THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2011/0011

BETWEEN:

BCEN-EUROBANK now known as VTB BANK (FRANCE) SA

Appellant

and

[1] VOSTOKRYBPORM COMPANY LIMITED
[2] APEX LUCK BUSINESS LIMITED
[3] THE DEPARTMENT OF MARITIME ADMINISTRATION
[4] THE REGISTRAR OF SHIPS
[5] THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

Respondents

Before:

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| The Hon. Mr. Davidson Kelvin Baptiste | Justice of Appeal |
| The Hon. Mr. Don Mitchell | Justice of Appeal [Ag.] |
| The Hon. Mde. Clare Henry | Justice of Appeal [Ag.] |

Appearances:

Mr. Stephen Hofmeyr, QC, with him, Mr. Samuel Commissiong, for the Appellant
Mr. Duane Daniel for the First Respondent
Mr. Graham Dunning, QC, with him, Mr. Richard Williams for the Second Respondent
Ms. Ruth-Ann Richards for the Third, Fourth and Fifth Respondents

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2012: February 29;
2013: June 10.

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*Vessel registered in Saint Vincent and the Grenadines Register of Ships – Mortgage registered as an encumbrance – Voluntary sales of vessel – Judicial sales of vessel in North Korea and China – Shipping Act 2004 – Whether vessel fulfilled statutory requirements to remain registered in Saint Vincent and the Grenadines Register of Ships – Effect of judicial sales – Whether judicial sales conferred clean title – 1993 International Convention on Maritime Liens and Mortgages incorporated into the laws of Saint Vincent*

*and the Grenadines – North Korea and China not parties to the 1993 Convention – Applicability of the 1993 Convention where judicial sale takes place in a non-Convention State*

The MV Phoenix ("the vessel") was registered in the Saint Vincent and the Grenadines Register of Ships in 1999. It remained there until June 2011 when the closure transcript of deregistration was given. The vessel became the subject of a mortgage taken in favour of the appellant. The mortgage was registered in the Register of Ships in 1999. The vessel was sold to several purchasers by voluntary sales as well as judicial sales in North Korea and China. The vessel was also registered in jurisdictions other than Saint Vincent and the Grenadines. The first respondent instituted a claim against the third, fourth and fifth respondents seeking, inter alia, an order compelling the court to deregister the vessel. The second respondent also sought deregistration and an order that it was the owner of the vessel free from encumbrances.

The Court made various orders including that the second respondent (the second claimant in the court below) is the owner of the vessel free of all encumbrances; that the fourth respondent shall terminate the registration of the vessel and issue a closure transcript in relation to the vessel as it was not entitled to remain on the Register of Ships as it no longer satisfied the requirements of the Shipping Act, 2004;[1] that an undischarged mortgage was no bar to deregistration of the vessel. The Court also ordered that the appellant pay the second respondent's costs of $14,000.00 Eastern Caribbean dollars. The appellant appealed against the orders of the judge. The second respondent filed a counter notice of appeal against the judge's refusal to admit affidavit evidence of deponents. The first respondent also appealed against the judge's order dismissing its claim and ordering it to pay the appellant's costs.

Held: dismissing the appellant's appeal and allowing the second respondent's cross-appeal and dismissing the first respondent's counter appeal that:

1. By reason of the judicial sales and the intervening private sales, the vessel had ceased to be eligible for registration in Saint Vincent and the Grenadines according to the requirements of section 6 of the Shipping Act, 2004 and there was no other basis on which on which the vessel was eligible for registration in Saint Vincent and the Grenadines.

2. The failure to meet the requirements of section 6 of the Shipping Act, 2004 allied with the effect of the judicial sales made it legitimate to secure the termination of the vessel's registration. In the circumstances the learned judge rightly directed the registrar to deregister the vessel as it would have been wrong in principle to perpetuate the registration of the vessel as it no longer and had long ceased to be eligible for registration under section 6 of the Shipping Act, 2004.

[1] Cap. 363, Revised Laws of Saint Vincent and the Grenadines 2009.

3. In circumstances where a vessel is no longer entitled to remain on the Register of Ships, the registration of a mortgage does not act as an indefinite bar to deregistration.

4. The 1993 International Convention on Maritime Liens and Mortgages is clearly intended to apply in respect of judicial sales taking place in State Parties to the Convention. Where the judicial sale takes place in a country which is not a party to the Convention, the common law rules apply. Thus, such a sale would be recognised under the laws of Saint Vincent and the Grenadines and given legal effect of transferring title to the purchaser free from encumbrances.

5. A foreign judicial sale is to be recognised as giving effect qua assignment/transfer of title unless it is invalid under the laws of the country where the sale took place. There was no evidence that the judicial sales at issue were invalid.

6. The court in North Korea had jurisdiction to decide on the disposition of the vessel and did not act beyond its jurisdiction. The process by which the vessel was sold clearly operated in rem, flowing as it did from the initial arrest of the vessel. The sale conferred clean title to the purchaser with all claims against the vessel being extinguished and transferred to the proceeds of sale.

7. The judicial sale in China was critical. The sale was on notice to the appellant; the appellant participated in the process and tried to stop it. There could be no issue of breach of natural justice in relation to that sale. There was no evidence of fraud. The sale was by public auction and it was not suggested that it was anything other than a fair market value. The judicial sale in China was effective in transferring good title free from encumbrances regardless of whatever was the prior position.

8. The trial judge had no proper basis for refusing to admit the evidence of the deponents. The factual evidence in the affidavit was not in dispute, the appellant was in possession of the affidavits before the trial and had every opportunity to put in evidence of its own, agreeing with, disputing or qualifying such evidence. The real issue was what weight should be attached to the evidence.

9. There was no good reason to disturb the order dismissing the first respondent's claim and ordering it to pay the appellant's costs.

## JUDGMENT

[1] BAPTISTE JA: This appeal concerns the law of Saint Vincent and the Grenadines relating to the registration of ships and the mortgages of ships. The ship in question is a factory shipping vessel, the MV Phoenix ("the Vessel"), registered in the Saint Vincent and the Grenadines Register of Ships in 1999. It

remained registered until 2011 when the closure transcript of deregistration for the vessel was issued. The vessel became the subject of a mortgage which was taken in favour of BCEN-EUROBANK ("the appellant") and duly registered in the Register of Ships in 1999. The vessel underwent a series of sales involving voluntary sales and judicial sales in the Democratic People's Republic of Korea ("North Korea") and in the People's Republic of China ("China"). The first respondent, Vostokrybporm Company Limited ("Vostok"), was the penultimate purchaser of the vessel and the second respondent, Apex Luck Business Limited ("Apex"), the ultimate purchaser. The vessel was also registered in jurisdictions other than Saint Vincent and the Grenadines.

