



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**ADMIRALTY DIVISION**

**CLAIM NO. 2016A00003**

<b>BETWEEN</b>	<b>JEBMED S.R.L</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CAPITALEASE S.P.A. OWNERS OF M.V TRADING FABRIZIA</b>	<b>DEFENDANT</b>

**CONSOLIDATED WITH:**

**ADMIRALTY DIVISION**

**CLAIM NO. 2017A00006**

<b>BETWEEN</b>	<b>ELBURG SHIP MANAGEMENT</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ENTERPRISE SHIPPING AGENCY</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>CAPTILEASE S.P.A.</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>THE MOTOR SHIP TRADING FABRIZIA</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**Mr. Vincent Chen and Mr. Makene Brown instructed by Chen, Green & company for the claimant/respondent (Jebmed)**

**Mr. Krishna Desai and Miss Amanda Montague instructed by Myers, Fletcher & Gordon for the defendant/applicant (Capitalease)**

**Mr. Remone Foster instructed by Foster Galloway for Bluefin**

**Mr. Emile Leiba instructed by DunnCox (former Attorneys-at-law for Jebmed)**

**Mr. Ramon Clayton instructed by Samuda and Johnson for Elberg Ship Management**

**Heard: October 4, 2019, January 9 and July 3, 2020**

**Admiralty law - Judicial sale – Application by the previous owner for payment of the remainder of the proceeds of sale – Shipping Act, sections 89(2)(c) and (d) - Civil Procedure Rules, 2002, rule 70.13 (9)**

**SIMMONS J**

**Background**

- [1] On 30 October 2016, a warrant of arrest was ordered in respect of the M/V Trading Fabrizia. The application was based on the applicant’s alleged failure to honour the terms of a mortgage between Jebmed S.R.L. (“Jebmed”) and Capitalease S.P.A. (“Capitalease”), which was its owner.
- [2] On 5 May 2016 Capitalease and Jebmed entered into a Master Agreement by which Jebmed agreed to take over the commercial operation of the M/V Trading Fabrizia and to advance certain sums described as “*financial expenses*”. In exchange, Capitalease agreed to grant a first preferred mortgage to Jebmed in the amount of United States Nine Hundred Thousand Dollars (US\$900,000.00). The M/V Trading Fabrizia was the collateral for that loan. The mortgage was executed on 11 May 2016 and is supported by a Deed of Covenants which provided that in the event of a default the security would become immediately enforceable. The applicant it was said, defaulted in its payments.
- [3] A claim was filed in *rem* seeking the repayment of United States Six Hundred and Ninety-Nine Thousand and Forty-Six Dollars and Thirty-Eight Cents (US\$699,046.38) plus compound interest at the rate of 8% per annum. In the alternative, damages were claimed for breach of contract.
- [4] On 28 June 2017 the following order was made by Edwards J (as she then was):

“1. *The application for sale is granted on condition.*

2. *Provided that the defendant fails to provide alternate security in the amount of USD\$450,000.00, USD\$778,497.79 and USD\$537,836.00 in the form of bonds, guarantees or undertakings satisfactory to Jebmed S.R.L., Ligabue S.P.A., Elburg Ship management and XO Shipping A/S respectively, the admiralty bailiff is empowered to proceed to appraisal (sic) and sale of the M/V "trading Fabrizia" within 30 days of this order.*
3. *Should the Defendant comply with the conditions at (2) before the expiration of 30 days following upon the date of this order, the vessel shall be release (sic) from arrest.*
4. *Liberty to apply.*
5. *Costs to the Claimant Jebmed S.R.L. to be agreed or taxed."*

[5] The condition was not satisfied and the M/V Trading Fabrizia was sold by the Admiralty Bailiff (free from encumbrances)<sup>1</sup> to Bluefin Marine Limited ("Bluefin") for United States Ten Million Three Hundred Thousand Dollars (US\$10,300,000.00) and renamed M/V Bright Star ("the vessel").

[6] Judgment debts owed to Elburg Ship Management (claim no. 2017 A 00006)<sup>2</sup>, XO Shipping A/S (claim no. 2016 A 0005)<sup>3</sup>, Ligabue S.P.A. (claim no. 2016 A 00004)<sup>4</sup> as well as the Admiralty Bailiff's fees were satisfied from the proceeds of sale.

