

Date: 20091222

Docket: T-1362-09

Citation: 2009 FC 1307

BETWEEN:

AOZORA BANK, LTD.

Plaintiff

and

**YOSEMITE LTD.,
THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP *YOSEMITE*,
AND THE SHIP *YOSEMITE***

Defendants

ASSESSMENT OF SHERIFF'S COSTS - REASONS

**Charles E. Stinson
Assessment Officer**

[1] The Plaintiff, a Japanese banking corporation, claimed as mortgagee (first preferred mortgage) of the Ship "Yosemite", a Liberian flagged bulk carrier of approximately 167.64 metres in length, US\$77,181,367.54 plus contractual interest, costs and disbursements and effected arrest of said ship.

[2] The Affidavit of Bill O'Dell, affirmed August 25, 2009 in support of the Plaintiff's motion for relief, indicated in paragraph 1 that he is "the Operations Manager for National Maritime

Services Inc.” and in paragraph 3 that “National Maritime Services Inc. is based in Fort Lauderdale, Florida, U.S.A. and is in the business of providing ship management services, including international vessel arrest, custody, and sale services” and otherwise set out the circumstances for the urged sale of the Ship “Yosemite”.

[3] The *ex parte* Order dated August 26, 2009, provided that:

...

2. National Maritime Services Inc. is hereby appointed as Sheriff in this action for the safety and preservation of the *in rem* Defendant Ship YOSEMITE (the Vessel) while under arrest until further order of the Court. The Plaintiff shall assume responsibility for any costs or fees incurred or payable in carrying out this Order, as required by Rule 483(2) of the *Federal Courts Rules*.
3. The Plaintiff, Aozora Bank Ltd., is hereby authorized, but not obligated, to advance funds for the payment of the wages and other sums outstanding and due to the master, officers and crew with respect to their service on board the *in rem* Defendant Vessel YOSEMITE and their costs of repatriation, relief and replacement as required. Any such payments shall rank without any precedence with liens for seamen’s and master’s wages and upon payment be deemed to be assigned to the Plaintiff without any need to take specific assignment of such claims.
4. The Plaintiff, Aozora Bank Ltd., is hereby authorized, but not obligated, to advance funds for the payment of other expenses applicable to the *in rem* Defendant Vessel YOSEMITE and its maintenance and protection while under arrest, including, without limitation of the foregoing, agency fees and disbursements, port fees and dues, crew to maintain and protect the Vessel while under arrest, insurance on and with respect to the Vessel, bunkers to fuel on board heating, generating equipment and electrical systems, garbage removal, launch services, crew wages and provisions.

Any such payments shall rank without any precedence with liens for the costs of the arrest and costs *custodia legis*.

5. The Plaintiff shall have its taxable costs of this motion paid out of the fund created on the sale of the *in rem* Defendant Vessel YOSEMITE.

[4] The *ex parte* default judgment dated October 5, 2009 awarded US\$77,181,367.54 (CAN\$83,023.997.06 further to the rate of exchange of the Bank of Canada of an even date) to the Plaintiff together with taxable costs of the motion payable out of the sale proceeds of the Ship “Yosemite” and permitted the Plaintiff to prove within the creditors’ scheme its additional claims and protective disbursements.

[5] The *ex parte* order dated October 5, 2009 (the Sale Order) provided that:

...

1. The Vessel, including its bunkers and appurtenances, which shall be separately appraised and sold as set out below in Paragraph 4 below (collectively referred to as the Vessel), now under arrest at Ladysmith, British Columbia, shall be appraised and sold by public auction to be arranged in accordance with the terms of this Order.
2. The Vessel shall be sold, as set out below, in its present state, after the removal of any cargo on board, on an “as-is, where-is” basis, with all existing faults, without any allowances for deficiencies or errors of description whatsoever and without any legal or contractual representations or warranties whatsoever, but free and clear of all liens and encumbrances as provided in Rule 490(3) of the *Federal Courts Rules*. Prospective purchasers shall satisfy themselves as to the condition of the Vessel, the quantity of bunkers on board and the currency of her certificates. The bunker fuel and diesel oil on board the Vessel shall be taken and paid for by the purchaser of the Vessel as a separate item together with the Vessel. The quantities of bunker fuel and diesel oil shall be

determined and valued by the Sheriff on the basis of market prices in effect at the Port of Vancouver, British Columbia, on the day before the sale.