## The appeal

[2] The critical issues between the parties are as to whether the appellant's maritime lien has been extinguished as a consequence of the judicial sales in North Korea and China and whether the vessel should remain registered in the Saint Vincent and the Grenadines Register of Ships. The appellant's case is that its maritime lien in the vessel subsists and that the vessel should not be deleted from the registry while the maritime lien subsists. The appellant states that it has not consented to the deregistration of the vessel, as stipulated by Article 3 of the 1993 International Convention on Maritime Liens and Mortgages[2] ("the 1993 Convention") before deregistration can take place. The appellant contends that notwithstanding the various transactions involving the vessel, under the laws of Saint Vincent and the Grenadines, it continues to have a legal proprietary interest in the vessel in the form of a registered mortgage. Such a registered mortgage could only be treated as discharged if it has been so noted in accordance with the procedure set out in section 70(1) of the Shipping Act, 2004[3] and there has been no such discharge of its mortgage in this case.

[2] See Schedule to the Shipping Act, 2004, Cap. 363, Revised Laws of Saint Vincent and the Grenadines 2009.
[3] Cap. 363, Revised Laws of Saint Vincent and the Grenadines 2009.

[3] The appellant also contends, inter alia, that it was not open to a court in Saint Vincent and the Grenadines to make an order compelling the Registrar of Ships to deregister the vessel from the Ship Register; accordingly, the first and second respondents were not entitled to that relief. The appellant challenged the finding that the Shipping Act, 2004 allows for the deregistration of a vessel notwithstanding an undischarged mortgage. The appellant also challenged the findings that: (i) where there is a judicial sale the maritime lien, which arises by virtue of the mortgage, is extinguished as it relates to the ship and all the interested parties rights are transferred to the proceeds of the sale of the ship; (ii) that it is a general rule that a judgment in rem of a foreign court of competent jurisdiction in respect of a maritime lien is regarded as binding against all the world; and (iii) that Apex received title, free from all encumbrances, when it purchased the vessel at the judicial sale of the Qingdao Maritime Court.

[4] Apex cross-appeals against the decision of Thom J dismissing its application for an order that the affidavits of certain deponents be admitted into evidence at the trial in their absence; alternatively, that the attendance of the deponents be dispensed with at the trial and that the court ascribes such weight to the evidence as it deemed fit. Vostokrybporm Company Limited ("Vostok"), the first respondent, also filed a counter notice of appeal against the order of the judge ordering it to pay costs to the appellant. Vostok had claimed that it was the owner of the vessel but at the trial accepted that it was no longer the owner and withdrew its application for a declaration that it was the owner. Vostok however maintained its claim for deregistration of the vessel.

## Background

[5] In 1999, Rendell Associates Corporation ("Rendell"), a British Virgin Islands company, registered the vessel in the Register of Ships of Saint Vincent and the Grenadines. That same year, Rendell mortgaged the vessel to the appellant as security for a loan by the appellant of US$5 million plus interest, to Ocean Resources Trade and Commerce AG ("ORTC"). The mortgage was registered in the Saint Vincent and the Grenadines Register of Ships in 1999. From 2003 the

vessel was involved in a series of transactions including voluntary and judicial sales. In September 2003 the Paris Commercial Court delivered a judgment in the appellant's favour against ORTC for US$2 million, plus interest. The judgment remains unsatisfied, the mortgage debt unpaid and Rendell has been struck off the BVI Register of Companies.

[6] In May 2003, the vessel was arrested in Rajin, North Korea and was sold to Rason Oil Company ("Rason") at a judicial sale there in November 2004. It was renamed M/V Rason and was registered with the Maritime Administration Bureau of North Korea which issued a certificate in January 2005 stating that the vessel was registered free from mortgages and third party claims. Rason then sold the vessel to Ferta Trade Ltd ("Ferta"), a Panamanian company, which renamed it the M/V Union with a Belize registration. Later in 2005, Ferta sold the vessel to Ultimate Goal, a company registered in the British Virgin Islands. Ultimate Goal renamed the vessel the M/V Soyuz and registered it in under the flag of Honduras.

[7] In July 2005 the vessel was arrested in China at the suit of the appellant which was seeking to enforce its mortgage. The vessel was released from arrest on the basis that she was sold free from encumbrances in the previous North Korean judicial sale. The Chinese court held that the vessel was not subject to the mortgage and this finding was upheld on appeal. Ultimate Goal transferred the vessel to Vostok, a Russian company, and she was registered in the Russian Federation. The appellant had requested that the registration be denied. The Russian authorities indicated that registration in the Russian Registry would remain on the condition that the vessel was deleted from the Register of Ships in Saint Vincent and the Grenadines. The vessel was arrested in China at the instance of Ultimate Goal, its former owner, in October 2009 and in November 2009 the Qingdao Maritime Court in China made an order for its judicial sale. The judicial sale was effected in January 2010 and the Apex bought the vessel for US$18.1 million. The certificate of ownership transfer stated that the Apex 'is not liable for any liabilities that occurred before the transfer of the ship'. The proceeds

of the judicial sale are held by the Qingdao Maritime Court subject to distribution among creditors.

[8] Vostok unsuccessfully approached the Saint Vincent and the Grenadines Shipping Registry to deregister the vessel. In 2008, Vostok issued proceedings in the High Court of Saint Vincent and the Grenadines against the Department of Maritime Administration, the Registrar of Ships and the Attorney General of Saint Vincent and the Grenadines (the third, fourth and fifth respondents respectively) for an order to compel the Registrar to deregister the vessel and for an order that it was the lawful owner of the vessel free from encumbrances. Apex also sought a declaration that it was the owner of the vessel free from all encumbrances and an order that the Registrar of Ships terminates the vessel's registration and for a closure transcript to be issued. After the appellant was notified of the application to deregister the vessel, it intervened in the proceedings as an "added party" seeking to maintain the registration.

[9] Thom J granted a declaration that Apex is the owner of the vessel free from all encumbrances and ordered the Registrar of Ships of Saint Vincent and the Grenadines to terminate the registration of the vessel and issue a closure transcript in relation to the vessel. Thom J also ordered the appellant to pay costs to Apex of $14,000.00. The appellant appeals against the orders.

