IN THE HIGH COURT OF NEW ZEALAND
IN ADMIRALTY
NELSON REGISTRY

AD No. 10/95

ADMIRALTY ACTION IN REM

BETWEEN EARL HILL and JANICE HILL, both of Richmond, Company Directors trading as E & J HILL DEMOLITION

Plaintiffs

AND THE SHIP "JAMES COOK"

Defendant

AND

AD No. 16/95

BETWEEN ANZ BANKING GROUP (NEW ZEALAND) LIMITED a duly incorporated company having its registered office in Wellington

Plaintiff

AND THE VESSEL "JAMES COOK"

Defendant

Date of Hearing: 3 December 1996

Date of Judgment: 5 December 1996

Counsel: M.B. Dumbill for First Plaintiff
C.N. Tuohy for Second Plaintiff
J.M. Fitchett for Nelson Ship Repair Group Ltd

JUDGMENT OF NEAZOR J

A proceeding was issued by E & J Hill Demolition Ltd ("the first plaintiff") against the vessel James Cook on 31 August 1995 claiming the sum of $2,707.25 being the balance of the cost of work done on the vessel by the first plaintiff. In that proceeding the vessel was arrested on 31 August 1995 where it lay in berthage owned by Nelson Ship Repair Group Ltd. The first plaintiff indemnified the Registrar in respect of fees and expenses, including harbour dues, in consequence of the arrest.

On 18 September 1995 a Nelson firm entered a caveat against the issue of a release or payment out of funds received by way of sale. On 11 December 1995 ANZ Banking Group (NZ) Ltd ("the second plaintiff") entered a similar caveat, and on 18 March 1996 Nicholson Marine Coatings Ltd and Nelson Ship Repair Group also did so. On 25 March 1996 solicitors for the last-named firm claimed on the Registrar for wharfage fees from 1 September 1995 to 23 March 1996 amounting to $22,962.82. Two days later solicitors for the first plaintiff indicated to the Registrar that they considered the warrant to arrest to have expired on 29 February. To remove any doubt, they wrote again on 1 May 1996 to say that so far as the plaintiff were concerned the vessel was no longer under arrest. No further step was taken by anyone in proceeding AD 10/95 until last week.

A further summons, AD 16/95, was issued by the second plaintiff on 11 December 1995 claiming $929,662.68 under a mortgage registered against the vessel. In February 1996, no appearance having been filed, the second plaintiff applied for judgment by default under RR 29(3) and 29(6) and for an order that the vessel be appraised and sold and the proceeds of the sale be paid into Court. At that time the second plaintiff indicated that because of continuing interest charges being incurred the second plaintiff wished to be in a position to apply to the Court for an order determining the priority of claims as soon as possible. Judgment and the order sought were given on 26 March 1996.

On 6 May the second plaintiff filed a request for a commission for appraisement and sale, which was issued to the Registrar at Nelson on 14 May 1996 on which day judgment was sealed.

On 1 October 1996 the second plaintiff sought orders consequent on sale for determination of the order of priority of claim after 30 days, for leave to apply for extension of the 30 days and for publication of the payment into Court. The vessel had not been sold and no orders have been made on that application.

The vessel has been advertised in four cities for sale by tender. There was an expression of interest in June and what purported to be a tender, but without a deposit. Nothing came of that and until 3 December 1996 no tenders had been submitted.

On 21 November Nelson Ship Repair Group Ltd sought leave to intervene in both proceedings and orders relating to sale. There is no objection by either plaintiff to the application for leave to intervene and leave is given accordingly. By consent the two proceedings are henceforward consolidated.

The application in AD 16/95 is for an order that the Registrar be authorised to sell the ship by accepting the highest offer made in writing and lodged before noon on 16 December 1996 with a deposit of 10% of the offered price, which is unconditional, is open until 20 December 1996 for acceptance and provides for settlement no later than 20 January 1997. The proviso sought to the order is that if the offer is for less than $65,000.00 Nelson Ship Repair Group Ltd is to have 24 hours to make a better offer, with the right in turn to the plaintiffs to better either offer. Further orders are sought that the order of priority of claims are not to be determined until after the expiration of 30 days after the payment of the sale proceeds into Court. Consequential orders are also sought.

The $65,000.00 figure is related to the intervener's bill of charges for berthage and other costs now claimed as $61,329.15 inclusive of GST.

The application made in AD 10/95 is for an order that the Registrar pay the intervener by 25 January 1997 the sum of $20,495.47 for berthage and other expenses from 1 September 1995 until 29 February 1996. Since the Registrar has no funds, this would be an order which could be satisfied only by the Registrar calling on the first plaintiff for that sum under the indemnity which they gave when they commenced these proceedings for $2,707.25 plus interest, a consequence which they indicate, not surprisingly, deeply concerns them.

The affidavit in support of the intervener's application indicates its concern that charges are mounting and that nothing effective has been done to sell the vessel since it was arrested in August 1995.

On the morning of the hearing 3 December 1996 the second plaintiff filed a notice of opposition to the application opposing any order for sale of the vessel at less than its market value as fixed by appraisal as it is the second plaintiff which will suffer loss if that happens.

During the hearing it was suggested that the order for sale of the vessel was made without jurisdiction because the order was made after 29 February 1996, more than 6 months after the vessel was arrested. The submission was made by reference to R 23(1) of the Admiralty Rules 1975 which authorises the Court to order any property "under the arrest of the Court" to be sold. By virtue of R 15(13) a warrant of arrest is valid for 6 months from the date of issue unless sooner withdrawn, but successive warrants may be issued.