[7] The remaining sum of United States Three Million Dollars (US\$3,000,000.00) was paid into court. By order dated 22 October 2018 the sum of United States Two Million Dollars (US\$2,000,000.00) was returned to Capitalease in accordance with the order of Edwards J dated 5 March 2018.

[8] It is from the remaining United States One Million Dollars (US\$1,000,000.00) which Jebmed's claim was to be satisfied.

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<sup>1</sup> See section 89 of the **Shipping Act**

<sup>2</sup> US\$696,423.13

<sup>3</sup> US\$390,000.00

<sup>4</sup> US\$128,121.50 plus costs of US\$5,000.00

[9] Capitalease also instituted proceedings in Malta in respect of the same mortgage debt and the vessel was arrested. In order to secure its release, Bluefin paid €779,346.61 claimed by Jebmed as cash security to the Maltese court. This action by Capitalease, whilst not prohibited is in my view, unfortunate. Bluefin having purchased the M/V Trading Fabrizia “free from encumbrances” was required to pay a handsome sum to secure its release from the Maltese authorities. In order to avoid such an injustice in the future, it may be desirable for claimants to give an undertaking to the court not to commence similar proceedings in another jurisdiction where the debt has already been secured in this jurisdiction by the arrest and sale of the ship.

[10] Bluefin subsequently filed an action in that court for a declaration that the warrant was illegal and/or void under Maltese law. That application was unsuccessful. Consequently, Bluefin sought and obtained an order to be added as an interested party in these proceedings. No further steps have been taken by Bluefin.

### **The application**

[11] Pursuant to sections 89 (2) (c) and (d) of the **Shipping Act** (“the **Act**”) and rule 70.13 (9) of the **Civil Procedure Rules, 2002 (CPR)**, Capitalease has applied for the payment of the residue of the proceeds of sale.

[12] The grounds on which the application is made are as follows:

- (i) All but one of the claims filed against the vessel since its arrest on October 30, 2016 have been satisfied, discontinued or adjudged with Orders for payment out made to all the Judgment Creditors.
- (ii) The only remaining Claimant is Jebmed SRL, whose claim is secured by a sum of US\$1,000,000.00 held in Court by order of Edwards J.
- (iii) Jebmed’s claim has subsequently been satisfied by a sum of €779,346.61 (approximately US\$910,000.00 at the exchange rate of

€1:US\$1.17) held in First Hall Civil Court of Malta following the arrest by Jebmed of M/V Bright Star (formerly the M/V Trading Fabrizia).

- (iv) Jebmed's claim at its highest does not exceed US\$900,000.00 and that was the sum secured by the mortgage.
- (v) This Honourable Court has previously been satisfied that there were no other claims pending against the fund.
- (vi) The remaining sum of US\$1,000,000.00 represents the residue of the proceeds of sale and section 89(2)(d) of the Shipping Act provides that the residue of the proceeds of sale shall be paid to the immediately previous owner and it shall be freely transferable.
- (vii) Capitlease, as the immediately previous owner of the vessel is entitled to have the residue of the proceeds of sale promptly returned to it.

[13] The application is supported by the affidavits of Litrow Hickson filed on 9 August 2018 and 8 July 2019. In addition to setting out the history of this matter, Mr. Hickson stated that the matter in Malta was litigated up to its Court of Appeal where Bluefin was unsuccessful and there is no further appeal from that court. He also indicated that the sums paid by Bluefin to secure the vessel's release, remain in that court and Jebmed is at liberty to withdraw those sums although it has not yet done so. In effect the claim by Jebmed is secured in both Jamaica and Malta.

[14] Mr. Hickson also stated that Jebmed has taken no further steps to prosecute its claim in Jamaica and the remaining sum of US\$1,000,000.00 represents the residue of the proceeds of sale which in accordance with the **Act** is to be paid to the previous owner which in this case is Capitlease.