3. Mr. Bill O'Dell of National Maritime Services Inc. (National Maritime), shall be appointed as an acting Sheriff of this Court (hereinafter the Sheriff). The Sheriff's commission on sale shall be three percent of the total sale price, which shall include payment for any brokering services provided by National Maritime or other agency for sale. The Sheriff may, in the event a situation arises in which he reasonably feels in need of independent legal advice, retain legal counsel, the cost of which shall be included as a Sheriff's cost, payable from the sale proceeds. Included in the aforesaid commission shall be the services of the Sheriff in contacting any prospective or potential purchasers, in arranging ship-board attendances by potential purchasers, the scheduling of the auction, dealing with the auction, dealing with the deposit and the purchase price, instructing lawyers and taxing costs. In the event that the Sheriff has any uncertainty as to what items are covered by the commission, he has liberty to apply to the Court on short notice for directions in that regard.
4. ... The bunker fuel and diesel fuel aboard shall be sold to the purchaser of the Vessel as a separate item on the basis of the amount aboard and at the Port of Vancouver, British Columbia, market price thereof, as determined by the Sheriff on the day before the auction sale. The sale of the Vessel shall be subject to the approval of the Court, which approval may be granted forthwith following the sale, before a Judge or Prothonotary of the Court present in person or by telephone conference call.
5. The Sheriff shall obtain an appraisal of the Vessel to be carried out by a recognized ship broker or marine surveyor other than the Sheriff and acceptable to the Sheriff and to the Solicitor for the Plaintiff herein. A sealed copy of the appraisal and appraisal certificate, if any, shall be filed in the Registry of the Court by the Sheriff forthwith upon its receipt by the Sheriff prior to the sale and shall not be unsealed until after the first round of bidding in the auction, as set out in Paragraph 12 below. The costs of appraisal shall be treated as Sheriff's costs payable out of the proceeds of the sale.

The quantities of bunker fuel and diesel oil shall be determined and valued by the Sheriff on the basis of market prices in effect at the Port of Vancouver, British Columbia on the day before the sale, as provided in Paragraph 4 above, and the costs of that determination shall be a Sheriff's cost payable out of the proceeds of the sale.

6. The Sheriff shall be required to promote the sale of the Vessel and seek out potential purchasers, and for such purposes to utilize the services of his own brokerage firm, or an agent.
7. The Vessel's Master, any Keeper of the Vessel, the Owner of the Vessel, and the Trustee in Bankruptcy of the Owner of the Vessel, shall provide to the Sheriff copies of any of the following documents in their possession or control, if any, of the Vessel's general arrangement plans, capacity plans, technical documentation concerning the Vessel's main machinery and auxiliaries and classification society certificates, with the costs of reproduction of same being a Sheriff's cost payable out of the proceeds of the sale, and they and each of them shall provide and/or not impede access to the Vessel and such documents to any ship broker, appraiser, surveyor, prospective purchaser or other person authorized by or on behalf of the Plaintiff or the Sheriff to inspect, appraise and show the Vessel to prospective purchasers, their inspectors, surveyors or agents, at any time of day and on any day of the week.
8. The Sheriff shall advertise the sale of the Vessel in the following publications: *Lloyd's List* and the *Vancouver Sun*, by October 16, 2009. Such advertisement shall include the following information concerning the sale process and the terms of sale:
...
 - (b) The Vessel shall be sold by public auction to be held in the Vancouver Registry Office of the Federal Court, 701 West Georgia Street, ... Vancouver, British Columbia, ... on October 30, 2009, commencing at 2:00 p.m. (Pacific Standard Time)....
 - (c) In order to bid, a potential bidder must register with the Sheriff by telephone or fax, no later than

