of Registry or, in its absence, Sellers letter of Undertaking to deliver such document within 30 days from delivery date.
- C. Non encumbrance certificate.
- D. Protocol of delivery and acceptance signed by Sellers and Buyers representatives on delivery date.
- E. Statement from Sellers that vessel not boycotted by Arab league."

Negotiations ensued in relation to the financing of the acquisition through Credit Suisse. On 28 August 1989 a fresh agreement was executed between Cugado and Sathof Livestock Trading Co. This was done apparently because the time limit for delivery under the agreement of 14 July was about to expire. The purchase price was reduced to \$US3,577,500, evidently to take account of the deposit already paid. There was nevertheless provision for a further 10% deposit. Time of delivery was September/October 1989. There was again an arbitration clause which provided for arbitration in London with the further provision that:

"This contract shall be subject to the law of the country agreed as the place of the arbitration."

There were additional clauses appended to and forming part of the new memorandum, the first of which contemplated that Credit Suisse would be financing the acquisition:

"16. US\$1,192,500/ - (ONE MILLION ONE HUNDRED NINETY TWO THOUSAND FIVE HUNDRED ONLY) which includes deposit (i.e. US\$357,750/-) (US DOLLARS THREE HUNDRED FIFTY SEVEN THOUSAND SEVEN HUNDRED FIFTY ONLY) will be paid in cash on Seller Bank and balance (US\$2,385,000/- TWO MILLION THREE HUNDRED EIGHTY FIVE THOUSAND ONLY) will be paid by finance arrangement provided by Credit Suisse, Seller's Bank for a period of 2 years on 3 months installments with normal interest charges." (sic)

It was a condition of the financial accommodation to be provided by Credit Suisse that the vessel be acquired by a company to be incorporated for that purpose in Panama. It was for this reason that Sathof Marine was incorporated. And it was, according to the owner's affidavits, a further requirement that any advances be made to the vendor Cugado and not to the purchaser or its associated companies. A third agreement of 15 September 1989 was drawn up and executed accordingly. A copy was exhibited to Silver's affidavit. It named as parties, Cugado Shipping Co. SA, Sathof Marine and Trade Inc., Satoof Goat and Cattle Food Co. (one of Sakkani's companies), Sakkani himself and Credit Suisse.

Under cl.1 of the agreement it was provided that the purchase price for the vessel would be \$US3,577,500, of which \$US1,192,500 would be payable on delivery and the balance, \$US2,385,000 repaid by eight instalments, seven of \$US300,000 each and one of \$US285,000. These payments were to be made quarterly commencing on 31 December 1989. The deferred payments were to be secured by eight Bills of Exchange issued to the order of the seller covering the payments comprising 7 of \$US300,000 and 1 of \$US285,000, together with interest at the rate of 11% per annum, making a total amount of \$US2,682,687.48. The Bills of Exchange were to be endorsed in favour of and made payable to Credit Suisse. Clause 2 of the agreement provided:

"The Buyer agrees to purchase the Vessel upon the agreed terms and price and to register the Vessel and title under the flag of Panama to issue the bills of exchange as required and further to execute and register a First Preferred Mortgage on the Vessel with first priority together with an assignment of insurances in favour of the Bank in such terms and conditions as the Bank shall require, and take all steps necessary for registration of the mortgage in Panama."

Under cl.3 the Bills of Exchange were to be discounted by the Bank who would credit and lend to the seller up to \$US2,700,000 on a current account facility which would be repayable from the proceeds of the Bills of Exchange. In the event that any Bill of Exchange were dishonoured the remaining bills could, at the Bank's option, also become immediately due and payable and the Bank would require immediate payment of

the loan facility from the Seller. Satoof Goat and Cattle Food Co. and Mr Sakkani were to back the Bills of Exchange and Sakkani was to guarantee their due and punctual payment. By cl.7 it was provided:

"7. This agreement shall be governed by English law."