- [15] He has also asserted that bearing in mind Jebmed's conduct in Malta and in Italy<sup>5</sup>, there appears to be no sustainable basis on which it could claim to be entitled to the sums in Jamaica. It has also been stated that Capitalease is in urgent need of the funds.
- [16] In response, Mr. Makene Brown on behalf of Jebmed stated that his client is entitled to recover its costs associated with the arrest of the vessel. He pointed out that Capitalease, as a foreign company, is out of the jurisdiction of this court and has no assets or interests in this jurisdiction from which an order for costs made against it can be satisfied. He stated that if the remaining sum is paid out to Capitalease there is no prospect of the arresting Attorneys recovering their fees or for the parties who have had costs awarded in their favour, recovering same.
- [17] In the circumstances, he requested that the court retain the remainder of the *res* in order to protect the costs incurred in the arrest and subsequent matters arising therefrom. Bills of costs from Capitalease<sup>6</sup> and Elberg<sup>7</sup> as well as a judgment in default of acknowledgment of service in favour of DunnCox<sup>8</sup> were exhibited to the affidavit.

### **Capitalease's submissions**

- [18] Counsel for Capitalease, Miss Montague submitted that the funds should be returned to Capitalease in accordance with section 89 (2) of the **Act** for the following reasons:
- (a) Jebmed's claim has been satisfied in Malta and it is not entitled to double recovery;

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<sup>5</sup> Arbitration proceedings

<sup>6</sup> J\$611,083.28

<sup>7</sup> J\$2,043,159.35

<sup>8</sup> US\$75,227.30 plus costs of J\$30,000.00

- (b) Bluefin has no sustainable claim which may be raised against the fund;
- (c) Bluefin has no existing claim against Jebmed, Capitalease or the fund;
- (d) Bluefin cannot sustain a claim against Capitalease for unjust enrichment.

A. *Jebmed's claim under the Mortgage has been satisfied in Malta and Jebmed is not entitled to double recovery*

[19] Miss Montague stated that the claim in Jamaica between Jebmed and Capitalease has not been determined and as such the funds held in court, which represent the *res*, have not been found to be due to Jebmed.

[20] Counsel gave a brief outline of the proceedings and stated that in respect of the funds held in Malta<sup>9</sup>, Jebmed has commenced proceedings for the withdrawal of those funds.<sup>10</sup> She stated that although Dr. Borg, counsel for Jebmed in Malta, in his affidavit has stated that the sums being held in the Maltese court are insufficient to satisfy the mortgage debt, Jebmed is not entitled to claim any sums in excess of United States Nine Hundred Thousand Dollars (US\$900,000.00) under the mortgage.

[21] It was submitted that the mortgage claim having been satisfied in Malta, by Bluefin's payment, Jebmed is not entitled to any more sums as that would amount to "double recovery" or recovery more than its secured loss. Reference was made to ***Jameson and another and Central Electricity Generating Board*** [2000] 1 A.C. 455 in support of that submission.

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<sup>9</sup> €779,346.61 which is equivalent to US\$900,000.00

<sup>10</sup> See paragraph 18 of the Affidavit of Marlon Borg exhibited to the affidavit of Makene Brown filed on July 17, 2019

[22] It was also submitted that Jebmed's Attorneys-at-law, Messrs Chen Green & Co are not entitled to recover their legal fees from the fund. Counsel stated that the fees owed to them are a contractual matter between the firm and its client. Counsel reminded the court, that in any event, costs were included in the sum secured by the mortgage.

[23] Where the default judgment obtained by Jebmed's former Attorneys-at-law is concerned, Miss Montague submitted that this does not ground any entitlement to the fund.

[24] Counsel also pointed out that there are cost orders made against Jebmed in favour of Capitalease, and Elburg which have not been satisfied by Jebmed.

B. *Bluefin does not have any sustainable claim against the res – the fund held in Court.*

[25] Miss Montague reminded the court that the funds held in court represent the *res* (the ship). It was submitted that in order to ground an entitlement against that fund, a party must fall in one of the categories of lien or right holders listed in the **Act** or have an admiralty claim *in rem* as contemplated by the United Kingdom **Administration of Justice Act**. She pointed out that Bluefin has no such claim.