9:00 a.m. (Pacific Standard Time), and shall provide to the Sheriff the following information:

- (i) the full name (including contact person), address, telephone and facsimile numbers, and email address of the bidder;
 - (ii) the full name and address, telephone and facsimile numbers, and email address of the company that the bidder is representing, if any;
 - (iii) the full name and address, telephone and facsimile numbers, and email address of an agent resident in Canada, appointed by the bidder, to whom the Sheriff may deliver the bill of sale in due course, if the bid is accepted; and
 - (iv) a deposit of \$300,000 in United States dollars by irrevocable certified cheque or bank draft drawn on or issued by a Canadian chartered bank and made payable to “Borden Ladner Gervais LLP, Barristers and Solicitors, in Trust.”
- (d) The Sheriff shall be at liberty to sell the Vessel to the bidder present in person, or with an agent present in person, with the highest bid at or in excess of the appraised value. Should the highest bid be less than the appraised value, the Sheriff shall adopt a procedure calling for further bids, by sealed bid, from among those bidders present in person, or by agent present in person, to be held immediately.
- (e) In the event that no bid equal to or higher than the appraised value of the Vessel is received after the process referred to in the preceding paragraph, the solicitors for the Plaintiff may verbally apply immediately to the Court for an order that the Vessel be sold to the highest bidder or for an order that the Vessel be sold by a further auction or by such other alternative method of sale and upon such other terms or conditions as the Court may deem fit to impose.

- (f) The Sheriff shall have the right to adjourn or postpone the auction for a period of up to 24 hours, in his sole discretion.
- (g) Once the sale of the Vessel and its bunkers and diesel oil is approved by the Court, the purchaser shall remit and pay the balance of the purchase price of the Vessel and payment for the bunkers and other fuel aboard, as established by the Sheriff; within seven (7) days of the date of the Court's approval, of the purchaser's bid, failing which the purchaser's deposit shall be forfeited. Payment of the balance of the purchase price and for the bunkers shall be made in United States dollars, by way of irrevocable certified cheque or bank draft drawn on or issued by a Canadian chartered bank and made payable to "Borden Ladner Gervais LLP, Barristers and Solicitors, in Trust."
- (h) If the purchaser's deposit is forfeited by reason of failure to pay the balance of the purchase price when due, then the Sheriff may communicate the amount of the highest offer to other bidders with the view of obtaining a higher offer, or, alternatively, the Solicitors for the Plaintiff or any interested party may request that the Court approve the sale of the Vessel to the second highest bidder should he or she still be willing, and failing same, then the Court may order another alternative method of sale upon such other terms and conditions as the Court may deem fit to impose.
- (i) In the event that the sale of the Vessel is approved by the Court, the Sheriff shall be vested and is hereby vested with the right to sign, a bill of sale or bills of sale transferring to the purchaser the ownership of the Vessel in the same manner and to the same extent as though he were the registered owner thereof but free and clear of any liens or encumbrances. Similarly, the Sheriff shall have the right to transfer title to bunkers and fuel on board the Vessel by a bill of sale. The Sheriff shall be entitled to deliver such bill or bills of sale to the purchaser by delivery thereof to the

purchaser's nominated agent at Vancouver, British Columbia.

- (j) Possession, risk and title to the Vessel, including its bunkers and fuel, shall pass to the purchaser on delivery by or on behalf of the Sheriff of an executed bill of sale to the purchaser or the purchaser's nominated agent in Canada.
- (k) Any deposits made by bidders whose bids are not accepted shall be promptly returned to such bidders at the address provided in their bid.

9. The Sheriff shall include in the advertisement for sale a notice to creditors to the effect that:

- (a) The Vessel "YOSEMITE" (the Vessel) is under arrest at Ladysmith, British Columbia, Canada; and
- (b) Any claim against the Vessel or the proceeds of its sale by *in rem* creditors and mortgagees must be filed by Affidavit in any Registry Office of the Federal Court on or before November 20, 2009, failing which the claim shall be barred. Such Affidavit shall provide full particulars of the claim, its basis and alleged status. The time for filing any additional Affidavit evidence such as that required for the proof of foreign law shall be reserved for the further direction of the Court.