[10] Thom J declared that Apex was the owner of the vessel free from encumbrances on the bases that where there is a judicial sale, the maritime lien which arises by virtue of the mortgage is extinguished as it relates to the ship and all interested parties' rights are transferred to the proceeds of sale of the ship, and the appellant was unable to dispute the effectiveness of the judicial sales that took place in North Korea and China and was unable to dispute that the mortgage lien was no longer in existence due to proceedings in the foreign courts. Thom J ordered deregistration on the bases that Apex, the owner of the vessel, is not an individual or corporation that fully meets the requirements of section 6 of the Shipping Act, 2004 and as such, the vessel is no longer entitled to remain registered on the

Ships Register. Further, an undischarged mortgage is not a bar to the termination of registration of a vessel under the laws of Saint Vincent and the Grenadines, while there is no requirement for arrangement to be made for repayment of the debt prior to termination of registration.

[11] A critical factor in the judge's reasoning was the effect attributed to the judicial sales and the proceedings which have taken place in the foreign courts. The appellant contends that effect should not be given to the judicial sales and proceedings as this would be incompatible with the provisions of the 1993 Convention which has the force of law by virtue of section 74F of the Shipping Act, 2004 of Saint Vincent and the Grenadines. The appellant also contends that the judge misconstrued the key provisions of the Shipping Act, 2004, in particular, in failing to give due weight to the provisions of the 1993 Convention, and failed to appreciate that the effect of the Shipping Act, 2004 is that Rendell remains the legal owner of the vessel until removal from the Register. An important plank of the appellant's case is that at the time of judgment the vessel was entered on the Saint Vincent and the Grenadines Registry with Rendell as the legal owner and its (the appellant's) mortgage registered as an encumbrance. It retains a proprietary interest in the vessel and Apex is not the legal owner. Further, the vessel is or was a Saint Vincent and Grenadines ship within the meaning of section 5 of the Shipping Act, 2004.

[12] Mr. Dunning, QC, counsel for Apex, argues that the appellant's argument proceeds on the expressed basis that registration as owner of a vessel on the register is conclusive evidence of title under the laws of Saint Vincent and the Grenadines. This argument, as Mr. Dunning, QC rightly points out, ignores the fact that registration of a ship is not conclusive evidence; it is only prima facie evidence of ownership. The primary purpose of registration is to confer nationality on a ship, not to guarantee title. The prima facie evidence of ownership constituted by registration is capable of being rebutted by evidence to the contrary. Further, the appellant's argument would have the effect of depriving the court of

the ability to consider the reality of the situation which, in the circumstances of this case, reveals that the stark reality differs from what appears on the Register.

[13] In The Law of Ship Mortgages,[4] the authors dealt with the effect of registration. At paragraph 2.25, they state that the registration of a ship does not conclusively prove that the registered owner is the true legal owner. The register of ships is merely prima facie evidence of ownership. At paragraph 3.18 they point out that the Register is prima facie evidence as to the title of the ship but it is open to any person interested in the matter to tender evidence to the effect that the true state of affairs is different from that which appears on the Register. The authors quoted from The Baumwoll Manufactur Von Carl Scheibler v Christopher Furness,[5] where Lord Herschell LC said:

> "… all that it [the legislature] has done is to make the register prima facie evidence of ownership. In fact it assumes that anybody may displace altogether the statutory effect which has been given to it, by proving what the facts really are."[6]

## Deregistration

[14] It is appropriate to approach this appeal from two main planks: (1) the deregistration issue; and (2) the legal effect of the judicial sales. With respect to deregistration, the following issues fall for determination:

1. whether the vessel was entitled to remain on the Register of Ships for Saint Vincent and the Grenadines;

2. whether the power of the Registrar to deregister the vessel was discretionary;
3. whether the registration of a mortgage on the vessel is a bar to its deregistration; and

4. whether the court has power to order the Registrar to deregister the vessel.

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[4] Graeme Bowtle and Kevin Patrick McGuinness: The Law of Ship Mortgages (2001).
[5] [1893] AC 8.
[6] p. 20 of the judgment.

[15] The appellant contends that under the laws of Saint Vincent and the Grenadines, the registration of a vessel may not be terminated while there is an undischarged mortgage noted on the ship's registration and no payment has been made towards the outstanding sums due. In that regard the appellant relies on the 1993 Convention incorporated into the laws of Saint Vincent and the Grenadines by section 74F of the Shipping Act, 2004. Article 3(1) of the 1993 Convention provides that with the exception of cases provided for in articles 11 and 12 (judicial sales) in all other cases that entail deregistration of a vessel from the register of a State Party, such State Party shall not permit the owner to deregister the vessel unless all registered mortgages or charges are previously deleted or the written consent of all holders of such mortgages or charges is obtained. However, where the deregistration of the vessel is obligatory in accordance with the law of a State Party, otherwise than as a result of a voluntary sale, the holders of registered mortgages or charges shall be notified of the pending deregistration in order to enable such holders to take appropriate action to protect their interests; unless the holders consent, the deregistration shall not be implemented earlier than after a lapse of a reasonable period of time which shall not be less than three months after the relevant notification to such holders.

[16] The appellant posits that sections 10 and 71 of the Shipping Act, 2004 are to be read in consonance with article 3 of the 1993 Convention as not permitting deregistration in the event there is an undischarged mortgage save with the consent of the mortgagee. The appellant also argues that the mere fact that the vessel did not meet the requirements of section 6 of the Act would not be a sufficient basis for terminating its registration.

[17] Section 10 of the Shipping Act, 2004 provides that subject to section 68(6), the Registrar of Ships shall not permit the deregistration of a ship, except after giving the prior notification in writing thereof to all registered holders of mortgages of that ship registered under the Act. Section 68(6) speaks to the order in which mortgages are to be registered. Section 71(1) provides that where the registration of a ship terminates by virtue of any provision of the Act, that termination shall not

affect any entry in the register of any undischarged registered mortgage of that ship or any share therein.

