

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Commercial Division  
2022/COM/adm/00012**

**IN THE MATTER of** an Admiralty Action in Rem against the M.V. “CRYSTAL  
SYMPHONY”

**BETWEEN**

**DNB BANK ASA**

Claimant

AND

**THE OWNERS AND PARTIES INTERESTED IN THE MOTOR VESSEL “CRYSTAL  
SYMPHONY”**

Defendants

**COMMONWEALTH OF THE BAHAMAS  
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**BETWEEN**

**DNB BANK ASA**

Claimant

AND

**THE OWNERS AND PARTIES INTERESTED IN THE MOTOR VESSEL “CRYSTAL  
SERENITY”**

Defendants

**Before:** The Honourable Justice Constance A. Delancy

**Appearances:** Richard Horton with Darzhon Rolle and Emma Van Wynen for the  
Claimant  
No Appearance for the Defendants  
Robert Adams, KC with Samuel Brown for the Intervener

**RULING  
[On the Papers]**

[1.] This is the Court's ruling, on the papers, on the Claimant's application for the payment out of security held by the Provost Marshal and the Claimant as provided by the Order of *Tynes, J. (Acting)* of 19 December 2022 and filed herein.

## **Background**

[2.] By Writs of Summons filed on 18 February 2022 the Claimant commenced separate actions against the owners and parties interested in M/V Crystal Symphony ("Symphony") and M/V Crystal Serenity ("Serenity").

[3.] On 24 March 2022, *Hanna-Adderley, J.* ordered that Symphony and Serenity be appraised and sold by the Admiralty Marshal, and that the proceeds of sale be held in an interest-bearing joint account held by the Admiralty Marshal and the Claimant's attorneys.

[4.] On 17 June 2022, *Hanna-Adderley, J.* granted SMS International Shore Operations US Inc. ("Intervener") leave to intervene in both actions.

[5.] On 5 August 2022, the Claimant was granted Judgments in default respecting the outstanding indebtedness owed by Symphony and Serenity pursuant to a First Ship Priority Mortgage dated 15 May 2015.

[6.] On 19 December 2022, a Priorities Order with respect to Symphony was granted by *Tynes, J (Acting)* wherein at para.2 it was ordered:

2. Of the Proceeds of Sale:
  - (a) The sum of US\$64,565.05 be paid to Peninsula Petroleum by way of reimbursement for their contribution to the Admiralty Marshal's expenses of the arrest of the Vessel;
  - (b) the sum of US\$12,500.00 be paid to Peninsula Petroleum in respect of their costs as the first arresting party;
  - (c) the sum of US\$250,000.00 be retained within the Joint Account as security for a final judgment(s) which may be obtained by such Crew as qualify under paragraph 1d) hereof; (d) the sum of US\$9,303.92 be retained within the Joint Account as security for a final judgment which may be obtained by Nassau Cruise Port Ltd.;
  - (e) the further sum of US\$275,000.00 be retained within the Joint Account as security for a final judgment which may be obtained by SMS. If that judgment does not also contain a declaratory ruling that the said final judgment has priority over that of the Plaintiff mortgagee herein then the said further sum of US\$275,000.00 (or such part thereof as appropriate depending on the amount of any such judgment as may be secured by maritime lien) will be released from security and paid to the Plaintiff mortgagee herein, by way of partial payment of the judgment herein dated 5th August 2022;
  - (f) the further sum of US\$15,540.50 be retained within the Joint Account as security for a final judgment which may be obtained by GPH (Antigua) Limited.

- (g) the further sum of US\$2,272,727.27 be retained within the Joint Account as security for the amount assessed by the Department of Inland Revenue against the Admiralty Marshal in respect to Value Added Tax on the supply of the Vessel, subject (i) to this Court's determination as to whether the sum assessed is properly to be included in the Marshal's expenses of the sale, taking into account the relevant provisions of the Value Added Tax Act 2014 (as amended), and the steps that should customarily be taken thereunder to establish the net value added tax liability, if any, properly arising from the sale, (ii) any directions the Court may make in connection with the establishment of the said net tax liability and (iii) to any aggrieved party's right to object to such assessment and appeal any decision by the Comptroller;
- (h) **the further sum of US\$1,000,000.00 be retained within the Joint Account as security for the potential future costs (along with interest) which may be incurred by the Crew, SMS, GPH (Antigua) Limited, Nassau Cruise Port Limited and the Department of Inland Revenue in prosecuting their respective claims to judgment;**
- (i) the balance of the proceeds of sale in the Joint Account be paid to the Plaintiff mortgagee herein, by way of partial payment of the judgment herein dated 5th August 2022.  
[Emphasis Added]