The mortgage which is the subject of this action is dated 19 October 1989. The parties are Sathof Marine (designated "the Owners") and Credit Suisse ("the Mortgagee"). The first recital sets out the ownership of the vessel, renamed Satouf 1 and its registration under the Panamanian flag. The second recital refers to the agreement of 15 September and the condition that the balance of the purchase price of the ship \$US2,385,000 plus interest at 11% be paid by eight quarterly instalments covered by 8 Bills of Exchange drawn upon and accepted by Sathof Marine. Cugado Shipping Co. is designed as "the Sellers" in this recital. The third recital sets out that Cugado had agreed to endorse the Bills in favour of Credit Suisse and that Sathof Marine had agreed as security for repayment of the deferred portion of the purchase price and interest covered by the Bills, to execute and register a first preferred mortgage on the ship and an assignment of the ship's insurances in favour of the Bank. Among the definitions in cl.1 of the operative provisions are the following:

"(vi)(a) "the Principal Sum" means the amount of Two Million Three hundred and eighty five thousand United States (sic) Dollars (US\$2,385,000) or the amount for the time being outstanding represented by the principal of the Bills of Exchange."

"(vi)(b) "the Outstanding Indebtedness" means the aggregate of all sums of money from time to time owing to the Mortgagee under this Mortgage and/or the Bills of Exchange or any of the Security Documents."

Clause 2 effects the mortgage of the ship in the following terms:

"PURSUANT TO the Agreement and in consideration of the Mortgagees advancing to the Sellers the Principal Sum and in consideration of the sum of Ten United States Dollars (US\$10) paid to the Owners and in order to secure the payment of the Outstanding Indebtedness and the Bills of Exchange and to secure the performance and observance of and compliance with the covenants terms and conditions in this Mortgage contained the Owners hereby mortgage and charge to and in favour of the Mortgagee the Ship (and all such Owners' interest therein) to the intent that this Mortgage shall constitute in favour of the Mortgagee a First and Absolute Mortgage on the Ship in accordance with the provisions of Chapter V Title IV of Book Second of the Code of Commerce and other pertinent provisions of the Civil Code and other laws of the Republic of Panama."

And the payment covenant is set out in cl.3:

"FOR the consideration aforesaid the Owners hereby covenant with the Mortgagee -

(a) to repay the Principal Sum by eight consecutive three monthly instalments the

first seven of Three hundred United States Dollars (sic) (US\$300,000) and a final instalment of Two hundred and eighty five thousand United States Dollars (US\$285,000) each payable upon the last days of June, September, December and March in each year but the first of which shall be payable on the 31st day of December 1989 and the final instalment on the 30th day of September 1991 and

(b) to pay interest in Dollars on the Principal Sum or balance from time to time outstanding at the rate of eleven per centum per annum ("the Interest Rate"). Interest shall be payable quarterly in arrears the first payment being due on the 31st December 1989 and shall be calculated on the actual number of days elapsed and a year of 360 days. Interest Payment Date means the last day of any Interest Period. If any Interest Period would end on a day which is not a Banking Day, such Interest Period shall be extended to the next succeeding Banking Day, unless such Banking Day falls on the next calendar month, in which case such Interest Period shall end of the preceding Banking Day

(c) To pay the Bills of Exchange representing the instalments of Principal Sum and interest upon their due date upon presentment"

Other covenants, set out in cl.6, require the Owners to insure the ship for an amount at least equal to its full commercial value but not less than 120% of the Outstanding Indebtedness. The insurance was to be effected with "such insurance offices clubs or underwriters as the Mortgagee shall approve which approval shall not be unreasonably withheld". There are other ancillary covenants in relation to insurances which it is not necessary to refer to for present purposes.

Clause 6(m) prohibits the execution or registration

of any subsequent mortgage without the prior written consent of the Bank. The mortgage itself was to be registered as a first preferred mortgage in the Republic of Panama. Recovery of expenses incurred by the Bank in connection with the protection of the security is provided for in cl.7:

"THE Mortgagee shall without prejudice to its other rights and powers hereunder be entitled (but not bound) at any time and as often as may be necessary to take any such action as it may in its discretion think fit for the purpose of protecting the security created by the Mortgage and each and every expense or liability so incurred by the Mortgagee in or about the protection of the security shall be repayable to it by the Owners on demand together with interest thereon at the Interest Rate from the date whereon such expense or liability was incurred by the Mortgagee until the date of actual receipt whether before or after any relevant judgment"

The default clause 8 provides, inter alia:

"IF the Owners shall make default in any of the following respect, or if any of the following events shall happen that is to say:

- (a) If the Owners shall make default in the payment of the whole or any part of any monies required to be paid by the Owners in accordance with or pursuant to the provisions of any of the Agreement the Bills of Exchange the Security Documents and/or this Mortgage or in the case of sums expressed to be payable upon demand within three (3) days of such demand being made and in particular if any Bill of Exchange is dishonoured or not paid in full on its due date

(b) If any material default shall be made by the Owners in the due and punctual observance and performance of any of the other covenants conditions or agreements contained in the Agreement the Security Documents or this Mortgage or in any other document required to be executed in accordance with the provisions thereof

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(i) If the Owners without the previous consent in writing of the Mortgagee create or attempt to create any mortgage or charge on the Ship or upon her insurance other than as contemplated in this Mortgage

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(p) If default shall be made in the due and punctual observance and performance of any of the covenants conditions or agreements contained in this Mortgage

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then in each and every case the Mortgagee shall be entitled to exercise the rights set forth in clause 9 hereof"

And cl. 9 provides:

"IN each of the defaults or events mentioned in Clause 8 the Mortgagee shall be entitled:-

(i) To treat as immediately due and payable the Outstanding Indebtedness which including all Bills of Exchange shall become and be immediately due and payable and thereafter shall bear interest (as well after as before judgment) at the Interest Rate

(in) Immediately to put into force and exercise all or any of the powers possessed by it at law and/or as Mortgagee under this Mortgage

(iii) to proceed to protect and enforce their rights by suit in equity or action in law or in admiralty or by other appropriate proceeding whether for the specific performance of any covenants or agreements contained in this Mortgage or in aid of the exercise of any power contained in this Mortgage or may proceed to enforce the payment of all monies due as aforesaid or to enforce any other legal or equitable right or proceed to take any action authorised or permitted under the terms of any security for the said monies or of the applicable law"

Sub-clause (iv) empowers the Bank to take possession of and manage the Ship. Clause 10(A) confers a power of sale.

Clause 21 required Sathof Marine to pay the costs, including legal fees incurred in connection with the preparation and registration of the mortgage. Clause 22 related to the service of notices of demand under the mortgage:

"ANY demand of any monies payable under this Mortgage shall be deemed to be sufficiently made if in writing addressed to the Owners at Loyal Transport and Shipping Co. of P.O. Box.6369 Sharjah U.A.E."

And cl. 23 provided for enforcement proceedings to be taken

in the court of any country:

"THE Owners agree that the Mortgagee (without prejudice to any other rights or remedies open to them as Mortgagee or otherwise) shall have liberty but shall not be obliged to take any proceedings in the Courts of any country to protect or enforce the security hereby constituted or to enforce any provisions of this Mortgage or to recover payment of any sums due and for the purpose of any such proceedings the Owners hereby submit to the jurisdiction of such Court and in particular the Mortgagee shall have the right to arrest and take action against the Ship and/or any other ships for the time being belonging to the Owners at whatever place such ships be found lying and for the purpose of action which the Mortgagee may bring before the local Court for the jurisdiction of such Court or other judicial authority and agrees that for the purpose of proceedings against any of the Owners' ships any writ notice judgment or other legal process or documents may be served upon the Owners' aforesaid agents and/or upon the Master of the ship against which the action is taken (or upon anyone acting as the Master) and that such service shall be deemed good service on the Owners for all purposes"

One question of construction that can be addressed immediately is whether the terms of the mortgage require any demand before enforcement action can be taken in the event of a failure to pay any of the instalments. Counsel for Sathof Marine contended that such a demand was a precondition to enforcement action. For present purposes cl.8(a) is the relevant provision. The default events specified in that provision fall into three classes:

(i) default in the payment of the whole or any part

of any monies required to be paid by the Owners in accordance with or pursuant to the provisions of any of the Agreement, the Bills of Exchange, the Security Documents and/or the Mortgage.

(ii) default in the payment of sums expressed to be payable upon demand within three days of such demand being made.

(iii) where any Bill of Exchange is dishonoured or not paid in full on its due date.