There was no full argument, but I doubt that there is anything in this point since once a warrant is executed within the period for which it is valid, its continued validity is of no significance. What is of significance is Rule 17, subrule (1) of which provides that property which has been arrested is to be released only under the authority of an instrument of release in the prescribed form issued out of the registry where the action is proceeding. There is no record in this case of such a release.

Under the rule, the party at whose instance the property was arrested may file a notice withdrawing the arrest before an appearance was entered in the action. There was never an appearance in action AD 10/95, but neither was any formal notice filed withdrawing the warrant of arrest. The first plaintiffs' solicitor's letter of 1 May was in terms that that party withdrew the application for arrest but did not put forward a document in Form 11 of the Schedule to the rules by which that withdrawal would be given effect as an order of the Court. There may be argument as to whether the first plaintiffs' detention of the vessel should be taken to have ended on that date on the basis that thereafter all that was wanting was a matter of form, but that has not been argued.

Under R 17(3) a release could not be issued under R 17(2) if a caveat against release was in effect. The second plaintiff's caveat was valid until 11 June 1996 (R 18(3)), no other caveat having been filed by that plaintiff. The intervener's caveat was valid until 18 September 1996, no other caveat by that party having been filed. Accordingly if the first plaintiffs' solicitor's letter of 1 May 1996 had effect, it may be that the vessel will be regarded as detained at the suit of second plaintiff until 11 June 1996 and of the intervener until 18 September 1996. It is still property arrested because no release has been issued but where responsibility lies may be a matter for argument. Whatever the position, on the face of it the vessel was subject to arrest when the order for sale was made on 26 March 1996.

Counsel for the intervener indicated that the reason for seeking the order to sell and the order that the Registrar pay its charges to February was primarily to prompt action to effect a sale, more than 6 months having passed with no result being effected whilst its charges, which it has no wish to incur, are increasing. It would have no concern to press for sale if the second plaintiff would agree to pay its berthage fees. It may be, of course, if the analysis of the position of the ship's arrest is correct, that the intervener is still protected in respect of its fees.

Counsel for the first plaintiffs indicated their concern. That is understandable and it is surprising that full steps have not been taken to apply for a release on the part of the

first plaintiffs. Counsel indicated that if the vessel can be sold for sufficient to cover their indemnity they would urge that course. There is obviously a good deal in their favour in that respect because the vessel has been held for a substantial time at their risk of costs almost 10 times if not 30 times their original claim, in respect of which they are resigned to getting nothing, for the benefit of the second plaintiff as a secured creditor. There is no justice in that.

Mr Tuohy for the second plaintiff indicated complete opposition to any fire-sale of the vessel, as he put it, for no-ones benefit but the first plaintiffs' and the intervener's. He indicated that there would be a dispute about how much the intervener should receive by way of priority, by reference to how long the ship was arrested. Mr Tuohy submitted that there was no reason for a panic sale at a cost of hundreds of thousands to the body entitled to the proceeds: the second plaintiff. He further submitted that by inference from regulation 23 and Form 15 the Registrar's authority to sell for less than the appraised value requires an order of the Court, and that an application for approval to sell for less than the appraised value is at this stage premature.

The vessel is said in its present state not to be fit to be moved and it was submitted that it would be unreasonable to sell it at any cost in such circumstances after only 5 months on the market.

Further, it was submitted, it is not for the intervener but for the Registrar to apply for an order to sell at less than the appraised value.

In my view Mr Tuohy is right in his submission that a commission for appraisement and sale having been issued, sale at less than the appraised value requires an order of the Court, on application by the Registrar.

Mr Tuohy may be right that more time should be allowed for sale but the present situation is in my view absolutely unjust as between the plaintiffs and to a lesser degree between the intervener and the second plaintiff. The second plaintiff has battened on to the arrest at the suit of the first plaintiffs and wishes to have the benefit of detention of

the ship for sale leaving the first plaintiffs to carry the burden of costs which by many times outweigh their original claim, and any extension of which liability would I am sure have been brought to an end long ago if proper steps had been taken on their behalf. There is already an indemnity in place by them for costs. The second plaintiff may have avoided incurring any liability for costs by way of damages by letting its caveat lapse.

In the same way the second plaintiff is content, as it seems from the submissions, if it can to leave the intervener whistling for the costs it is unwillingly incurring, by arguing that they are unsecured costs being incurred outside the period of arrest.

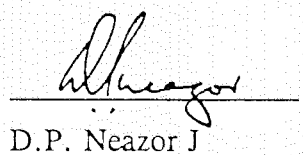
In my view no order for sale can be made until the Registrar applies, but he has a duty to have regard to the circumstances of the first plaintiffs and the intervener as well as those of the second plaintiff when he has a tender, whether it be of appraised value or not. The second plaintiff can expect that those interests and the second plaintiff's attitude will be taken into account if such an application is made. The second plaintiff's position in respect of deferring sale would no doubt be enhanced if it was to accept liability for costs.

Clearly the Registrar's duty to all parties and to the Court encompasses pressing on by best means to sell. If that involves further advertising in New Zealand or overseas, so be it. The cost will be borne by the ultimate recipient of surplus funds.

At present I can see no justice in making an order in favour of the intervener at the plain cost of the first plaintiffs; nor is it clear that there is any jurisdiction to make such an order before the Registrar has received any funds from the proceeds of sale.

The application for an order for sale is refused. The application for payment by the Registrar is adjourned until the February sitting of the Court so that if necessary the jurisdiction point can be argued.

Each party's costs of the application will be borne by it.



D.P. Neazor J

Solicitors: Knapps, Nelson for First Plaintiff

Fletcher Vautier Moore, Nelson for Second Plaintiff

Rout Milner & Fitchett, Nelson for Nelson Ship Repair Group Ltd