10. The Plaintiff is and shall be entitled to participate in the auction.

...

21. *All reasonable expenses of advertisement of the sale, agency fees, insurances and all other costs, disbursements, commissions and other expenses such as costs of berthage, security, reproduction of plans, photographs, courier services, survey reports, appraisal etc. necessary or inherent to giving effect to this order and the commission of sale and for the preservation, safekeeping or maintenance of the Vessel incurred by the Sheriff and/or funded by or on behalf of the Plaintiff shall be treated as Sheriff's costs payable*

immediately after taxation by an assessment officer in priority from the proceeds of the sale. Notwithstanding Federal Courts Rules 490(5) and 490(6), the Sheriff's account shall be submitted directly to the assessment officer who shall promptly examine it and who shall issue a certificate, authorizing all or such portion of the account as he or she deems appropriate, whereupon the amount set out in the certificate shall be paid out to the Sheriff or as the Sheriff shall direct, out of the proceeds of sale. [Emphasis added]

22. The proceeds from the sale of the Vessel, bunkers and fuel which are paid directly to Borden Ladner Gervais LLP in trust in United States dollars shall be held in a United States dollar interest bearing trust account and the funds so deposited shall be deemed for all purposes to be monies paid into this Court to the credit of all *in rem* claims against the Vessel and shall not be disbursed except in accordance with the further order of the Court.
23. All questions relating to the right of any claimant *in rem* against the Vessel or the proceeds of sale of the Vessel and all questions respecting the priority of all *in rem* creditors shall be reserved until further order of the Court.
24. Without prejudice to any other claims for costs, the Plaintiff shall have their taxable costs of this motion for default judgment and sale to be paid out of the fund created on the sale of the Vessel.
25. Liberty to apply to the Court to vary or set aside this Order is granted to all interested parties.

[6] My decision on the assessment of the Sheriff's costs in *Fraser Shipyard and Industrial Centre Ltd. v. the Ship "Atlantis Two"*, [1998] F.C.J. No. 1676 (A.O.) (the "Atlantis Two") read in part:

1 STINSON, ASSESSMENT OFFICER (Reasons for Assessment of Sheriff's Costs):-- By Order dated May 27, 1998, the Prothonotary, John A. Hargrave, directed that Mr. Bernard T. Jones, a Ship Broker of C.T.L. Westrans, be appointed as Acting Sheriff of

this Court (hereafter the “Sheriff”) with authority for appraisal and sale of the ship “ATLANTIS TWO”. The Order, which was not appealed, directed that the costs of the appraisal be treated as Sheriff’s costs payable out of the proceeds of the sale and that the Sheriff’s commission be set at 1% of the total sale price. Ultimately, the vessel sold for US\$1,100,000.

2 Paragraph nos. 19, 20 and 23 of the sale order read:

19. Following the successful sale the Sheriff shall deposit the proceeds into Court and produce his account together with his bill of costs and expenses supported with vouchers to be taxed;
20. All reasonable expenses of advertisement of the sale, agency fees, insurance and all other costs, disbursements, commissions and other expenses necessary or inherent to giving effect to this order and the commission of appraisal and sale and for the preservation, safekeeping or maintenance of the ship, incurred by the Sheriff, shall be treated as Sheriff’s costs payable immediately from the proceeds of the sale, upon taxation;
23. Liberty to apply is granted to the Sheriff and to all interested parties.

The Sheriff produced his account by way of Bill of Costs and the Affidavit of Mr. Jones sworn August 20, 1998, in support and filed (as specified in the Commission of Appraisal and Sale) August 21, and the Affidavit of Mr. Jones sworn September 16, 1998, and filed on September 17, in support of his Supplemental Bill of Costs exhibited thereto.

