



Neutral Citation Number: [2020] EWHC 719 (Admlty)

Case No: AD 2018 000096

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
ADMIRALRY ACTION IN REM AGAINST
THE YACHT FORCE INDIA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2020

Before :

MR. JUSTICE TEARE

Between :

QATAR NATIONAL BANK (QPSC)	<u>Claimant</u>
- and -	
THE OWNERS OF THE YACHT FORCE INDIA	<u>Defendant</u>

Stephen Du (instructed by **Ince Gordon Dadds LLP**) for the **Claimant**
Brian Taylor of Gateley PLC for the **Defendant**

Oliver Caplin (instructed by **Cleary Gottlieb Steen & Hamilton LLP**)
for Cannes Islands SAS

Neil Henderson (instructed by **TLT LLP**) for the **State Bank of India** and others
The Admiralty Marshal represented himself

Hearing date: 20 March 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TEARE

Mr. Justice Teare :

1. On 29 January 2020 the Admiralty Court made an order at the request of the Claimant in this action, Qatar National Bank, that the “Super Yacht” FORCE INDIA be sold. The Admiralty Marshal instructed his broker to sell FORCE INDIA and bids were to be received by 10 March 2020. On that very day the Claimants applied to the Court for an order setting aside the order for sale. The Court declined to do so but suspended the sale to enable a proper hearing to take place on notice to the interested parties. In so doing the court followed the course adopted by Hewson J. in *The Acrux* [1961] 1 Lloyd’s Reports 471. In order to protect the position of the Marshal, his brokers, another claimant with a statutory right of action *in rem* and the claimants in another action who had obtained a Worldwide Freezing Order which affected FORCE INDIA, the order for sale was only suspended on terms that certain undertakings were given. On 20 March 2020 the Court considered the adjourned application with the benefit of submissions from the interested parties and further evidence. That hearing took place by telephone as a result of the coronavirus crisis. The Court decided to set aside the order for sale. In view of the unusual nature of the application the Court indicated that its reasons would be given at a later date. These are the Court’s reasons.
2. The Court is particularly grateful to Charles Berthillon, a director of Cannes Islands, for his second witness statement dated 20 March 2020 which was prepared urgently in order to provide the Court with important evidence regarding the genesis of the application to set aside the order for sale.

The background

3. The Claimant had a mortgage on FORCE INDIA and on 29 January 2020 had obtained judgment against the yacht in respect of the sums secured by that mortgage. Unusually, the mortgage had not been granted as security for a loan to the owner of the yacht to enable him to purchase the yacht. A related company known as Gizmo had borrowed some €27 million in 2008 to finance the acquisition of a company which owned a property in Sainte Marguerite off the coast of France. The mortgage on the yacht was later granted as additional security for that loan. The circumstances in which the mortgage was granted were described in the Court’s judgment given on 29 January 2020 at paragraph 3; see [2020] EWHC 103 (Admlty).
4. On 27 December 2019, prior to the Claimant obtaining judgment *in rem* against the yacht, Gizmo and Cannes Islands SAS, a subsidiary of a Swiss company in the luxury real estate business, had entered into a memorandum of understanding by which Cannes Islands would purchase the shares in Le Grand Jardin, a wholly owned subsidiary of Gizmo which owned the property in Sainte Marguerite. Cannes Islands has no links with the Owners of FORCE INDIA or with Dr. Mallya, who is said (which allegation is denied) to be the beneficial owner of FORCE INDIA.
5. Le Grand Jardin had been placed under judicial receivership by the Commercial Court in Cannes on 5 February 2019 and the memorandum of understanding required Cannes Islands and Gizmo to obtain that court’s approval to the “continuation plan” for Le Grand Jardin.

The need for an order setting aside the order for sale

6. On 4 February 2020, that is after the Admiralty Court had ordered the sale of FORCE INDIA, the Commercial Court in Cannes considered the continuation plan. The court expressed reservations that the plan did not sufficiently guarantee the repayment of Le Grand Jardin's liabilities, in particular those owed to the Claimant. As a result of the court's reservations a transaction, the Assignment Agreement, was entered into between Cannes Islands and the Claimant on 6 March 2020. A sum of Euros 17.5 million was to be paid to the Claimant in return for an assignment of contracts and receivables, including an assignment of the charge on the French property and of the mortgage on the yacht. This arrangement was to assure the Cannes Commercial Court that Le Grand Jardin's liabilities would be repaid.
7. The Claimant was obliged by clause 7.3 of the Assignment Agreement to apply to the English Admiralty Court for an order revoking the order for the sale of FORCE INDIA "prior to 10 March 2020 at noon". The sum of Euros 17.5 million was paid on 10 March 2020 and both Cannes Islands and the Defendant provided letters dated 9 March 2020 confirming their consent to the "cancellation" of the judicial sale of FORCE INDIA. Hence it was that the Claimant made the application to this Court on the morning of 10 March 2020.
8. For the reasons given *ex tempore* on 10 March 2020 the sale of the yacht was suspended. (That judgment will, I hope, be placed on BAILII but at present I do not have its neutral citation number.)