[7.] On 19 December 2022, a Priorities Order with respect to Serenity was granted by *Tynes, J (Acting)* wherein at para.2 it was ordered:

- 2. Of the Proceeds of Sale:
  - (a) The sum of US\$64,565.05 be paid to Peninsula Petroleum by way of reimbursement for their contribution to the Admiralty Marshal's expenses of the arrest of the Vessel;
  - (b) the sum of US\$12,500.00 be paid to Peninsula Petroleum in respect of their costs as the first arresting party;
  - (c) the sum of US\$250,000.00 be retained within the Joint Account as security for a final judgment(s) which may be obtained by such Crew as qualify under paragraph 1d) hereof;
  - (d) the sum of US\$323,167.20 be retained within the Joint Account as security for a final judgment which may be obtained by Nassau Cruise Port Ltd.;
  - (e) the further sum of US\$725,000.00 be retained within the Joint Account as security for a final judgment which may be obtained by SMS. If that judgment does not also contain a declaratory ruling that the said final judgment has priority over that of the Plaintiff mortgagee herein then the said further sum of US\$725,000.00 (or such part thereof as appropriate depending on the amount of any such judgment as may be secured by maritime lien) will be released from security and paid to the Plaintiff mortgagee herein, by way of partial payment of the judgment herein dated 5th August 2022;
  - (f) the further sum of US\$13,588.50 be retained within the Joint Account as security for a final judgment which may be obtained by GPH (Antigua) Limited;

- (g) the further sum of US\$9,363,636.36 be retained within the Joint Account as security for the amount assessed by the Department of Inland Revenue against the Admiralty Marshal in respect to Value Added Tax on the supply of the Vessel, subject (i) to this Court's determination as to whether the sum assessed is properly to be included in the Marshal's expenses of the sale, taking into account the relevant provisions of the Value Added Tax Act 2014 (as amended), and the steps that should customarily be taken thereunder to establish the net value added tax liability, if any, properly arising from the sale, (ii) any directions the Court may make in connection with the establishment of the said net tax liability and (iii) to any aggrieved party's right to object to such assessment and appeal any decision by the Comptroller;
- (h) **the further sum of US\$1,000,000.00 be retained within the Joint Account as security for the potential future costs (along with interest) which may be incurred by the Crew, SMS, GPH (Antigua) Limited, Nassau Cruise Port Limited and the Department of Inland Revenue in prosecuting their respective claims to judgment;**
- (i) the balance of the proceeds of sale in the Joint Account be paid to the Plaintiff mortgagee herein, by way of partial payment of the judgment herein dated 5th August 2022.  
[Emphasis Added]

[8.] On 06 March 2023, the Intervener filed a Writ of Summons and Statement of Claim (Claim No. 2023/COM/adm/0005) against Symphony claiming maritime liens for port dues and pilotage dues in the sum of \$157,578.58.

[9.] On 06 March 2023, the Intervener filed a Writ of Summons and Statement of Claim (Claim No. 2023/COM/adm/0006) against Serenity claiming maritime liens for port dues and pilotage dues in the sum of \$568,699.23.

[10.] On 5 October 2023, the Claimant was granted leave to intervene in the Intervener's actions and the Intervener was granted Judgment by default in respect to the indebtedness incurred by Symphony and Serenity. The Court provided that the issue of whether SMS was entitled to a maritime lien in respect to the pilots' fees and port fees and whether SMS could be paid in priority of the Claimant was to be determined at a later date.

[11.] By Consent Orders the Claimant has settled maritime liens claims brought by The Crew, GPH (Antigua) Limited and Nassau Cruise Port.

[12.] On 9 February 2024, *Hanna-Adderley J.* in her Ruling determined that the Admiralty Marshal's expenses of the sale of the Vessels did not include Value Added Tax; therefore the sum claimed by the Department of Inland Revenue was released and paid to the Claimant (para. 2(i) of the Priorities Orders).

[13.] On 19 March, 2024, the Claimant filed Notices of Application on 19 March 2024 seeking Orders releasing the sum of US \$1,000,000.00 (para. 2(h) of the Priorities Orders) retained as security for the potential future costs (along with interest) which may be incurred by all of the parties who were ordered to prosecute their respective claims to Judgment.

