Neutral Citation Number: [2020] EWHC 1494 (Comm)

Case No: CL-2019-000484

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 10/06/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

(1) DVB BANK SE **(formerly named DVB BANK AG)** **(2) NORDDEUTSCHE LANDESBANK - GIROZENTRALE**	**Claimants**
- and –	
(1) VEGA MARINE LTD **(2) FORTUNESHIP LTD** **(3) MR NIKOLAOS LIVANOS**	**Defendants**

- -
- -

Tom Bird (instructed by **Stephenson Harwood LLP**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing date: 3 April 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 Henshaw:

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(A) INTRODUCTION

1. The Claimants apply for summary judgment and other relief in respect of sums claimed to be due to them as lenders pursuant to (a) a loan agreement dated 23 April 2007 ("***the Loan Agreement***"), as amended and supplemented by a series of later agreements including a fourth supplemental agreement dated 25 November 2016 ("***the Fourth Supplemental Agreement***"), and (b) a written guarantee dated 25 November 2016 ("***the Guarantee***") between the First Claimant and the Third Defendant, Mr Livanos ("***the Guarantor***").

2. The Claimants' applications are for:

   i) permission under CPR 6.27 to serve documents other than the claim form on the Defendants' process agents (where the claim form was served pursuant to CPR 6.11);

   ii) permission to seek summary judgment against the Defendants pursuant to CPR 24.4(1)(i), on the basis that the Claimants should have the opportunity to apply for judgment on the merits so as to ensure that the judgment is more readily enforceable in jurisdictions where the Defendants' assets may be located; and

   iii) summary judgment against the Defendants under CPR 24.2, on the grounds that the Defendants have no real prospect of successfully defending the Claimants' claims and there is no other compelling reason for the claims to be determined at trial.

3. The Loan Agreement, Fourth Supplemental Agreement and Guarantee are all subject to English law and jurisdiction (see clauses 31.1 and 31.2 of the Loan Agreement,

clauses 12.1 and 12.2 of the Fourth Supplemental Agreement, and clauses 18.1 and 18.2 of the Guarantee).

(B) PROCEDURAL HISTORY

4. The Claimants issued these proceedings on 31 July 2019. The claim form, Particulars of Claim and other relevant documents were served on the Defendants' process agents, Saville & Co, in London on 1 August 2019 pursuant to clause 12.4 of the Fourth Supplemental Agreement and clause 18.4 of the Guarantee. Each of those clauses provided for the service of *"any process or other document relating to any proceedings in the English courts"* on Saville & Co, who are a firm of scrivener notaries in London. The Defendants had duly appointed Saville & Co as process agents, and Saville & Co accepted service of the documents served on 1 August 2019.

5. There was correspondence about the claim on 13 August 2019 between the Claimants and the Guarantor, who (the evidence indicates) is the beneficial owner of the First and Second Defendants (together, "***the Borrowers***").

6. The Defendants thus had been duly served with and were aware of the proceedings. However, none of them filed an Acknowledgment of Service or a Defence.

7. On 17 January 2020 the Claimants issued the present applications. The application notice, draft order and original supporting evidence were served on Saville & Co by hand on 20 January 2020.

8. On 20 March 2020 the Claimants' solicitors, Stephenson Harwood, emailed the Guarantor to propose that this hearing take place remotely pursuant to the Protocol Regarding Remote Hearings issued by the Business and Property Courts of England and Wales, in light of the Coronavirus pandemic. Stephenson Harwood asked for a response by 5pm on 23 March, but heard nothing back.

9. On 24 March 2020 Stephenson Harwood wrote to the Commercial Court Listing Office, with a copy to the Guarantor, to request that the hearing take place remotely and in public. The Listing Office subsequently confirmed that the hearing would take place by telephone. It took place on 3 April 2020.

10. None of the Defendants appeared or was represented at the hearing, nor made any approach to the Claimants or the court with a view to participating in the hearing. I therefore considered whether to proceed with the hearing in their absence pursuant to CPR 23.11. In doing so I took account, by analogy, of the factors identified by the Court of Appeal in *R v Hayward, Jones and Purvis* [2001] EWCA Crim 168, [2001] 2 Cr. App. R. 11 at § 22.5.