Sums expressed to be payable on demand are the costs of rectifying defects (cl.6(e)) and the expenses or liabilities incurred by the Bank in taking action to protect the security under cl.7. There is no such requirement with respect to a failure to meet the instalment payments due whether that be characterised as a failure to honour the covenant in cl.3(a) "to repay the Principal Sum by eight consecutive three monthly instalments" or to pay interest under cl.3(b) or to pay the Bills of Exchange under cl.3(c). In any of those default events the entitlement to exercise the rights under cl.9, which entitlement is conferred by cl.8, is unconditioned by any requirement for a prior demand. Nor does cl.9 itself interpose any such condition but in the events mentioned empowers the Bank to treat as "immediately due and payable the Outstanding Indebtedness" which, "including all Bills of Exchange shall become immediately due and payable and thereafter shall bear interest (as well after as before

judgment) at the Interest Rate".

It is not in dispute that the instalment which was due on 31 December 1989 has been paid. However interest on the late payment has not been met. More importantly, the instalments due on 30 March and 30 June 1990 have not been paid and it is the non-payment of these instalments which is the principal basis of the claim. An alleged failure to obtain the requisite insurance cover and the registration by Sathof Marine of a second mortgage over the ship without the Bank's written consent are also relied upon. These breaches are however not as central to the case as the failure to meet the instalments.

Perucchi in his affidavit, verified the statement of claim which alleged the failure to pay "to the plaintiff two instalments of \$US300,000 each and interest payments of US\$57,337.50 due on 30 March and US\$49,632.91 due on 3 June 1990". He also alleged a failure to pay the Bank's legal expenses as required by cl.21. The figure claimed in that respect was 5,719.90 which had been paid by the Bank to Messrs. Vincent, French & Browne, Solicitors of London.

The Defendant's Case

The defendant's case as it emerges from the affidavit material, involves an account of the background and history of the transactions leading up to the execution of the

mortgage. It is convenient to set it out so far as practicable in the form of a narrative without reference to the particular parts of the evidence from which the components of that narrative are drawn.

The principal of Sathof Marine is Hussain Sakkani. He is also the principal of the related and pre-existing companies Satoof Goat and Cattle Food Company and Sathof Livestock Trading Company. He resides in Dubai in the United Arab Emirates and carries on business from there. He has only a rudimentary command of the spoken English language and cannot read English. His business is that of a livestock trader and his usually banker is the First Gulf Bank of Amman. Prior to June 1989 he used the services of Cugado Shipping Co. as a livestock carrier. Generally he dealt with Messrs. Moro and Balzarini of that company. In June 1989 one Jehan Bakhesh Assadi suggested to Sakkani that he purchase a livestock carrying vessel which Assadi could find and manage for him. The vessel he suggested was the "El Redil" used by Cugado. Acting upon Assadi's recommendation, Sakkani agreed to purchase the vessel through Sathof Livestock Trading Co. for \$US3,970,000 and signed the agreement dated 14 July 1989.

In subsequent discussions between Sakkani, Assadi, Moro and Balzarini it was proposed to Sakkani that financing be arranged by Moro through Credit Suisse. On being approached to provide that finance Credit Suisse insisted that

the vessel be sold to a Panamanian company incorporated for the purpose of acting as a holding company for the vessel. And it was for this reason that Sathof Marine was incorporated. Credit Suisse also required that any advances be made to Cugado and not to Sakkani or any of his companies. These requirements were reflected in the further agreement of 15 September 1989.

The Bank was said to be represented at all times by London solicitors, Vincent French & Browne. According to Silver, Sakkani was not advised that he should seek independent representation and to the best of his knowledge he was not at any time asked, whether orally or in writing, to confirm that he had no objection to the solicitors instructed by Credit Suisse from also acting for the vendor and for him. The firm acted in all respects for all three parties. He exhibited copies of powers of attorney from Sathof Marine and Cugado in its favour. The powers of attorney were dated 16 October 1989 and 13 September 1989 respectively.

Silver also referred to valuations of the vessel from Messrs. E.A. Gibson, Shipbrokers Limited and Harley Mullin and Company Limited, both dated 7 August 1989. The Gibson valuation included the following statement:

"On the assumption that the vessel is in good working order and in the condition and hull and machinery which is to be expected of a vessel of her age, size and type, we are of the opinion based on the information which has been obtainable,

that the present day market value of this vessel, as described above, in sound sea-going condition, undamaged and fully equipped, as between a willing seller and a willing buyer is approximately \$US3,950,000 UNITED STATES DOLLARS THREE MILLION NINE HUNDRED AND FIFTY THOUSAND.

The figure mentioned above is solely our opinion of the market value on the 7th August 1989 and should not be taken to apply at any other date.