The reason for rescinding the order for sale

9. The reason is simple. In circumstances where the sum secured by the mortgage has in effect been paid by a third party the judicial sale of the vessel is no longer required. That is emphasised by the fact that the Claimant has brought this application to set aside the order for sale which it had earlier sought.

The court's concerns

10. Sales by the Admiralty Marshal of vessels which have been arrested in an Admiralty action *in rem* are the means by which, failing the provision of alternative security, claims *in rem* are enforced. Sales by the Marshal are free of pre-existing maritime liens, statutory rights of action *in rem* or other encumbrances. In order to ensure that the market price is achieved the vessel's value is appraised prior to sale. The Marshal cannot sell for less than the appraised value without the permission of the court. These features of an Admiralty sale are well known to the market. If it became the practice for orders for sale to be set aside those willing to incur the time and expense involved in making a bid for a vessel ordered to be sold may feel disinclined to do so. That might lead to vessels being sold for less than their market value and might tarnish the reputation of the Court. In the long term the service provided by the Admiralty Court to the maritime community would or might be damaged.
11. These concerns suggest that the court should be reluctant to set aside a sale, particularly when the application is made as late as the application in this case was made. In his witness statement the Marshal has stated that, according to his broker, Paul Wilcox of Kellocks, around 20 potential bidders had carried out inspections and investigations during the sale period and that if it became widespread knowledge that

parties can stop a sale process it will make interested parties "more cautious about bidding for vessels being sold through the court's process".

12. The setting aside of sales should certainly not become a practice.
13. However, there are very few instances of such applications being made. The only reported instance appears to be *The Acrux* in 1961. That such applications are rare is apparent from the witness statement of the Marshal in which he said that he had been informed by his broker, Mr. Paul Wilcox of Kellocks, that in his 40 year association with court sales he had never known such an application being made to halt a sale at such a late stage.

The present case

14. It is to be expected that applications for an order setting aside a sale will be rare because in the usual case where it has been necessary for the claimant to seek an order for sale that will because the sale of the vessel is the only means by which his claim can be satisfied. It must be a rare case when, as in the present case, an independent third party is prepared, in effect, to discharge the judgment debt and so render the sale of the vessel unnecessary. Indeed, in the present case that has only come about because the asset which the third party wished to acquire, the French property, was charged with a debt which also secured in part by the mortgage on the yacht. Thus when the loan secured by the charge on the property was paid, the smaller sum secured by the mortgage on the yacht was also discharged. These are unusual circumstances, at least in the context of sales by the Admiralty Court.
15. I was therefore persuaded that the need to set aside the order for sale in the present case was brought about by unusual and perhaps exceptional circumstances. So long as this is understood by the market there should not be any damage to the reputation of the Court or to its ability in future cases to achieve a vessel's market value when an order for sale is made.
16. For these reasons I concluded that it was appropriate to set aside the order for sale and to release the yacht from arrest.

Other matters

17. The Marshal's interests (and those of his broker Kellocks) are protected by the undertaking which was given by the Claimant on 9 March 2020 which, it was accepted, indemnifies the Marshal in respect of any liability to the broker and in respect of any expenses thrown away. The Marshal informed the parties that the broker has claimed £5,250 in respect of the cost and expense of marketing and selling the yacht. Ordinarily the broker would recover a commission on the court sale but that will not happen now that the order for sale has been set aside. In that regard counsel for the Claimant (and counsel for Cannes Islands who indemnify the Claimant) informed the court that they accepted that the Marshal could pay those costs and expenses and recover them from the Claimant.
18. The other creditor with a statutory right of action *in rem* was a bunker supplier. When the sale was suspended the Defendant undertook to pay that claim. The bunker supplier has confirmed that its claim has been paid.

19. Finally, the State Bank of India obtained a Worldwide Freezing Order against Dr. Mallya. The effect of that WFO is that Dr. Mallya is restrained from removing the yacht from the jurisdiction. Counsel for the State Bank sought an undertaking from the Defendant that if the yacht were released from arrest it would not remove the yacht from the jurisdiction. Such an undertaking has been given but it was given by a Swiss director on behalf of the Defendant, a Maltese company. Counsel pointed out that there might be difficulties of enforcement if that undertaking were breached. In response the director and the Defendant undertook to submit to the jurisdiction of this court. In those circumstances counsel for the State of Bank of India accepted that his concerns were alleviated.
20. The above undertakings should be recorded in the Court's order.