[26] It was also submitted that even if Bluefin has a claim against any of the parties, that does not give Bluefin any rights against the fund as it could not have made a claim before the vessel was sold. In other words, having had no claim before the sale it cannot claim any right to the money which represents the ship.

[27] Counsel also submitted that although Bluefin was granted permission to intervene in the present claim on the basis that it was compelled to pay money into court in Malta to secure the ship's release, which enured to the benefit of Capitalease, that principle does not assist Bluefin or give it any right to the fund as that cause of action could not properly form the basis of a claim *in rem*.

[28] Miss Montague stated that any claim against Capitalease for unjust enrichment would have to be on the basis of contract as it would not amount to an admiralty

claim *in personam*. That being so, Bluefin would not be entitled to claim against the fund (the *res*).

C. *Bluefin does not have an existing claim in Jamaica*

[29] Counsel stated that although Bluefin having bought the vessel at a judicial auction in January 2018 would have been aware that there was a dispute between Jebmed and Capitalsease, this did not prompt Bluefin to bring any claim against Capitalsease or the fund in Jamaica. This state of affairs exists until today although it was granted permission to be added as an interested party in August 2019.

[30] It was submitted that the Court should not deny Capitalsease's right to the residue of the fund in anticipation of any claim Bluefin may wish to raise. Counsel stated that the **Act** is clear and once the claims under the **Act** are satisfied, the residue of the proceeds of sale of the ship shall be "*paid to the immediately previous owner and it shall be freely transferable*".

D. *Bluefin cannot sustain a claim against Capitalsease for unjust enrichment*

[31] It was also submitted that in any event, Bluefin could not properly sustain any claim against Capitalsease based on unjust enrichment. She stated that in order to succeed on that ground Bluefin would have to prove that its payment in Malta was either made as Capitalsease's agent, was for and on account of Capitalsease, on the authority of Capitalsease or was subsequently ratified by Capitalsease. Counsel also argued that Bluefin's payment into court in Malta did not discharge a debt which Capitalsease was "ultimately liable to pay" as there has been no such finding by the Jamaican court.

[32] In this regard, counsel referred to Amended Defence and Counterclaim filed by Capitalsease in response to Jebmed's claim in which it denies that the debt under the mortgage is due and owing to Jebmed and counterclaims for breach of the Ship Management Agreement and for unlawful arrest of the vessel. She stated that Jebmed has taken no steps to proceed with the claim and as such there is still a

dispute as to whether the mortgage debt was owed by Capitalease. In other words, the issues between them are as yet to be determined.

- [33] In conclusion, Miss Montague submitted that the remainder of the proceeds of sale clearly represents the *res* to which Bluefin is not entitled under the **Act** or any principle of law. She stated that in light of the fact that Jebmed's claim under the mortgage has been satisfied in Malta, the residue of the proceeds of sale are not subject to any encumbrance and ought to be released to Capitalease as mandated by the **Act**.

### **Jebmed's submissions**

- [34] Mr. Chen submitted that it would be unusual for the court to grant an application for the release of the remaining funds at this stage as there are issues between the parties which have not been determined and it is those funds which ground the jurisdiction of the court. He stated that by virtue of section 89 of the **Act** the remaining funds represent the *res* and the rights of the mortgagee must be determined by this court. Counsel stated that whilst there has been no formal stay of the proceedings it was understood between the parties that the matter would be dealt with in either Malta or Italy and the Jamaican court would be informed of the outcome. At that stage the appropriate orders could be made.
- [35] Counsel also submitted that the claim under the mortgage is not limited to the money claim which has been quantified. He also stated that there are claims as well as possible claims in court and also possible claims for costs which should be paid by Jebmed in respect of which it is entitled to be indemnified. That issue he said could be adjudicated in either Jamaica, Italy or Malta. He also stated that there are costs which are to be taxed and paid by Capitalease in connection with the arrest of the vessel, its sale and payment into court of the proceeds of sale. He also pointed out that Messrs. Chen Green & Co would be entitled to have their costs taxed after the completion of the matter.

[36] It was also argued that if the funds are released that would remove the only basis for this court's jurisdiction in the matter as the money would have been removed from the jurisdiction.

[37] In the circumstances, it was submitted that the application should be refused.