## Issue

[14.] The Court must determine whether the sums retained as security under para.2(h) of the Priorities Orders ought to be released to the Claimant.

## Law & Discussion

[15.] The Counsel for the Claimant contends that the sums retained under para.2(h) of the Priorities Orders are no longer necessary as the Intervener's claims are already secured by the sums retained under para.2(e) of the Priorities Orders. Further, that the Court is not yet *functus officio*, and has the jurisdiction to ensure that the correct parties receive the monies from the fund held in the joint account. (See **Halsbury's Laws of England Vol. 93 (2022)** at para. 166).

[16.] The Counsel for the Claimant also submits that the Court has the jurisdiction to vary Priorities Order, even after the orders have already been perfected. Counsel relies on **The Fairport (No 4) [1967] 2 All ER 914**, *Karminsky, J.*, at page 915E, quoting the dicta of *Sir Robert Phillimore* in *The Markland*:

Sir Robert Phillimore said in his judgment:

“With regard to the fact that the order for payment in this case was actually signed by me, I cannot hold that upon that ground the court is *functus officio*. The court has not parted with the funds; and after it has been apprised that by so doing it would be inflicting an injustice upon parties who have a prior legal claim over those funds it would be strange indeed if the court had not power to prevent the execution of the order. I am clear that I have power, and ought to exercise it to prevent the execution of that order, the effect of which would be to do a wrong to a party who has established priority in his claim.”

...An important part of that decision, as I understand it, is that where, as here, the court has not parted with the fund, it has not completed its duty of adjudicating between the parties. In other words, it is not *functus officio* and, where the result of doing nothing might be to inflict an injustice, then it must act.

[17.] Counsel for the Intervener contends that the Claimant's applications for payout is a variation of the Priorities Orders and there is no procedural basis for the same. Further that the “liberty to apply” provision at para. 3 of the Priorities Orders does not and cannot permit the Court to vary the terms by paying to the Claimant a sum reserved as security for the Intervener's costs and interest incurred in prosecuting its claims to Judgment. Counsel drew the Court's attention to para.1567 of Halsbury's Laws of England, 5th edition, Volume 12A:

...Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances....

[18.] Counsel for the Intervener also relies on the dicta of *Somervell L.J.*, in **Cristel v Cristel** [1951] 2 All ER 574 at page 576, paragraph b-d (which was also adopted by *Georges, C.J.* in **Henderson et Al v Sulgrave Management Ltd.** Common Law 76 of 1985):

Prima facie, “liberty to apply” is expressed very often—and, if it is not expressed, it will be implied---where the order that is drawn up requires working out and the working out involves matters on which it may be necessary to get the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied.

[19.] Counsel for the Claimant contends that at the time of the granting of the Priorities Orders the Court was not aware that the amounts proposed for Intervener para. 2(i) of the Priorities Orders included interest and costs. Counsel for Intervener counters that paragraph 2(h) of the respective Priorities Orders mandates that the sum retained as security for future costs and interest ought to be reserved until all of the parties listed therein have completed the prosecution of their respective claims to Judgment. Further, as Intervener has not completed its prosecution of its claims asserting maritime liens the sums ought not be paid out.

[20.] The Courts accepts the submissions that the Claimant’s applications for the release of the funds retained under para.2(h) Priorities Orders would vary the terms thereof. The Court finds that the wording in para.2(h) of the Priorities Orders contemplated “*potential future costs (along with interest) which may be incurred by the Crew, SMS, GPH (Antigua) Limited, Nassau Cruise Port Limited and the Department of Inland Revenue in prosecuting their respective claims to judgment.*”

[21.] The issues of whether Intervener is entitled to a maritime liens and whether the Intervener could be paid in priority to the Claimant have yet to be determined and therefore fall within the ambit of “*potential future costs (along with interest)*” as set out in para.2(h) the Priorities Orders. The catalyst for the payout of the sums retained under para.2(h) of the Priorities Orders is the final determination of all claims of the parties named therein.

[22.] Moreover, Counsel has not demonstrated to the Court any substantial change or hardship in the performance of the order for the allotted scheduling, which was from the period of “*prosecuting their respective claims to judgment*”. Therefore, the application is not one of necessity but rather convenience on the part of the Claimant.

**Conclusion**

[23.] In all the circumstances, the Court hereby dismisses the Claimant's applications and grants costs to Intervener to be assessed if not agreed.

Dated the 28 day of April, 2025

*[Original Signed and Sealed]*

Constance A. Delancy  
Justice