[18] Ms. Richards, counsel for the third, fourth and fifth respondents, contends that the vessel no longer fulfilled the statutory requirements which entitled it to remain on the Register of Ships of Saint Vincent and the Grenadines. To my mind, there is much force in that contention. As Ms. Richards points out, the Shipping Act, 2004 governs, inter alia, the registration of ships and regulates proprietary interests in ships. Sections 5 and 6 govern the qualifications of a vessel eligible for registration, while sections 16 to 22 prescribe the process to be followed for registration. By virtue of sections 5 and 6, in order for a ship to qualify for registration, the owners either have to be, inter alia, corporations registered in a member state of the Caribbean Community; corporations owning ships hired out on a bareboat charter to nationals of Saint Vincent and the Grenadines; corporations engaged with nationals of Saint Vincent and the Grenadines in a legitimate joint venture shipping enterprise relationship; corporations registered in accordance with the laws of and having its main office in Saint Vincent and the Grenadines; or corporations which have a registered agent in Saint Vincent and the Grenadines.

[19] When the pertinent provisions of the Shipping Act, 2004 are read in context, it is plain that where a vessel does not meet the statutory requirements, it is not entitled to be registered where its registration is being sought in the first instance nor is the vessel entitled to remain on the Register in a case where it is already registered. The successive sales of the vessel commencing in 2003 resulted in the vessel being owned by entities which were not qualified to own a Saint Vincent and the Grenadines ship. None of the subsequent owners of the vessel could be said to satisfy the qualifications of section 6 of the Shipping Act, 2004. The unavoidable consequence of the failure to satisfy the mandates of section 6 of the Shipping Act, 2004 resulted in the loss of entitlement to be either placed on or remain on the Register of Ships.

[20] With respect to the Registrar's power to deregister, and whether the court has power to order the Registrar to deregister the vessel, I note that section 9(1)(c) expressly provides that a ship's registration may be terminated by the Registrar where a registered ship is no longer entitled to remain on the Register. In light of the court's declaration on the ownership issue and given that it is indisputable that Apex does not satisfy the requirements for an owner of a ship under section 6 of the Shipping Act, 2004, section 9 expressly applies, thus the Registrar would have been obliged to deregister the ship, even if the court had not so directed. Mr. Dunning, QC argues, and I agree, that no other option would have been properly open to the Registrar in light of the court's finding that Rendell had ceased to be the owner and that Apex was now the owner of the vessel. On the basis of these findings, I agree with Mr. Dunning, QC's submission that the continued registration of the vessel on the Saint Vincent and the Grenadines Register was unsupportable because section 6 was no longer satisfied.

[21] In my judgment, by the time of the trial in Saint Vincent and the Grenadines, the position was that by reason of the judicial sales and the intervening private sales, the vessel had long ceased to be eligible for registration in Saint Vincent and the Grenadines according to the requirements of section 6 of the Shipping Act, 2004 nor was there any other basis on which the vessel was eligible for Saint Vincent and the Grenadines registration. Rendell was still recorded as the owner of the vessel. In that regard the Ship Register was "stale"; it was out of date and inconsistent with the true ownership position. The failure to meet the requirements of section 6 of the Shipping Act, 2004 coupled with the effect of the judicial sales, made it legitimate to secure the termination of the registration.

[22] In any event, the judge adopted a legally correct, logical, just and sensible course of action in ordering the termination of the vessel's entry as a registered Saint Vincent and the Grenadines vessel. The learned judge rightly directed the Registrar to act as he did as it would have been wrong in principle to perpetuate the registration of the vessel on the Saint Vincent and the Grenadines Register as she no longer and had long ceased to be eligible for registration under section 6 of

the Shipping Act, 2004. The registration was stale and misleading to the world at large. To the extent that discretionary factors came into play, the court was entitled to take into account the question of prejudice to Apex from the continued stale and misleading registration. Further, taking into account that the vessel had undergone two judicial sales since being owned by its original Saint Vincent and the Grenadines registered owner over eight years ago and has had no practical supervision from the Saint Vincent and the Grenadines authorities since 2004, any other discretionary outcome would have been inconceivable. The vessel's continued registration would also have constituted an unmerited imposition on the Saint Vincent and the Grenadines authorities. The unpalatable consequence would be that, in spite of a judicial sale and possession and control of a ship passing to a foreign entity outside the control of Saint Vincent and the Grenadines, the ship in question must remain registered in Saint Vincent and the Grenadines with all the attendant obligations imposed on the authorities there by virtue of national and international law including the applicable maritime Conventions such as the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution From Ships (MARPOL). I agree with Mr. Dunning, QC that to interpret the Shipping Act, 2004 in the way the appellant suggests would be both unattractive and discordant with the wording of the Act.

[23] Mr. Dunning, QC argues that the question whether to deregister the vessel is related to its ownership as opposed to the existence or otherwise of a mortgage over the ship. Mr. Dunning, QC submits, and I agree, that the vessel should be deregistered as she no longer meets the requirement for registration, regardless of whether the appellant's mortgage might otherwise have been thought to continue to attach to the ship. The learned judge was correct to declare that Apex is the owner of the vessel and to decide that section 9(1)(c) is a separate and independent ground on which registration can be terminated and that the vessel was no longer entitled to be registered. While it is true that the appellant was not given the three month period within which to protect its interest, that failure would not have invalidated the termination of the vessel's registration. I agree that in

circumstances where a vessel is no longer entitled to remain on the Register of Ships, the registration of the mortgage does not act as an indefinite restriction on deregistration.

Foreign judicial sale and the 1993 Convention

[24] The appellant contends that unless a foreign judicial sale takes place in accordance with the procedures set out in articles 11 and 12 of the 1993 Convention, such foreign sale should not be given any legal effect. Mr. Dunning, QC disagrees and states that the appellant's proposition cannot be correct where the foreign judicial sale has taken place in countries like North Korea and China which are not State parties to the 1993 Convention. Mr. Dunning, QC points out that the United Nations recognises fewer than 200 States and apart from Saint Vincent and the Grenadines, no more than 16 countries are State Parties to the 1993 Convention; a small minority of the states recognised by the United Nations. The ineluctable consequence flowing from the appellant's argument is that a foreign judicial sale outside of the 1993 Convention states would have no legal effect under the laws of Saint Vincent and the Grenadines, unless they complied with the letter of articles 11 and 12 of the 1993 Convention, which provisions are not applicable to these countries because they are not State Parties to the 1993 Convention. Such an outcome, while highly palatable to disreputable ship-owners and their financiers, would be perverse and highly injurious to the interests of Saint Vincent and the Grenadines and the international maritime community in general. No legitimate purpose could or would be served by such an outcome which runs directly contrary to accepted notions of comity as well as being inharmonious with the laws of Saint Vincent and the Grenadines.