### **DunnCox's submissions**

[38] Mr. Leiba submitted that the effect of granting the application would be summary determination of the issue which is precluded by rule 15.3 (e) of the **CPR**. He stated that it was his understanding from the submissions made on behalf of Capitalease that its liability to Jebmed has been extinguished. He argued that the grant of the application requires the court to make a summary determination that that is correct. It was submitted that the court has no power to do so. He stated that until it is determined that Jebmed is no longer a mortgagee and therefore not entitled under the **Act** to claim the proceeds of sale or any part thereof, Jebmed would remain as a potential claimant to the proceeds of sale. In those circumstances, it was submitted that the fund should not be paid out to Capitalease.

[39] It was submitted that the issue could either be judicially determined or the parties could apply for a consent order to be made. Once a final judgment is entered, the court can deal with the issue of costs and direct how the remaining sum is to be distributed. In this regard he reminded the court that rule 70.13 (9) of the **CPR**, speaks to the payment of judgment creditors from the proceeds of sale.

### **Elberg's submissions**

[40] Mr. Clayton submitted that the application ought not to be granted on the basis that it would require the court to make summary decision on the issue in dispute.

### **Bluefin's submissions**

[41] Mr. Foster argued that the application ought not to be granted as there are triable issues which have not been resolved. He argued that Bluefin is still "out of pocket"

although Jebmed's debt has been satisfied. He however, conceded that no claim has been filed, citing jurisdictional issues.

- [42] Counsel stated that the only thing which connects the parties is the sum remaining in the fund and everyone would like their "piece of the pie". He submitted that in light of the competing claims the moneys ought to remain within the jurisdiction.

### **Capitalease's response**

- [43] Miss Montague submitted that the release of the funds does not create a jurisdictional issue as the filing of the acknowledgment of service and the defence clearly indicate that the applicant has submitted to the jurisdiction of the court and as such, the action also continues as one *in personam*. Reference was made to paragraphs 88 and 89 of **Larson Higgins v M T Tajin** [2017] JMSC Civ 83 in support of that submission. Reference was also made to **The Indian Grace (2); Republic of India and another v India Steamship Co. Ltd.** [1997] 4 All ER 380. The parties she said are therefore free to proceed *in personam*.

- [44] Counsel also indicated that the arbitration proceedings are at an end, having been abandoned by the parties.

- [45] With respect to Mr. Chen's submission that the rights of the mortgagee under the **Act** need to be determined before the sums remaining in the fund can be released, Miss Montague stated that Jebmed does not have a mortgage registered under the **Act**. She stated that the court had already determined that the price for which the vessel was sold was sufficient to satisfy the claim. With respect to section 89 (2)(c) of the **Act**, counsel stated that it was also applicable where there were insufficient funds to cover the claim.

- [46] It was submitted that all the persons who are entitled to be paid have been paid and Jebmed, Elberg and DunnCox do not enjoy any statutory protection. DunnCox and Elberg she said, have a claim against Jebmed. She stated that the fund remaining in court represents the ship which is Capitalease and it is unclear how

Jebmed and DunnCox can assert a right to the fund since it has not been found to be due to Jebmed.

- [47] With respect to Mr. Chen's reference to a claim having been filed on Jebmed's behalf, Miss Montague stated that that application for possession of the vessel was refused. The vessel was then sold to Bluefin which had the effect of extinguishing Jebmed's right to possession of the vessel. Reference was made to ***Bank of Scotland Plc v the Owners of the M/V "Union Gold"*** [2013] EWHC 1696 (Admlty) in which Teare J stated that a mortgagee can only exercise its power of sale if there is no order for sale of the vessel.
- [48] With respect to whether the sums in the fund in Malta were paid to Jebmed, counsel stated that whilst there is no evidence of that it would mean that Jebmed would have recovered the secured amount under the mortgage. She also reminded the court that no other claims were secured by the mortgage. Where possible claims are concerned, Miss Montague referred to the order of Edwards J dated 5 March 2018 and stated that the learned Judge at the time of making the order was satisfied that there were no other parties to whom payment was due.
- [49] With respect to Mr. Leiba's submission that Capitalease is asking the court to determine the matter summarily, Miss Montague submitted that that is not so. In this regard she stated that Jebmed's claim under the mortgage has been extinguished and it would be improper to embark on any enquiry to determine whether Capitalease can be held liable in respect of the same mortgage. In short, the principle against double recovery would bar Jebmed from recovering again in respect of the same debt.
- [50] With respect to Elburg, it was submitted that its claim is against Jebmed and not Capitalease. Where Bluefin is concerned, counsel made the point that it does not currently have a claim before the court and as such cannot claim any interest in the fund.