We believe that the above valuation and particulars are reasonably accurate but all statements made are an opinion and are not to be taken as a representation of fact. Any persons intending to rely on the valuation should satisfy themselves by inspection of the vessel or otherwise as to the correctness of the statement which the valuation contains."

The valuation from Harley Mullin & Co. Limited bearing the same date contained a similar statement:

"It is our considered opinion, having carefully studied details of the above vessel, that the estimated value today in good and sound trading condition free of any damages and/or encumbrances, with her class and trading certificates (indecipherable) and valid, basis early charter free delivery, always assuming willing Buyer and willing Seller to be in the region of USD4/4,100,000 (Four/Four Million One Hundred Thousand United States Dollars).

We would stress that we have not carried out an inspection of the vessel or her class records and that the above figure is an expression of opinion not a statement of fact."

Silver said that Sakkani was shown the two reports at the time of the purchase of the vessel and that Jehan Assadi

represented them as being actual valuations of the vessel. He argued that on a careful reading of both documents it is apparent that neither constitutes a valuation of the vessel after inspection. No details of the vessel's history were provided in connection with the purchase. No logs or copies of logs of the vessel were furnished. And although Silver has written to Messrs. Vincent French & Browne raising the question, he has not yet been furnished with any such copies.

Sakkani appointed Assadi to take delivery of the vessel on behalf of Sathof Marine in the United Arab Emirates territorial waters on or about 25 October 1989. Following delivery it was bunkered and provisioned for a voyage to Australia. The voyage commenced on 26 October 1989 but the vessel broke down after travelling less than 50 kilometres. A survey conducted on behalf of the hull and machinery insurers was undertaken and a report furnished on 4 November 1989. This disclosed a crack of approximately 25 inches in the upper section of the lower cylinder block on the starboard side of number 5 cylinder unit. There was also a series of cracks in the airbox area of number 5 unit. The surveyor was unable to determine how long the cracks had existed prior to being discovered. The crack in the upper section was repaired by metal locking while those in the airbox were to be monitored during the voyage and repaired on return when the approved welding procedure was received from the engine manufacturers. The engine was certified for the voyage on 2 November 1989. It was said to be apparent from a printout of the vessel's

history since 1986 that one crack in the engine block had already occurred sometime prior to delivery and been repaired. There were no further disclosures relating to subsequent cracks. According to Silver, a number of further problems have come to light including wasting of the hull plating, defects in the power generation system, defects in the feeding system and other difficulties which have resulted in repairs to a value in excess of \$US1,000,000. Some difficulty has been experienced in calculating the exact cost of such repairs due to the early involvement of Assadi and the absence of any records retained by him in that connection.

At the request of proposed P. & I. Insurers, a valuation of the vessel was obtained from Lloyds approved surveyors, J.A.J. Engineering. A copy of that report was annexed to Silver's affidavit. It followed a survey carried out on June 6 and 7, 1990 and was made after taking into consideration the condition of the hull, engines and machinery, ancillary equipment, geographical location, current market conditions, age of the vessel and its replacement cost. According to that valuation the vessel was worth \$US2,432,000.

A further report from Henderson Marine Consultants dated 15 July 1990 carried out at the request of the First Gulf Bank Amman was based upon a survey of the ship as it lay on blocks in Dubai dry dock and later afloat alongside the repair quay. The survey was held on 30 May 1990 and was to ascertain the general condition of the vessel's hull and

machinery and to verify her current class and statutory certificate status. It was found that the vessel's systems for feeding and watering livestock cargo were in poor condition and incapable of prolonged satisfactory operation. The air ventilation system was in poor condition due to corrosion with much of the trunking wasted away. The fodder tanks of the vessel were heavily infested with cockroaches. The fresh watertanks were not available for survey and were therefore regarded as suspect. The ballast operating valves were in poor condition due to corrosion and the vessel's ability to take in, discharge and transfer ballast was severely curtailed. This could affect stability and was dangerous. The safety and firefighting equipment was in the process of being maintained. There was a risk of oil pollution whilst bunkering due to the lack of protective sables at the bunkering points. The condition of the main and ancillary machinery was seen as suspect and there were areas of wastage on the vessel's hull.