11. The evidence presented showed that:

    i) the proceedings had been served on the Defendants through their duly appointed agent for service of process, and the agents accepted service, as indicated in § 4 above;

    ii) the Guarantor, who is also the beneficial owner of the Borrowers, has demonstrable actual knowledge of the proceedings: see § 5 above;

iii) none of the Defendants filed an Acknowledgment of Service or Defence within time, or at all;

iv) the Claimants' present applications (together with the evidence in support) were served on Saville & Co, as the Defendants' duly appointed agent for service, on 20 January 2020;

v) on 21 January 2020 the Claimants notified the Defendants, using the email address nel@kylashipping.com which had been used in previous correspondence between the parties, that their Counsel's clerk would be attending the Commercial Court Listing Office at 11am on Thursday 23 January 2020 to fix a date for the hearing. The Claimants' message provided the address and contact details for the Listing Office;

vi) notice of the hearing on 3 April 2020 was sent by email to the Defendants on 23 January 2020 using the same email address; and

vii) on 2 April 2020 the Claimants sent emails to the same email address and also to Saville & Co (using two email addresses), informing the Defendants that the hearing the following day would commence at 2pm, attaching instructions on how to join the hearing, and attaching a copy of the Claimants' skeleton argument and draft order which had been filed that day. Automatic responses indicated that all three emails had been delivered.

12. In these circumstances, I was (and remain) satisfied that:

i) the Defendants had been given sufficient notice of the proceedings, the present applications and the hearing, and had had ample opportunity to attend and/or be represented at the hearing;

ii) there was no reason to believe that an adjournment would be likely to result in the Defendants (or any of them) attending the hearing at a later date;

iii) there was no reason to believe that any of the Defendants wished to be represented at the hearing;

iv) the Defendants had voluntarily waived their right to appear or to be represented at the hearing, and were voluntarily absent; and

v) although the claims are for significant sums of money, there was a public interest in the matter proceeding without further delay.

13. I therefore indicated that I would proceed with the hearing, and asked counsel for the Claimants to ensure that the court was made aware, so far as possible, of such points as the Defendants might reasonably have been expected to take had they been present or represented at the hearing. I am satisfied that this was done, and at the hearing on 3 April 2020 counsel for the Claimants also took me carefully through the transaction documents and other relevant evidence.

(C) PRINCIPAL FACTS

(1) The parties and the Loan Agreement

14. The Claimants are German banks. The Borrowers are companies incorporated in Liberia. The Guarantor is a Greek national involved in the shipping industry.

15. Under the Loan Agreement, as amended and supplemented by later agreements, the Claimants agreed to make available to the Borrowers a facility in the principal amount of US$ 97 million for the purpose of financing two vessels named the "*Captain Vangelis L*" and the "*Kyla Fortune*". Clause 2 provided for "*Advance A*", of up to US$29 million, to be made for the purpose of financing part of the fair market value of the "*Captain Vangelis L*"; and for "*Advance B*", of up to US$68 million, to be made for the purpose of financing part of the fair market value of the "*Cape Kennedy*", which the agreement stated was to be renamed the "*Kyla Fortune*". Clause 8 provided for Advance A to be repaid by 20 consecutive quarterly instalments (the last one accompanied by a final balloon payment) and for Advance B to be repaid by 36 consecutive quarterly instalments (the last one accompanied by a final balloon payment). In each case the first instalment would fall due three months after drawdown. Thus Advance A would be repaid over a period of 5 years and Advance B over 9 years.

16. The Loan Agreement was originally between the First Claimant and the Borrowers. However, clause 26.2 provided that a Lender could, without the Borrowers' prior consent, transfer all or part of its rights (defined to include loan monies owed to it) and/or obligations to another bank or financial institution, by delivering to the "*Agent*" (defined as being the First Claimant) a completed transfer certificate executed by the transferor and transferee lender in the form set out in Schedule 4 to the Loan Agreement. Clause 26.2 was subject to the proviso that no Lender could make any transfer that would result in there being more than three Lenders. Clauses 26.5 and 26.6. provided:

> **"26.5 No transfer without Transfer Certificate.** No assignment or transfer of any right or obligation of a Lender under any Finance Document is binding on, or effective in relation to, the Borrowers, any Security Party, the Agent or the Security Trustee unless it is effected, evidenced or perfected by a Transfer Certificate.
>
> **26.6. Lender reorganisation; waiver of Transfer Certificate**. However, if a Lender enters into any merger, de-merger or other reorganisation as a result of which all its rights or obligations vest in another person (the "**successor**"), the Agent may, if it sees fit, by notice to the successor and the Borrowers and the Security Trustee waive the need for the execution and delivery of a Transfer Certificate; and, upon service of the Agent's notice, the successor shall become a Lender with the same Commitment and Contribution as were held by the predecessor Lender."