3 Throughout, the Sheriff pressed the Registry and myself for early settlement of the account and suggested that the reputation of the Court and his reputation suffered because of the delay. He had incurred bills on behalf of the Court and was being pressed for settlement of these accounts. His letter dated September 17, 1998 to the Registry was indicative of his various communications to this effect. In part, it urged us “to deal with this matter soonest so that we can place these people in funds” and to settle the Compass Marine disbursement account as a first priority. There is no question that the Admiralty Court for Canada and the claimants were well served in this matter by Mr. Jones. As well, I recognize and accept that delays

in settling accounts are to be avoided. However, the Sheriff's communications may have misconstrued the authority of the Registry and, in particular, of an Assessment Officer in this area. Rules 490(5) and (6) provide for the assessment of the Sheriff's accounts including the participation of any party or caveator who is interested in the proceeds of sale. Those proceeds are held in trust accounts governed by strict regulations concerning access. Therefore, it was never open to me to settle accounts except further to formal notice to interested parties giving them a reasonable opportunity to participate. The sale Order did not exempt the Sheriff from giving notice of his accounts. He did not, however, do so. The Registry and an Assessment Officer did not have authority under paragraph 23 of the sale Order.

4 In Court file No. T-76-93, *Luis Ricardo Almeida Gomez et al. v. The Ship "M.V. Rio Mafil"*, similar concerns for the timely payment of sale-related accounts occurred before the sale Order was issued. On August 25, 1993, the Honourable Mr. Justice Rothstein ordered:

...

3. The Vessel shall be appraised and sold pursuant to Rule 1007 and under authority of a commission addressed to a Deputy Marshal of this Honourable Court in the form attached as Schedule "A" hereto, and the price and terms of such sale to be subject to the approval of this Court.
4. The Plaintiffs shall have joint conduct with the Deputy Marshal of the sale of the Vessel and the Plaintiffs shall be at liberty to list it for sale as aforesaid by engaging a ship broker or a ship brokeraging firm, acceptable to the Deputy Marshal and be at liberty to pay any ship broker or firm who may arrange a sale of the Vessel a commission not to exceed 1% of the gross selling price of the Vessel. Such commission and the expenses of the ship broker or firm in connection with services in promoting the sale, including the costs of advertising, shall be paid from the proceeds of the sale and shall be submitted directly to a Taxing Officer who shall forthwith

examine said account. The Taxing Officer shall issue a Certificate *ex parte* to the ship broker authorizing all or such portions of the account as he deems appropriate. The ship broker is hereby authorized to keep such monies, out of the proceeds of sale, as are authorized by the Certificate of the Taxing Officer and shall pay the net proceeds from the sale into Court to the credit of all claimants *in rem* against the Defendant vessel and the Plaintiffs shall be at liberty to seek payment out thereafter. The Taxing Officer shall file a report as to that portion of the account not certified for further Order of the Court.

...

7. After the deduction of the said commission and the said expenses as described in Paragraph 4 above, the net proceeds from the sal[e] shall be paid into court to the credit of all claimants *in rem* against the Defendant vessel and the Plaintiffs shall be at liberty to seek payment thereafter....

As it happened, it was Mr. Jones who was engaged as the Ship Broker in that matter. He filed his account on October 22, 1993 and I issued the appropriate Certificate of Ship Broker's account that same day. Here, the Registry had no authority to apply for similar directions....

The Court in *Gomez v. M.V. "Rio Mafil"*, [1994] F.C.J. No. 824 (F.C.) (P.) disposed of the Marshall's account separately on May 30, 1994: see [1994] F.C.J. No. 824 (F.C.T.D.).

[7] In the circumstances of concern for delay and of several identified claimants to the sale proceeds of the "Atlantis Two", I directed the Registry to circulate the ship broker's account as contemplated by Rule 490(6). Four claimants filed an objection to certain costs, but with the stipulation that the balance of the Sheriff's costs not in issue could immediately be assessed and paid out of the sale proceeds. I issued a Certificate of Assessment accordingly for these latter costs

and a second Certificate of Assessment on a later date reducing the disputed costs of \$14,096 to \$3,289. I noted in paragraph 9 of the “Atlantis Two” that if “I had had directions comparable to the “*Rio Mafil*”, *supra*, or some other directions waiving the full effect of Rule 490(6) relative to a trust fund, I would have cut short the period of circulation.”