Silver deposed also that he had been informed by Abdullah Showaiter, Credit and Marketing Manager of First Gulf Bank, that Brunello Perucchi had told him in the course of conversation that Credit Suisse was aware at the time of the financing arrangement that the vessel was not worth the amount for which it was being sold.

Silver instructed a local advocate in Dubai, Naji Beidoun & Associates to issue proceedings in the Dubai Shari'a

Court against all parties to the agreement. Due to difficulties of serving notice of the action upon the office of Credit Suisse and in tracing Jehan Assadi, a decision was taken in the first instance to sue Cugado and advise the Court in the statement of claim that it was intended to issue proceedings against all parties to the agreement. On the return of the Credit Suisse representative to Dubai and upon discovery of the whereabouts of Jehan Assadi, an application to join Credit Suisse and Assadi was made to the Court in Dubai and granted. Silver said he was informed and believed that notice of proceedings had now been served on the bank and Assadi. The nature of the action in the Dubai Shari'a Court was elaborated by Mr Farquharson in his affidavit of 9 August. He said that on 30 June 1990 application was made in that Court for a "precautionary attachment", which he understood to be equivalent to an interlocutory injunction operating to prevent First Gulf Bank from making payment in accordance with a guarantee it has granted associated with payment of the March Bill of Exchange. The document in question seemed to have the form of a letter of request from the Dubai Shari'a Court to the Ajman Shari'a Court. By it Judge Burae Mohammed Ahmed of the Dubai Shari'a Court authorised the judge of the Ajman Shari'a Court to write to First Gulf Bank Ajman to suspend the payment of bank guarantee number (905054) dated 30/5/1990 in the sum of \$US380,990.96 until further notice.

The equivalent of the statement of claim which was also exhibited to Farquharson's affidavit, referred to the

contract of 15 September 1989, the contract price and terms of payment and the guarantee by Sakkani and his company to pay the balance of the price. The statement of claim then went on:

- "4. It was found that the selling of this vessel was a result of fraud and cheating against the plaintiffs and that the vessel is not seaworthy as per the initial report attached with the docket, after it experienced many break downs in some ports.
5. The plaintiffs submitted a precautionary attachment against the bank guarantee which was issued by First Gulf Bank as a security for the settlement of part of the price. They registered the precautionary attachment under No. 146/90 dated 30.6.1990."

And in para.7:

- "7. Whereas the selling contract was made in fraud and in cheating, and whereas the same renders the selling contract as null and void."

The relief claimed was the cancellation of the contract "and the signed documents validating it returned to above, repayment of moneys paid to the defendant together with damages and costs."

Also exhibited to Farquharson's affidavit (JGF12) was a document headed "Intervention Application" in the Dubai

Shari'a Court. This appeared to be an application to join Credit Suisse and Assadi as parties to the pending proceedings and was justified in its terms by the following contentions:

"As the agreement which is a subject matter of this case is signed by the Bank, it is required to be joined as a party to the action.

As it has been discovered that this transaction was fraudulent and that the Plaintiffs were defrauded and that they did not have any experience of buying or surveying ships and as the Bank Credit Suisse was the prime mover of this transaction and as the joining of Credit Suisse in to the agreement which it challenged and its signature on the agreement is not banking business but was an intervention in a contract for the purchase and sale of a ship, its intervention and attestation of the agreement were the most important reason involving the plaintiff in the transaction who believed that it was a safe transaction.

As the agreement for the sale and purchase of the ship was entered in to as a result of fraud in which the plaintiffs were involved and the parties which it is required to join were participants and it is clear that parties who are required to be joined are responsible for loss and damage and as the court has ruled that it will hear the case on the 1st September 1990.

THEREFORE we request this court to serve the parties required to be joined to this action with copies of the statement of claim and the intervention application to call in to trial on the issue and award them jointly and severally with the original defendant to pay the sums claimed in this case."

No further particulars of any alleged fraud or the participation of the Bank therein were provided.

The Defendant's Contentions

The defendant contends that it was a pre-requisite to the cause of action, imposed by cl.8 of the mortgage, that demand for payment should be made and three clear business days elapse thereafter. Such demand it says, was not given in this case. Accepting that to have been so, it was not necessary. That is a matter of the construction of the terms of the mortgage which has been discussed earlier in relation to the requirement for demand generally.