[25] It must be noted that section 74 of the Shipping Act, 2004 does not provide that the 1993 Convention shall replace the common law rules on the legal effect to be given to judicial sales in foreign countries that are not State Parties to the Convention. Section 74F states that:

> "… the provisions of Articles 1 to 16 of the International Convention on Maritime Liens and Mortgages, 1993, as set out in the Schedule shall form an integral part of this Act and have the force of law as such …".

Mr. Dunning, QC states, and I agree, that what this means is that the treaty, which would otherwise be legally effective only on the international law plane and only as between contracting parties – and thus would have no direct effect or application as between legal entities other than states – is enacted into the laws of Saint Vincent and the Grenadines and thus would apply as between entities other than states. The enactment of the Convention into the laws of Saint Vincent and the Grenadines does not change the Convention to make it applicable to judicial sales that take place in states not party to the Convention.

[26] On a proper interpretation, articles 3, 11 and 12 of the 1993 Convention, as enacted into the law of Saint Vincent and the Grenadines, cannot apply where the relevant legal act or judicial sale took place in a country which was not a party to the Convention. Article 11 states, 'Prior to the forced sale of a vessel in a State Party, the competent authority in such State Party shall ensure that notice in accordance with this article is provided to …'. It goes on to list the entities to which notice should be provided. These include: holders of registered mortgages, the registered owner of the vessel, and the authority in charge of the register in the State of registration. It is clear from the wording, that article 11 applies only where the sale takes place in a state which is a contracting party to the 1993 Convention. This would exclude China and North Korea as they are not State Parties to the 1993 Convention. There are references in articles 3, 11 and 12 which repeatedly speak to events taking place in or in accordance with the law of a "State Party". For instance, article 3 states: 'With the exception of the cases provided for in Articles 11 and 12, in all other cases that entail the deregistration of the vessel from the register of a State Party …'. Article 12 states in part: 'In the event of the forced sale of the vessel in a State Party, all registered mortgages … or charges, except those assumed by the purchaser with the consent of the holders and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel …'. The 1993 Convention is clearly intended to apply in respect of judicial

sales taking place in State Parties to the Convention. Where the judicial sale takes place in a country which is not a party to the Convention, the common law rules apply. Thus such a sale would be recognised under the law of Saint Vincent and the Grenadines and given the legal effect of transferring title to the purchaser free from encumbrances.

[27] The appellant contends that the judicial proceedings in North Korea pursuant to which the judicial sale was carried out, involved a critical breach of natural justice as the proceedings breached the audi alteram partem principle. The appellant complains that it was not informed of the proceedings in time to participate but only discovered after the event that a judicial sale had been carried out so it was unable to act effectively to protect its interests and defend its rights. The appellant asserts that the fact that it was not given notice of the in rem proceedings against the Vessel in 2004 in North Korea until after the North Korean Court had ordered the sale of the Vessel and/or the vessel had been sold, was a clear breach of natural justice. By way of example only, the appellant contends that had it been notified timeously, it might have chosen to seek foreclosure pursuant to the Mortgage Deed dated 4th November 1999 as amended and to pay off the parties who were seeking to assert claims in rem in North Korea.

[28] The appellant submits that the court should not recognise or give effect to the outcome of proceedings carried out in breach of natural justice. The appellant relies on Halsbury's Laws of England[7] citing inter alia, Adams v Cape Industries Plc,[8] for the proposition that a foreign judgment may be impeached if the proceedings in which the judgment was obtained were contrary to natural or substantial justice. Similarly, the right to notice of proceedings and the right to put one's side of the case before a decision is reached are key elements of natural justice.

[7] 5th edn., Volume 19, para. 429.
[8] [1990] Ch 433.

[29] In dealing with the issue of notice, the learned judge held that the 'main purpose of notice to interested parties is to give them an opportunity to make their claims on the proceeds of the sale'[9] and that the appellant had not 'led any evidence to show that it was prevented from participating in the process of making a claim on the proceeds of sale after it became aware of the sale'.[10] The learned judge accordingly held that there had been no breach of natural justice in the North Korean judicial sale proceedings.

[30] The appellant challenges the judge's finding that there was no breach of natural justice in the North Korean judicial sale; in that regard, Mr. Hofmeyr, QC characterises the judge's reasoning as flawed on the basis that it was incorrect to state that the main purpose of notice to interested parties is to provide an opportunity to claim the proceeds of claim. Mr. Hofmeyr, QC states that the main purpose of notice to interested parties given by a court exercising in rem jurisdiction is to give effect to the audi alterem partem principle, i.e. to give interested parties the opportunity of a hearing before the court. In support of his contention that the judge's reasoning was flawed, Mr. Hofmeyr, QC argues that the judge failed to consider article 11 of the 1993 Convention and that the judge's reasoning is completely incompatible with that article. In my judgment, in so far as the argument relies for its validity on a failure to pay regard to article 11 of the 1993 Convention, it is untenable, for the reasons articulated previously. It is noted that North Korea is not a State Party to the Convention.

[31] Mr. Hofmeyr, QC also argues that the ability to participate in the proceeds of sale does not provide sufficient protection for the holder of the mortgage, particularly in a State where the price to be achieved may very well be substantially less than the true value of the vessel, as was the case here. Mr. Dunning, QC concedes that the sale price was lower than might have been achieved between a willing buyer and seller in a place accessible to international buyers but noted that North Korea was not such a place; it was a distressed sale and Rendell had been unable to

[9] para. 65 of the learned judge's judgment.
[10] ibid.

afford vessel maintenance. I agree that all these factors would have undoubtedly affected the sale price. Mr. Hofmeyr, QC asserts that even if the judge were correct that the appellant only needed to be given the opportunity to participate in the proceeds of sale, the weight of evidence suggests that they did not have such an opportunity.

[32] As indicated earlier, Thom J said that she was not satisfied that there was a breach of natural justice in respect of the North Korean judicial sale. Thom J reasoned that the appellant was aware of the sale by the time the price was paid and it had adduced no evidence that it was prevented from making a claim on the proceeds of sale after it became aware of the claim. I find no fault in the judge's reasoning. The appellant was well aware of the judicial sale process and was in contact with the court before the sale proceeds were paid and/or distributed. There was the court's letter to the appellant dated 21st April 2005 and paragraph 10 of Mr. Kononyuk's affidavit. The appellant failed to produce the faxed documents referred to in the letter of 21st April. It did not adduce any other credible evidence to contradict the evidence contained in the letter that it was aware of the judicial sale process. Further, Justice Thom correctly found that there was no evidence to support the allegation of fraud.

