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To: Transport Industry Operators

Court's sale of vessel

On 22/4/2008, Judge William Waung of the Hong Kong High Court issued a Judgment to sell the vessel "Fair Wind 28" under arrest for HK\$2.4million.

What had happened was that the vessel was arrested. There was order for sale and pursuant to the order, in the usual way, there was newspaper announcement that the sale would be by way of a public tender and the court had reserved the right to accept by private treaty whatever bid suitable that would come in.

The vessel was a somewhat unusual vessel. Pursuant to the usual practice of the court, two appraisers had given appraised value of the ship. They ranged from \$4.5 million to \$5 million. The bid that came in within time, the only bid, was from UDL and the bid was for \$2.4 million. This was very much below the appraised values.

The court examined the file, noticed that there were no other claimants apart from the plaintiff Fratelli Consulich Bunkers (HK) Ltd against the ship, that there was no mortgagee interest that the court could see, there was no caveat entered, and the value of the plaintiff's claim was somewhere in the area of the \$2.4 million bid although a bit higher, the court therefore took the precaution of instructing the chief bailiff to write to the two appraisers asking for their explanation as to why their appraised value was so much higher than the only bid that had come in and what was their assessment of the likelihood that a second tender would give rise to a higher price.

The answer that came back from the two appraisers was not too optimistic. There was a little bit of hedging given by the two appraisers with the indication that there was no guarantee or even assurance that on the second round of a tender, a higher price than the \$2.4 million would come in.

The court therefore was put in the difficult position of deciding whether to order the second round of tender with no certainty that even the previous \$2.4 million would be reached because once a second round was ordered, of course, the first bid would have lapsed, or alternatively to do the best it could and accept the only offer that was available.

The court, however, took the precaution of asking the chief bailiff to write to the only bidder UDL and ask whether UDL was prepared to increase its offer having regard to the fact that the only bid that came in was very much below the appraised value. The bidder UDL took a very commercial and hard line and said it would not increase its offer.

The Judge was faced with a difficult decision. Doing the best the Judge could and with his hopefully considerable experience in this matter, knowing that sometimes unusual vessels had difficulty in finding a buyer — sometimes even for long period could not find the right buyer at the right price, the Judge directed the chief bailiff to accept the offer.

The chief bailiff wrote to UDL accepting the bid and proceeded to cash its 10% deposit. The chief bailiff set the date of 25/4/2008 for the completion of the sale when the bill of sale would be executed. So this was perfectly in the ordinary course of the Admiralty Court work performed by the chief bailiff and as directed by the Judge-in-charge of the Admiralty list.

Out of the blue, there was a letter or there was some indication from the plaintiff on 21/4/2008 to say that it learnt about the successful bid by UDL, it took the view that the bid of UDL was grossly below the value that

could be realized and that there was a mortgage involved and that there was a new bidder in the form of Hong Kong Fuels Ltd which was ready and willing to bid at \$4 million, namely \$1.6 million higher.

The Judge took into account that the plaintiff made on 22/4/2008 that the true value of the vessel was higher as evidenced by its saying that there was a \$4 million bid on the table, but counter-balanced against that was there was already a binding agreement between the court and UDL. To accede to what the plaintiff asked the Judge to do would be to go against all the procedure that had been laid down over the years and in order to benefit partly the plaintiff and partly the mortgagee Wing Hang Finance Co. Ltd. But the plaintiff and the mortgagee had only themselves to blame for not doing anything earlier. The mortgagee did not register the mortgage. There was no indication to the court that there was even a mortgage. The mortgagee did not enter caveat. There was no caveat entered whatsoever.

The plaintiff knowing of the likely value of the vessel did not do anything to alert their friends or anyone else to make sure that whatever bid that would come in would reach at least some minimum sum. When only one bid came, there was no application to the court to say: "We understand there is only one bid, can something be done?" So, it seemed to the Judge, that the court was put into the position of doing the best it could in the circumstances.

To accede the plaintiff's submissions of 22/4/2008, it seemed to the Judge would wholly erode the authority of the court. There is a set procedure: there was a tender, the court accepted the only bid (after much discussions) and it seemed to the Judge that notwithstanding the apparent glaring injustice — might be "injustice" was not the right word, the lack of a full price that could be realised, it seemed to the Judge wrong in the circumstance for the court at that stage having cashed the cheque of UDL, having accepted its bid and having set the date for the completion on 25/4/2008, to go back on its word and give the vessel to someone else who could have come in, who should have come in if they wanted to and did not.

The plaintiff made the additional point that the chief bailiff had acted unfairly and had been unwilling to reveal the material information to the plaintiff and the mortgagee. But that was not the case — until the bid had either been rejected or had been accepted, the chief bailiff was not at liberty to do more and, if any party was unhappy with what the chief bailiff had done, all it had to do was to apply to the Judge. The Judge was always accessible, to make whatever application it wished to make in relation to the tender process that was still ongoing.

Before the court accepted the UDL bid there was always a possibility of something being done, but once the court accepted the bid, then the court's hand was tied.

It was unfortunate that this had happened, but in the circumstance, it seemed to the Judge that both as a matter of public policy and as a matter of following the procedure of the court, that the court had agreed to the selling the vessel to the only bidder of UDL at \$2.4 million and this sale therefore had to go forward. The Judge directed that the chief bailiff complete the sale on 25/4/2008 as scheduled.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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It goes without saying the economy is heading further south as 2009 sets sail into the second quarter.

Unrealistic it is to expect turnaround any time soon. Before we see the lights, we see rising number of E&O, uncollected cargo and completion of carriage claims. The global credit crunch has created chain effects leading to, forced or otherwise, found or unfounded, breach of contracts and obligations along the logistics chain. Our claims team are on full gear recently in dealing with those claims.

If you are in need of a cost effective service in defending claims lodged against you, SMIC is just a phone call away.