It was further submitted that the bank in this case had not advanced any money to Sathof Marine and that it could not be said that there was money "repayable" under the mortgage. This argument was refined somewhat during the hearing to the proposition that the statement of claim did not make it clear that the action was brought under the mortgage as distinct from the agreement of 15 September. The submission was, with respect, not an attractive one and I am satisfied that the statement of claim properly raised an action based upon the mortgage. Out of an abundance of caution, counsel for the bank moved and was permitted to amend the statement of claim to allege, in the alternative, that in breach of the terms of the mortgage the defendant failed to pay the amounts payable under the Bills of Exchange falling due on 31 March 1990 and 30 June 1990. So pleaded, the failure to pay on the bills was a breach of cl.3(c) of the mortgage.

And linked both to the question of summary judgment and the proceedings in Dubai was the contention that there had been some kind of fraud in the transaction in which the bank was involved. Neither the documents filed in the Dubai proceedings nor the affidavits of Silver or Farquharson however disclose any allegation of fraudulent conduct on the part of the bank. Assuming that Perucchi told Showaiter of the Gulf Bank that Credit Suisse believed Sathof Marine had paid too much for the vessel, there is no fraud there disclosed nor any other basis upon which the transaction could be set aside. Counsel was unable to put it any higher in argument than that the defendant believed that the bank was aware that the defendant was buying the vessel for a price which bore no relationship to its true value and that the bank so knowing, nevertheless took part in the transaction without disclosing its belief to the defendant. This was done in circumstances where the bank became privy to a fraud being perpetrated upon the defendant. The belief is little more than a suspicion. And as such it does not rise to the level of a triable issue.

In my opinion the action on the mortgage must succeed. The defendant has not put anything before the Court to show an arguable defence. In the circumstances and by virtue of the terms of the mortgage the bank is entitled to judgment in the amount of the Outstanding Indebtedness under the mortgage and the amount of solicitor's fees incurred in connection with the preparation of that document.

The bank's entitlement to judgment also disposes of the question of a stay of proceedings. To stay the proceedings at this point, while action is pending in Dubai, would serve neither convenience nor justice. It would postpone the bank's access to the fruits of judgment against the outcome of what appears, as against the bank, to be a purely speculative action in Dubai. The ship is within the jurisdiction and in the custody of the Court, and the plaintiff has shown that it has a case which cannot be resisted. In the circumstances the motion for a stay of proceedings will be refused. And in that event the application for the sale of the ship pendente lite becomes academic.

One matter which remains to be addressed is the question of outstanding wages and repatriation expenses of the crew. The solicitors for the bank yesterday advised the Court by letter that the bank is ready and willing to meet those expenses. As it appears that a lien exists in favour of the crew in relation to those amounts the final order will need to take account of appropriate arrangements to protect their rights.

After allowing for interest on the late December instalment at \$US4,859.22 and interest of \$US143,579.08 from 1 January 1990 to 16 August 1990, the plaintiff claims \$US2,233,458.30 plus \$US629.82 interest per day from 16 August. Five days having passed since that time the judgment

amount will therefore come to \$US2,236,607.40. The parties will have liberty to apply within 48 hours to correct any arithmetical error in calculation of that figure. Subject to that the orders will be:

1. There be judgment for the plaintiff in the sum of \$US2,236,607.40 and 5,719.90 pounds sterling.
2. That subject to the plaintiff making arrangements satisfactory to the Marshal for repatriation of the crew and Master of the Ship Satouf 1 and the payment of their outstanding wages, the ship be appraised and sold and the proceeds paid into court for disbursement in accordance with this judgment.
3. There be liberty to the parties and the Marshal to apply generally as to the mode of appraisal and sale of the vessel and the disposition of any proceeds.
4. The motion for a stay of proceedings and the motion for a sale of the vessel pendente lite

be dismissed.

5. There be liberty to apply on the correctness of the arithmetical calculations underlying the money judgment.
6. The defendant to pay the plaintiff's costs of the action to be taxed.

I certify that this and the preceding thirty one (31) pages are a true copy of the Reasons for Judgment of his Honour Justice French.

Associate: *C Kerstew*

Date: *21 August 1990*

Counsel for the Plaintiff: Mr K. Martin

Solicitors for the Plaintiff: Parkers

Counsel for the Defendant: Mr P.G. McGowan

Solicitors for the Defendant: Phillips Fox

Date of Hearing: 16 August 1990

Date of Judgment: 21 August 1990