[33] It must also be pointed out that allegations of fraud should be distinctly pleaded. It cannot be said that this was the case here. "The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest."[11]

[34] At common law the legal effect of judicial sales has been long recognised. A judicial sale extinguishes not only the lien which led to the arrest and sale but all other liens attached to the property. The liens are transferred to the fund created

[11] per Byron CJ in Thomas v Stoutt and Others (1997) 55 WIR 112, 117.

by the proceeds. In The "Tremont",[12] Dr. Lushington said 'The jurisdiction of the Court in these matters is confirmed by the municipal law of this country … and the title conferred by the Court in the exercise of this authority is a valid title against the whole world, and is recognised by the Courts of this country and by the Courts of all other countries'. These principles were restated by Mr. Justice Hewson in The "Acrux" (No. 2)[13] and by Mr. Justice Sheen in The "Cerro Colorado".[14] The legal effect of a judicial sale in a State not party to the Convention is governed by the common law and not by the 1993 Convention.

[35] Thom J was correct in holding that at common law the judicial sales should be recognised as having transferred ownership of the vessel free of the appellant's mortgage. The judicial sale in North Korea should be recognised as having that effect as it satisfies both of the two common law conditions specified by Lord Blackburn in Castrique v Imrie:[15]

> "We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."[16]

Firstly, having been arrested and detained in the port of Rajin in North Korea, the vessel was so situated so as to be clearly under the lawful control of the North Korean court and authorities. Secondly, rule 40 in The Conflict of Laws,[17] supports the jurisdiction of the court. Rule 40(1) states:

> "A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country."

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[12] (1841) 1 W Rob 163.
[13] [1962] 1 Lloyd's Rep 405 at 409.
[14] [1993] 1 Lloyd's Rep 58 at 60.
[15] (1869-70) LR 4 HL 414 at 429.
[16] p. 429.
[17] Dicey, Morris & Collins: The Conflict of Laws (14th edn., Sweet & Maxwell 2006).

[36] The following facts further underline the position:

(a) On 20th September 2004, a claim was brought against the owners of the "Phoenix" (the vessel) by the crew, the local port authority and a bank, leading to the arrest of the vessel.

(b) The North Korean court issued judgment on 27th October 2004 noting that the claim had not been paid and ordering the sale of the ship pursuant to North Korean law.

(c) On 1st November 2004, the court gave notice of the sale to the owners, the local Russian consul and 'all the parties concerned'.

(d) The vessel was subsequently sold to a company called Rason Oil, with the court issuing certificates to this effect on 26th November 2004 and 10th August 2005.

(e) The vessel was provisionally registered with the Maritime Administration Bureau of North Korea which issued a certificate of third persons' claims absence noting that the vessel was registered 'free of mortgage and third persons' claims.'

[37] In the circumstances, the second condition postulated by Lord Blackburn in Castrique v Imrie was fulfilled. The Rajin People's Court of North Korea had jurisdiction to decide as to the disposition of the vessel and there is nothing to suggest that it acted beyond its jurisdiction. The process by which the vessel was sold clearly operated in rem, flowing as it did, from the initial arrest of the vessel. The sale of the vessel in North Korea conferred – as it would in Saint Vincent and the Grenadines – clean title to the purchaser, with all claims against the vessel being extinguished and transferred to the proceeds of sale.

[38] Mr. Dunning, QC submits that in any event, the court should recognise the judicial sale by the Qingdao Maritime Court in January 2010 irrespective of any findings with respect to the North Korean judicial sale. I agree. The argument runs along

parallel lines with the North Korean sale. The vessel was arrested and detained in the port of Qingdao in China, and therefore, was under the lawful control of China under the authority of which the court sits. Following rule 40 in The Conflict of Laws,[18] the court clearly had jurisdiction to effect a judicial sale of the vessel. In addition, the following facts are clear from the affidavit of Ms. Zhong Boning and the exhibited documents:

(a) On 22nd October 2009 the vessel was arrested in China by Ultimate Goal by order of the Qingdao Maritime Court.

(b) On 27th November the court ordered the sale of the vessel by auction.

(c) On 10th December 2009, the St. Vincent and Russian ship registration authorities were notified of the upcoming auction of the vessel scheduled for 10th January 2010.

(d) On 7th January 2010, Apex participated in the auction and was the successful bidder at US$18.1 million.

(e) On 15th January 2010, the Qingdao Maritime Court approved and sealed a certificate of ownership transfer in favour of Apex, as buyer, noting receipt of the full purchase monies and that 'The buyer is not liable for any liabilities that occurred before the transfer of the ship.'

In the circumstances, the judicial sale by the Qingdao Maritime Court falls squarely within the type of sale contemplated by Lord Blackburn in Castrique v Imrie and had the effect of transferring a clean title on Apex.

[39] The judicial sale in China is of critical importance. The sale was on notice to the appellant; the appellant participated in the process and tried to stop it. There could be no case of a breach of natural justice in relation to this sale. There was no fraud. The learned judge rightly found that the purchase was bona fide. The

[18] Dicey, Morris & Collins: The Conflict of Laws (14th edn., Sweet & Maxwell 2006).

sale was at public auction and at a price that has not been suggested to be anything other than a fair market value. The judicial sale in the China was effective to confer good title, free of encumbrances, regardless of whatever was the prior position.

[40] In conclusion, a foreign judicial sale is to be recognised and given effect qua assignment/transfer of title unless it is invalid under the law of the country where the sale took place. There was no plea or evidence that such was the case in respect of either of the judicial sales at issue at the trial. The prime consideration is whether the transaction was valid under local law.

Res judicata / Issue Estoppel

[41] The appellant complains of events after 2003 in which it was not consulted and in which it had no proper opportunity to be involved. This criticism, however, cannot be leveled at the proceedings in the Tianjin Courts in 2005. The appellant itself chose to invoke the jurisdiction of the Tianjin Court to rule on its mortgage claim as against the vessel proceedings and lost at first instance and on appeal. The Tianjin Court rejected the appellant's arrest of the vessel based on its judgment for the mortgage debt obtained in Paris. Justice Thom correctly held that that this gave rise to a res judicata or issue estoppel as against the appellant: it was the final decision of a court whose jurisdiction had been invoked by the appellant itself, and which decided that the appellant no longer had any interest in the vessel sufficient to establish an arrest. The appellant cannot be heard to say that the Tianjin Court was a court which lacked jurisdiction over, or was not the forum conveniens for the determination of, the issues raised by that claim. In that claim, the appellant failed to establish both at first instance and on appeal, that its mortgage interest in the vessel had survived the North Korean judicial sale. The substantive issue was the same as one of the issues on this appeal, namely, whether the appellant has a mortgage in the vessel which survived the North Korean judicial sale or whether the mortgage interest ceased to attach to the vessel at that time. The Tianjin Maritime court held that the appellant's mortgage

interest in the vessel was extinguished by the North Korean judicial sale. This holding was upheld on appeal by the Tianjin Municipal Higher People's Court.