[51] In closing, Miss Montague submitted that none of the parties or DunnCox have shown that they have sufficient interest in the fund to persuade the court that the remainder of the fund should not be paid to Capitalsease.

## Discussion

[52] Sections 89(2)(a), (c) & (d) of the **Act** state:

*“(2) In the event of a forced sale of a ship, the proceeds of sale shall be distributed as follows-*

*(a) any sum awarded by a court as costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel shall be paid out first; such costs and expenses to include the costs for the upkeep of the vessel and the crew as well as wages and other sums and costs referred to in paragraph (a) of section 80 incurred from the time of the arrest or seizure;*

*(b) .....*

*(c) the balance of the proceeds shall then be distributed among-*

*(i) the holders of maritime liens securing any claim under section 80(a);*

*(ii) the holders of mortgages registered under this Act;*

*(iii) the holders of maritime liens securing any claim under section 80(b), (c) and (d);*

*(iv) the holders of rights under section 84;*

*(v) the holders of other preferential rights.*

*in accordance with the provisions of this Part, to the extent necessary to satisfy the respective claims;*

*(d) upon satisfaction of all claimants referred to in paragraphs (a), (b) and (c), the **residue** of the proceeds **shall** be paid to the immediately previous owner and it shall be freely transferable.”*

[My emphasis]

[53] Rule 70.13 (9) of the **CPR** which deals with the payment out of the proceeds of sale states:

*“Payment out of the proceeds of sale will be made only to judgment creditors and -*

- a) *in accordance with the determination of priorities; or*
- b) *as the court orders.”*

[54] The nature of the dispute between the parties as it concerns the distribution of the residue appears to be centred around the principles applicable to the enforcement of an action *in rem* as against an action *in personam*. The claim between Jebmed and Capitlease is a claim *in rem*. An action *in rem* is a proceeding against the world at large and relates to a thing, that is proprietary rights. This may take the form of a chattel or security lodged in its stead. An action *in personam* on the other hand, is between persons and decides the personal rights and interests of the parties named in the claim. Any judgment obtained is enforceable only against the person originally bound.

[55] In D.C. Jackson, **Enforcement of Maritime Claims**, 4<sup>th</sup> ed. the learned author states:

*“23.160 Although English law has long supported the cumulative effect and often concurrent availability of actions in personam and actions in rem it has not addressed itself to the relationship of interests enforceable by those actions. The concept of the action in rem means that:*

- (i) The provisional remedy of arrest is available;*
- (ii) Specified claimants are given preferred creditor status in relation to a particular asset or its substitute;*
- (iii) There has developed an ‘in rem’ priority scheme with its own relative values, encompassing proprietary interests created by the action in rem and those enforceable as such by an action in personam but enforced by an action in rem;*

- (iv) *A sale of the asset by the court wipes off all such claims which could have been made in relation to the asset prior to the sale and transfers them to the proceeds.*”

[56] Where the asset is sold in execution of an *in personam* claim it does not have the same effect as a judicial sale which confers clear title to the asset. The learned author also stated:

“9.12 *The action in rem ...is an action connected essentially with a specified thing (in the Admiralty context ship, cargo of freight). While historically it may have been considered as lying against the thing it must now be accepted as lying against a person having an interest in the thing. However it is seen, it is focused on a thing relevant to the claim (as, for example, a ship carrying goods said to be damaged or a ship colliding with another). Subject to some English judicial comments to the contrary, although it is aimed at an interested person the claim is limited to the thing and neither the person who liable in the claim nor any other assets are subject to liability. A claim enforceable by an action in rem may also be enforceable concurrently by an action in personam (see infra).*