The Second Claimant subsequently became a "*Lender*" under the agreement by this route on or about 24 July 2019 in the circumstances outlined in §§ 44-45 below.

17. Clause 28.2 of the Loan Agreement provided for notices to the Borrowers to be sent c/o Kyla Shipping Company for the attention of Athanassios P. Thanopoulos, and specified an address in Piraeus and a fax number for that purpose. Clauses 31.1 to 31.3 provided that the Loan Agreement was governed by English law and that the courts of England shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with it, subject to the right of the Creditor Parties (as defined) to sue in any other court having or claiming jurisdiction. Clause 31.4 provided:

> "**31.4 Process agent.** Each Borrower irrevocably appoints Saville & Co. at their office for the time being, presently at One Carey Lane, EC2V 8AE, London, England, to act as its agent to receive and accept on its behalf any process or other document relating to any proceedings in the English courts which are connected with this Agreement."

18. The Borrowers pursuant to a Drawdown Notice dated 23 April 2017 drew down the full amount available under the Loan Agreement, i.e. Advance A in the amount of US$29 million and Advance B in the amount of US$68 million.

19. Advance A was repaid by late 2007 when the *Captain Vangelis L* was sold.

20. On 26 March 2012 the first of four Supplemental Agreements to the Loan Agreement was entered into. As indicated in this agreement, the First Claimant had by this stage changed its name from DVB Bank AG to DVB Bank SE. As indicated in Schedule 1, Bremer Landesbank Kreditanstalt Oldenburg-Girozentrale ("***Bremer***") appeared as a second Lender alongside DVB Bank AG. The evidence does not show the precise mechanism by which Bremer had become a lender, but it is unnecessary to consider that mechanism because each of the four Supplemental Agreements reflects the parties' agreement that it was by that stage a Lender.

21. Second and Third Supplemental Agreements were entered into between the Borrowers, the First Claimant and Bremer, dated 27 June 2013 and 29 August 2014, but are not relevant for present purposes.

22. When the Loan Agreement matured on 25 July 2016, US$ 16,241,758.12 remained outstanding in respect of Advance B. In order to address the situation, the parties entered into the Fourth Supplemental Agreement, and the Guarantor provided a personal guarantee.

(2) The Fourth Supplemental Agreement

23. The Fourth Supplemental Agreement, dated 25 November 2016, was made between the First Claimant, Bremer, the Borrowers, the Guarantor and N&P Shipping Co. (the existing corporate guarantor of the loans). It recorded the loan amount outstanding as US$ 16,241,758.12 and defined that sum as the "***Indebtedness***".

24. Clauses 4.2 and 4.3 of the Fourth Supplemental Agreement provided, in summary, that the "*Kyla Fortune*" would be sold and the "*Net Proceeds of Sale*" *"which shall be equal to or greater than US$4,500,000"* applied to the sums due to the Lenders.

25. Clause 4.5 provided as follows:

> "Following the sale of the Ship and the application of the Net Sale Proceeds in accordance with Clause 4.3 above, the Lenders shall (subject always to the provisions of Clause 4.7) write off the remainder of the Indebtedness (and shall confirm the same in writing to the Borrowers and the Personal Guarantor) in consideration of which the Borrowers undertake to pay the further sum of US$3,000,000 (without interest) to the Lenders by way of sixteen (16) instalments as follows (the "**Scheduled Repayments**"):
>
> (i) US$ 187,500 on or before 31 January 2019;
>
> (ii) US$ 187,500 on or before 30 April 2019;
>
> (iii) US$ 187,500 on or before 31 July 2019;
>
> (iv) US$ 187,500 on or before 31 October 2019;
>
> (v) US$ 187,500 on or before 31 January 2020;
>
> (vi) US$ 187,500 on or before 30 April 2020;
>
> (vii) US$ 187,500 on or before 31 July 2020;
>
> (viii) US$ 187,500 on or before 31 October 2020;
>
> (ix) US$ 187,500 on or before 31 January 2021;
>
> (x) US$ 187,500 on or before 30 April 2021;
>
> (xi) US$ 187,500 on or before 31 July 2021;
>
> (xii) US$ 187,500 on or before 31 October 2021;
>
> (xiii) US$ 187,500 on or before 31 January 2022;
>
> (xiv) US$ 187,500 on or before 30 April 2022;
>
> (xv) US$ 187,500 on or before 31 July 2022;
>
> (xvi) US$ 187,500 on or before 31 October 2022.
>
> **Provided always** that the Lenders agree that the Borrowers shall be entitled to a period of up to thirty (30) days to rectify any Scheduled Repayment that is not made on the relevant date set out above and which shall not constitute an Event of Default during such thirty day period."