[42] The concept of res judicata in this context is succinctly expressed in Rule 41 of The Conflict of Laws[19] as follows:

> "A foreign judgment which is final and conclusive on the merits and not impeachable under any of Rules 42 to 45 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either (1) of fact; or (2) of law."

Rules 42 to 45 (foreign judgment impeachable for lack of subject matter jurisdiction, for fraud or lack of natural justice) have no bearing with respect to the Tianjin Court of Appeal decision. The three conditions which must be satisfied before the doctrine can apply are:

(a) the judgment of the foreign court must be from a court of competent jurisdiction and must be final and conclusive on the merits;

(b) there must be identity of subject matter (the issues must be the same); and

(c) there must be identity of parties.

[43] With respect to the first condition, there can be little doubt that the Tianjin Courts were competent courts. There seems little doubt that the decision was final and conclusive on the merits. Mr. Dunning submitted, and I agree that it was up to the appellant, being the party to the Chinese appeal proceedings, to refute the common sense conclusion that a five year old appeal judgment on the very point in issue must be final and conclusive. It did not do so and must be presumed to have been unable to obtain such evidence. With respect to the second condition, the identical issue arises in these proceedings as arose in the Chinese proceedings: namely, the validity and the existence of the mortgage claimed by the appellant to attach to the vessel. There is no doubt that the second condition

[19] Dicey, Morris & Collins: The Conflict of Laws (14th edn., Sweet & Maxwell 2006).

is fulfilled. In the Chinese proceedings the claim is recorded in the Tianjin Court of Appeal judgment as follows:

> "In order to exercise its mortgage rights against M/V Phoenix, on August 18 of 2005, EuroBank brought a law suit [sic] into the Court of First instance, lodged the claim for the confirmation of its mortgage right being still effective against M/V Union (Ex-M/V Phoenix) and the claim for exercising such mortgage of the ship to recover the creditor's rights under the judgment made by the Paris Commercial Court on September 11, 2003 …"

The effect of the Rajin Court sale was directly considered and ruled upon by the Tianjin Court of Appeal:

> "As the mortgage of the M/V Phoenix enjoyed by the Appellant was extinguished along with the conclusion of the auction sale of the ship, the Appellant has no rights to claim his mortgage rights against the buyer of this ship, Rason Oil Co. and even less against the subtransferee, the Appellee."

[44] The third condition that there must be identity of parties, does not apply where the judgment in issue is in rem, rather than in personam.[20] If the decision is in rem, it is good against all the world. While it is true that neither Vostok nor Apex was a party to the Tianjin Court proceedings either at first instance or on appeal, the decision of the Tianjin Court of Appeal is a result of proceedings against movable property to enforce a propriety right against that property and should therefore be considered a judgment in rem. In The Law of Ship Mortgages, the learned authors stated that the common law recognises only a limited number of judgments in rem. This includes proceedings against movable property to enforce a proprietary right against that property, such as a lien or mortgage. The appellant sought to enforce its alleged mortgage against the vessel by arresting it. The claim was brought by way of an in rem proceeding with arrest proceedings being brought against the vessel while present in Chinese territory. The then owner subsequently appeared to protest the arrest. In the circumstances, there is undoubted res judicata or issue estoppel against the appellant.

[20] See Dicey, Morris & Collins: The Conflict of Laws (14th edn., Sweet & Maxwell 2006), footnote 17, p. 618.

Res judicata based on Russian Judgment

[45] In its amended notice of appeal (paragraph 10A(f)) the appellant seeks to contend that the Russian decision of 24th April 2009 gave rise to a res judicata as against Apex:

> "if any decision were to give rise to a res judicata it would be the decision to contrary effect of the Sixth Commercial Appeal Court of the Russian Federation dated 24 April 2009 in proceedings between the Appellant and the First Respondent, particularly as the decision of the Russian Court was reached specifically having regard to the 1993 Convention."

The amendment introduces a substantive new issue that was neither pleaded nor argued before the High Court. In the circumstances it is unfair to criticize the learned judge for not referring to or dealing with the Russian decision in her judgment. Further, there is no basis for any issue estoppel as against Apex. Apex was not a party to the Russian proceedings, and no issue was determined in the Russian proceedings to which it was a party. The Russian proceedings did not determine any issue as to the legal effect of the North Korean judicial sale or the People's Republic of China judicial sale. The Russian Court did not consider the legal effect of either of these judicial sales. The decision relied on was not a final decision on the merits but only an interlocutory procedural decision, that is, the vessel should remain under arrest until the merits were decided. In any event, in the case of competing foreign judgments, each pronounced by a court of competent jurisdiction and final and not open to impeachment on any ground, the earlier in time must be recognised and given effect to the exclusion of the latter.[21] Therefore, even if Apex had been a party, or it could be said that the Russian Court decision was final or determined a relevant issue, it was not binding as it came too late in the sequence of foreign judgments and could be quite properly ignored by the judge.

[21] Abdul Rahman Showlag v Abdel Moniem Mansour and Others [1995] 1 AC 431 (PC).

Cross appeal – admissibility of affidavit evidence

[46] Apex cross appeals against paragraphs 90 to 94 of the judgment of Thom J dismissing an application in relation to certain affidavits which it had wished to introduce as evidence at the trial. Apex contends that the affidavits should have been admitted in evidence in the absence of the deponents at the trial; alternatively that an order should have been made dispensing with the attendance of the deponents and the court ascribes such weight to the affidavits as appropriate in the circumstances. Mr. Hofmeyr, QC argues that the appeal is against a case management decision and it cannot be said that the decision the judge took was unreasonable. No reliance was sought to be placed on the affidavit evidence and they have no relevance to the appeal. Mr. Hofmeyr, QC argues that in so far as the affidavits contained facts which were admitted, putting in the evidence was irrelevant and in so far as they reflected what was already agreed, the case management decision was unassailable and should stand.