**9.13 Neither the action in personam nor the judgment obtained in such an action will of itself provide any security for the claim through any interest in the assets of the defendant. The claimant has no preferred status nor any ability to assert his claim against any person other than the defendant simply because it is an action in personam. Any security aspect will follow from the nature of the claim and not the legal process available to enforce it. Any judgment will be enforced against the defendant’s assets through the general procedure for execution of judgments.**

9.14 *On the other hand the issue of an in rem claim form makes the plaintiff a secured creditor in respect of the thing in relation to which the writ is issued. The “thing” may be sold by the court and the proceeds made available for creditors in rem.*”

[My emphasis]

[57] In ***Bank of Scotland Plc v The Owners of the M/V “Union Gold”*** (supra), Teare J stated:

*“Sales by the Admiralty Marshal*

*2. A claimant in rem who has obtained judgment against a vessel may seek an order that the vessel be sold so that his claim may be*

*satisfied from the proceeds of sale. A claimant may also seek such an order before obtaining judgment if the circumstances require it; see the **Myrto** [1977] 2 Lloyd's Rep.243. It is often the case that, in addition to the claimant in rem who has obtained the order for sale, there are other claimants in rem against the vessel. When the vessel is sold by the Marshal the purchaser acquires title to the vessel free of all encumbrances and liens and so existing rights in rem against the vessel are transferred to the proceeds of sale. The Marshal must therefore sell the vessel for the best possible price. **If the proceeds of sale are not sufficient to enable all claims in rem to be satisfied then the proceeds will be distributed in accordance with an established order of priorities**".*

[My emphasis]

- [58] Miss Montague has also argued that the effect of the judicial sale is that Jebmed's rights under the mortgage have been extinguished. The effect of a judicial sale is that all enforceable claims in rem are transferred to the proceeds of sale. Those claims have been satisfied. Currently, DunnCox has a default judgment against Jebmed arising from a claim for professional services. That is the subject of another claim which was based on contractual relations between them and it is at best unclear why it should affect Capitalease's entitlement to the residue pursuant to section 89 (2)(c) of the **Act**.
- [59] The issue of costs to which Jebmed may be entitled in relation to the arrest was raised by Mr. Chen. At this time the issue of costs does not arise as there has been no determination of the matter.
- [60] It has been submitted that the payment of the sum remaining in court would amount to a summary determination of the claim as it has not been adjudicated, settled or discontinued. I agree with that submission.
- [61] The issues between the parties have been joined as may be gleaned from the defence and counterclaim filed by Capitalease. Capitalease's liability under the mortgage also appears to be capped at United States Nine Hundred Thousand Dollars (US\$900,000.00). Jebmed would not without more, be entitled to receive any sum in excess of that amount. In addition, it has also been stated that Jebmed

has taken steps to access the sum paid by Bluefin in the Maltese court. For all intents and purposes, it appears that Jebmed is satisfied with the outcome of the matter in Malta as far as its claim is concerned.

[62] Residue is defined is defined by **The Oxford Dictionary** as “*a small part of something after the main part has gone or been taken*”. In this matter, the remaining sum, in my view can only be properly classified as “residue” if the claim between the parties was at an end.

[63] Whilst I am of the view that the terms of the mortgage are clear and a court is unlikely to make an award to Jebmed in excess of the mortgage sum, I am mindful of the fact that a ruling which results in the remaining sum of United States One Million Dollars (US\$1,000,000.00) being paid to Capitalease would in effect, defeat the purpose of the claim and the consequent arrest and the judicial sale. I agree with the submission that the release of the funds would indicate that the court has concluded that the claim has no real prospect of success and as such amount to a summary determination of the claim. In this regard, I am mindful that part 15.3(e) of the **CPR** states that summary judgment is not available in respect of admiralty claims *in rem*. The funds are to remain in court until the claim is either disposed of by trial, settlement or its withdrawal.

[64] With respect to costs, I am of the view that although the application is being refused the issue of costs should be reserved until the determination of the matter.

[65] In the circumstances, it is ordered as follows:

- (1) The application is refused.
- (2) The issue of costs should await the disposal of the claim.
- (3) The Applicant’s Attorneys-at-Law are to prepare, file and serve this order.