[8] The highlighted portion of the Sale Order permits me to waive circulation among the creditors of the Sheriff’s account, but does not require that I do so. The period for creditors to file claims is over. The Plaintiff is the only creditor of record. I could certify the Sheriff’s account in part only and hold back those costs considered doubtful for further consideration. The latter process could include circulation of the Sheriff’s account if other creditors had appeared. I did not have to do that for the assessment of the Sheriff’s costs on March 30, 1999, in Federal Court file T-32-99, *The Royal Bank of Scotland plc. v. The Ship “Golden Trinity” et al.*, in which I effected minimal reductions. Counsel for the Plaintiff here presented the Sheriff’s sale account for assessment and requested that I certify it accordingly. I would have found, if necessary, that I did not have to circulate the Sheriff’s account.

[9] This matter was instituted on August 17, 2009. The warrant for arrest of the defendant vessel was issued that same day. The Sheriff’s bill of costs includes claims of US\$1,725 and \$5,750 billed for July 31 and August 17, 2009 respectively for port entry and transit requirements at Long Beach, California. The vessel was in Ladysmith, British Columbia. The relevance of these amounts for preservation or the sale is not clear, but the Plaintiff apparently does not oppose them and no other interested party, including the former owner, is present to raise concerns.

[10] The Sheriff's bill of costs includes several claims for repatriation airfare for the crew. It could be argued that these charges were essential to remove the crew as part of readying the vessel for sale and therefore were sale-related. Paragraph 3 of the Order dated August 26, 2009 linked such costs to the Plaintiff. However, crew claims generally rank very high in the hierarchy of liens and I find it reasonable to certify them as part of the sale expenses.

[11] The Sheriff's bill of costs contains many other items such as P&I coverage, crew wages, garbage inspection, immigration clearance for the crew, overtime, crew medical fees etc., all of which I find relevant and essential. I am satisfied that the bill of costs does not improperly include brokering services beyond the limit in paragraph 3 of the Sale Order making such services part of the Sheriff's commission on sale.

[12] Paragraphs 9 and 10 of the affidavit of Bill O'Dell affirmed December 10, 2009 in support of the bill of costs read:

9. The total amount of Sheriff's Account is \$955,954.32 USD. Of this, \$378,048.09 USD has been paid in advance by the plaintiff, Aozora Bank Ltd., leaving a balance of \$577,906.23 USD due and owing.
10. I make this affidavit in support of the Plaintiff's application for a certificate authorizing the remaining balance of the Sheriff's Account, being \$577,906.23 USD to be paid out in full to National Maritime, out of the proceeds of the sale of the YOSEMITE, pursuant to the terms of the Order for Sale.

[13] The payment (US\$378,048.09) in advance by the Plaintiff represents ordinary admiralty law practice. Although the materials request only certification of US\$577,906.23, I think that my

assessment should address the entirety of the Sheriff's account and leave it to the Sheriff and the Plaintiff to identify in any representations which amounts should be paid out of the sale proceeds. The Certificate of Assessment will state that the costs of the Sheriff in effecting preservation and sale of the Defendant Ship "Yosemite" are assessed and allowed as presented at US\$955,954.32, an amount which includes US\$378,048.09 paid in advance by the Plaintiff, Aozora Bank, Ltd.

"Charles E. Stinson"
Assessment Officer

Vancouver, BC
December 22, 2009

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1362-09

STYLE OF CAUSE: AOZORA BANK, LTD.
v.
THE SHIP *YOSEMITE* et al.

**ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE
OF THE PARTIES**

REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON

DATED: December 22, 2009

WRITTEN REPRESENTATIONS:

Rick Williams FOR THE PLAINTIFF

n/a FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP FOR THE PLAINTIFF
Vancouver, BC

n/a FOR THE DEFENDANTS