[47] The affidavits in issue include those Dr. Ryo Sung Chol; Marcia McFarlane; Kam Man Peter Chung; and Li Shengzhou. In summary, the affidavit of Dr. Chol explains that the North Korean judicial sale of the vessel free of all claims was legitimate and effective under North Korean law and states the law and procedure for such an arrest and sale. It also explains why notification was sent to the Russian authorities and not to the appellant. The affidavit of Li Shengzhou explains that the judicial sale in China was in accordance with Chinese law and that the buyer took the vessel free from previous liabilities so that Apex obtained good title free from all encumbrances and mortgages; and that the appellant had been approved by the court as a creditor against the proceeds of sale of the vessel. The affidavit of Marcia Mc Farlane states that Rendell has been struck off the British Virgin Islands register of companies since 1st November 2004 and cannot commence proceedings, carry on any business or deal with assets in any way.

[48] The learned trial judge erroneously stated that it was after the appellant had closed its case and after the court had ordered written submissions to be made that Apex sought to have these affidavits (of deponents who had not testified) admitted into evidence based on the application it had made on 15th October 2010. Further, that the application was not pursued until after the first and second respondents had closed their cases. The fact is that the application was issued on 15th October 2010 and the judge declined the application in chambers on the first day of trial, prior to any opening statement being given or witness being heard. The learned trial judge's subsequent request for written submissions in relation to the application was made after trial, in response to Apex's counsel request at that time that the trial judge give reasons for her earlier decision declining the application in chambers just before the trial started.

[49] I find the affidavit evidence to be relevant to the appeal. It is noted that the factual evidence in the affidavit was not in dispute. The appellant had been in possession of the affidavits before trial and had every opportunity to put in, evidence of its own; agreeing with, disputing or qualifying such evidence. The trial judge had no proper basis for refusing to admit the evidence of the said deponents albeit that she would have to decide what weight ought to be given to that evidence. In the circumstances Apex's cross-appeal should be allowed.

First Respondent's Counter Notice of Appeal

[50] At the trial the learned judge dismissed the first respondent's claim and ordered it to pay the appellant's costs. The learned judge appears to have dismissed the claim on the basis that it had ceased to be the owner when the vessel was sold to the second respondent through judicial sale in China. At the trial the first respondent accepted that it was no longer the owner of the vessel and accordingly withdrew its application for a declaration that it was the owner. It however maintained its application for deregistration. The first respondent submits that ownership is not a prerequisite for relief under the Shipping Act, 2004 and contends that it remains an interested person in terms of section 67 of the Shipping Act, 2004 as its ability to deregister the vessel in Russia required it to

obtain deletion of the Vessel's entry in Saint Vincent and the Grenadines. The first respondent argues that the judge failed to properly take into account its position for the following reasons:

(a) It was the owner of the vessel when it commenced these proceedings. The primary relief sought was an order compelling the Registrar of Ships to deregister the vessel from the local register of ships. Although it ceased to be owner of the vessel, the primary relief sought was granted by the court.

(b) As the registered owner of the vessel in Russia, it remained the registered owner under Russian law and was required by the Russian authorities to make the necessary application to effect closure of the Vessel's registry in Saint Vincent and the Grenadines.

(c) As the registered owner in Russia, it had standing and good reason to pursue its application for deregistration of the vessel in Saint Vincent and the Grenadines.

The learned judge would have considered all the circumstances of the case in arriving at her decision and I do not discern any error on her part. There was nothing in the amended statement of claim to show that the first respondent had a continuing interest in the outcome of the matter. There was no evidence produced at the trial as to why they had a continuing interest. In the circumstances the first respondent's counter appeal is dismissed.

## Costs

[51] The guiding rule for costs on appeal is set out in rule 65.13 of the Civil Procedure Rules 2000 ("CPR"). CPR 65.13 states:

> "(1) The general rule is that costs of any appeal must be determined in accordance with Rules 65.5, 65.6, and 65.7 and Appendix B but the costs must be limited to two thirds of the amount that would otherwise be allowed.

(2) The Court of Appeal may, if the circumstances of the appeal or the justice of the case require, depart from the general rule and, in such a case, it may –

(a) make an order for budgeted costs whether on an application made in accordance with Rules 65.8 and 65.9 or otherwise; or

(b) make such other order as it sees fit."

The learned judge ordered the appellant to pay the second respondent's costs of EC$14,000.00. At the conclusion of the hearing of the appeal, the parties filed submissions on the issue of costs. Mr. Commissiong, for the appellant, submits that the Court should award $9,333.33 on appeal being 2/3 of $14,000.00 awarded in the court below and as a matter of strict procedure the costs must be $14,000.00 in addition to the $9,333.00. Mr. Commissiong stated that none of the parties suggested what they wanted from the trial judge nor did they appeal the issue of costs. Counsel submits that the court should not disturb the costs order as there was no appeal against it.

[52] Mr. Williams and Mr. Daniel on behalf of the first and second respondents submit that costs on appeal should be assessed based on the altered circumstances on the appeal compared to the trial – the altered circumstances being that the appellant elected to retain London Queen's Counsel to argue the appeal and in response the second respondent retained leading London counsel; whereas at the trial, both parties were represented by local counsel. Counsel argued that given the approach taken by the appellant in appointing senior London counsel, it was neither in the interests of justice nor in the interest of the parties that recoverable costs should be approached in the same way as was done at the trial. Both counsel invited the court to award prescribed costs based on what they state is the value of the underlying claim, as that is what is really at stake for the appellant. Counsel arrived at prescribed costs of EC$166,837.84 based on a French Commercial court judgment of 2003 and invited the court to award costs in that amount, limited to two thirds of that amount.

[53] I am not satisfied from the representation of counsel for the first and second respondents that a good case has been made for a departure from the general rule. From what they have advanced I do not find that the circumstances of the appeal or the interests of justice require a departure from the general rule. I would accordingly apply the general rule and order that the appellant pay the second respondent's costs of this appeal of two thirds of the amount of EC$14,000.00 awarded below, which would be EC$9,333.33 in addition to the sum of EC$14,000.00.

## Disposition

[54] The appellant's appeal is dismissed; the second respondent's cross appeal is allowed and the first respondent's counter appeal is dismissed. The appellant is to pay the second respondent's costs of this appeal of EC $9,333.33 being two thirds of the costs awarded below in addition to the EC $14,000.00.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Clare Henry
Justice of Appeal [Ag.]