



SEMAPHORE

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Judicial Sale of the Yangtze Fortune

Case note on Yangtze Fortune by Stefanie Andresek (lawyer) and Elise Northcote (paralegal) at Sparke Helmore Lawyers

The Federal Court of Australia is currently dealing with a judicial sale of a vessel, an infrequent event in the Australian admiralty jurisdiction.

On 2 December 2022, an Admiralty Marshal of the Federal Court of Australia arrested the Liberian-flagged vessel Yangtze Fortune (IMO: 9336282) for outstanding bunker debts. Yangtze Fortune was built in 2005 as a container vessel and was later converted to a livestock carrier. The vessel's gross tonnage is 11,672 metric tonnes, with a length of 132.6 metres and a breadth of 19.2 metres.

In September 2022, the ship sailed to Australia from China to load 5200 head of breeder livestock at Portland (Victoria) for carriage to China. However, while the vessel was en route, it sustained a crack to its hull and instead moved to anchorage from 27 September 2022.

On 9 November 2022, the voyage charterer of the vessel issued a writ in the Western Australian registry of the Federal Court against Yangtze Fortune Co Ltd, a Hong Kong corporation, as demise charterers of the vessel, for breach of a booking note. The voyage charterers claimed damages of US\$2.3 million plus A\$1 million.

On 11 November 2022, the vessel's bunker supplier issued a writ in the New South Wales registry of the Federal Court against the vessel for US\$549,695 plus interest for bunkers supplied to the ship at



Elise Northcote



Stefanie Andresek

Bios**Stefanie Andresek**

Stefanie is a solicitor at Sparke Helmore advising on admiralty and maritime-related disputes, marine incidents including marine pollution, cargo claims and transport law. Stefanie is recognised as a Recommended Lawyer for Transport: Shipping in the 2023 Legal 500 Asia Pacific directory. Prior to joining Sparke Helmore, Stefanie worked as the Associate to Justice SC Derrington of the Federal Court of Australia. Stefanie was the Young MLAANZ Speaker for Australia at the MLAANZ Conference in October 2022, speaking on the topic of the international legal framework for marine plastic pollution.

Elise Northcote

Elise joined Sparke Helmore in February 2023 as a paralegal assisting on maritime and transport matters. She is in her penultimate year of Bachelor of Laws/Science (Honours) at the University of Queensland (UQ), majoring in Geographical Science. Elise previously worked as a law clerk at a personal injury firm. She represents UQ in domestic and international mooted competitions and has completed an internship for non-governmental organisations in Laos, which involved constructing fact sheets for the government and writing a comparative research paper on the international legality of mandatory death sentencing and its mitigators in South East Asia.

Zhoushan Port (China). The bunker supplier made an application to arrest of the vessel, which was granted, and the vessel was arrested on 2 December 2022.

Following the arrest, five caveats against release were issued in the NSW proceedings by the voyage charterer, necessities suppliers, and former technical and crew managers.

Dan-Bunkering (Singapore) Pte Ltd v The Ship Yangtze Fortune [2022] FCA 1556

In Justice Stewart's first judgment of 20 December 2022, his Honour made orders for the sale of the Yangtze Fortune under rule 69(5) of the Admiralty Rules 1988 (Cth). Rule 69(5) provides that if a ship is deteriorating in value, the Court may, at any stage of the proceeding, either with or without application, order that it be sold.

His Honour considered the interests of the plaintiff and other creditors in the sale in having security for their claims in circumstances where there were low prospects of the owner securing the plaintiff and creditor's claims. A forefront consideration was the welfare of the crew, who had not been paid for six weeks, and expenditure by the Marshal, who had paid over A\$270,000 in bunker fuel since the arrest.

Although there was no evidence of deterioration beyond normal wear and tear, the vessel's age and the fact that temporary repairs to the ship's hull would ultimately require permanent repair, were factors leading to his Honour's conclusion that the vessel was deteriorating. As a result, it was found that there was no other available course other than to order its sale. Stewart J also considered that the deterioration of value caused by continuing costs of maintaining the arrest, as explained by Brandon J in *The Myrto* [1977] 2 Lloyd's Rep 243, amounted to a circumstance where an order for the appraisal and sale of a ship under arrest in action *in rem* should be made *pendente lite* because deterioration of the value of vessel had occurred whilst under arrest.

On 11 January 2023, orders for the judicial sale of the vessel were put into effect by a close bid tender process, with bids closing on 10 February 2023. On 14 February, the Marshal was directed to accept the tender of the highest bidder, which was US\$8.5 million inclusive of GST.

Under the terms of sale, the highest bidder was to pay 10% of the purchase price within five days of the orders. Within ten days of the orders, the balance was to be paid, in addition to an adjustment for bunker fuel, lubricant and consumables.

On 23 February 2023, the Marshal was advised by the highest bidder that it could not make the deposit due to “investor delay”. The Marshal advised the highest bidder that the Court was willing to extend the time for receipt of the 10% deposit to 28 February 2023 on the condition that the highest bidder provided evidence of remittance the same day. The Marshal also extended the time for receipt of the balance.

On 24 February 2023, the Marshal filed an affidavit applying for orders authorising the sale contract be terminated and seeking a direction to accept the second-highest bidder. The second-highest bid was only 4% lower than the independent appraisal of the vessel’s value. However, it was notably lower than the highest bid, albeit substantially above the average for the remaining bids.

Dan-Bunkering (Singapore) Pte Ltd v The Ship Yangtze Fortune (No 2) [2023] FCA 148

In a further hearing on 27 February 2023, Justice Stewart noted the urgency of the matter, given the impending deadline being the time originally imposed for the Marshal to accept a bid. A failure to accept a bid by the deadline would result in the sale process having to recommence.

His Honour was most concerned about the interests of the crew onboard the vessel, noting that 16 of the original 36 crew members were required to remain onboard in accordance with safe manning requirements. In addition, the ongoing deterioration of the vessel was considered, along with the fact that beyond Marshal’s insurance, the vessel’s protection and indemnity insurance cover had expired.

His Honour directed the Marshal to terminate the contract with the highest bidder and to accept the tender of the second-highest bidder on certain conditions of sale.

At paragraph 13 of the judgment his Honour stated: “No party has spoken against the orders sought by the Marshal. Everyone is desirous that the sale proceed as quickly as possible. In circumstances where the highest bidder seems to have lost interest, it is important to accept the second highest bid and move on.”

Implications

In many jurisdictions, including Australia, once a ship is sold by way of judicial sale, the previous ownership of the vessel will cease to exist and the mortgages, maritime liens and other charges attached to the ship prior to the sale will be extinguished. The buyer of a vessel by judicial sale effectively attains a clean title to the vessel.

On 7 December 2022, the United Nations General Assembly adopted the United Nations Convention on the International Effects of Judicial Sales of Ships. The purpose of the convention is to create a uniform regime on the international effects of judicial sale of ships, so that the clean title acquired by the purchaser of a ship will be recognised internationally. The convention also sets out safeguards for the issuing of a certificate of judicial sale, including notification of the shipowner, creditors, and other interested parties.

Although judicial sales are rare in Australia, there exists a strong rationale in favour of unifying the recognition of foreign judicial sales of ship to ensure that in appropriate circumstances, the foreign judicial sale of ship will be recognised as having the same legal effect as a domestic judicial sale.

Australia is currently considering its response to the convention.

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