26. Clause 4.7 provided:

> "The Personal Guarantor shall guarantee the payment of the Scheduled Repayments pursuant to the Personal Guarantee. **Provided always** that should the Borrowers fail to pay to the Lenders any of the Scheduled Repayments in the amounts and on the dates set out in Clause 4.5, then this shall constitute an Event of Default and the entire balance of the Indebtedness (less any Scheduled Repayments actually received by the Lenders and less the Net Sale Proceeds received and applied by the Lenders) shall become immediately due and payable to the Lenders in full and shall be recoverable by the Lenders under the Personal Guarantee, and the Borrowers and the Personal Guarantor acknowledge and agree to the same."

27. The "*Kyla Fortune"* was in fact sold pursuant to a memorandum of sale dated 1 November 2016, and the Net Sale Proceeds were US$4,500,000. However, the Borrowers failed to pay the first instalment of US$187,500 due under clause 4.5 of the Fourth Supplemental Agreement by 31 January 2019, or at all. Nor were any of the other instalments set out in clause 4.5 ever paid. The effect of that failure was that the indulgence conditionally granted by clause 4.5 fell away, and under the terms of clause 4.7 (to which clause 4.5 was subject) an Event of Default occurred and the whole of the Indebtedness of US$ 16,241,758.12 less the vessel sale proceeds of US$4,500,000, thus a net sum of US$11,741,758.12, became immediately due and payable by the Borrowers and recoverable from the Guarantor.

28. Under clause 7 of the Fourth Supplemental Agreement default interest also became due on the sum of US$11,741,758.12. Clause 7 provides:

> "**7 DEFAULT INTEREST**
>
> **7.1** **Payment of default interest on overdue amounts**. The Borrowers shall pay default interest from the relevant date in accordance with the following provisions of this Clause 7 on the entire amount of the Indebtedness (less the amount of any Scheduled Repayments received to date) if the Borrowers fail to pay any of the Scheduled Repayments under Clause 4.5. For the purposes of this Clause 7.1, "relevant date" shall mean:
>
> (a) the date on which this Supplemental Agreement or a Finance Document provides that such amount is due for payment; or
>
> (b) if such amount is payable on demand, the date on which the demand is served; or
>
> (c) if such amount has become immediately due and payable under this Supplemental Agreement or a

> Finance Document, the date on which it became immediately due and payable.
>
> **7.2** **Default rate of interest.** Interest shall accrue on an overdue amount from (and including) the relevant date until the date of actual payment (as well after as before judgment) at the rate of 3.5% per annum.
>
> **7.3** **Payment of accrued default interest.** Subject to the other provisions of this Supplemental Agreement, any interest due under this Clause 7 shall be paid on the last day of the period by reference to which it was determined.
>
> **7.4** **Compounding of default interest.** Any such interest which is not paid at the end of the period by reference to which it was determined shall thereupon be compounded."

29. A question arises as to the "*relevant date*" from which default interest is payable on the sum of US$11,741,758.12 for the purposes of clause 7. One view might be that *"such amount"* in clause 7.1(a) relates to the Scheduled Repayment under clause 4.5 which the Borrowers failed to make, with the result that default interest on the entire Indebtedness runs from the end of the date (31 January 2019) on which the Borrowers failed to make the first repayment. An alternative view is that *"such amount"* refers to the entire Indebtedness , i.e. the sum on which the default interest is due. On that view, the relevant subclause is in my view subclause 7.1.(c), because the entire Indebtedness is a sum that has become *"immediately due and payable"* (by virtue of clause 4.7). On this second approach, the relevant date is the end of the 30-day rectification period, i.e. 2 March 2019, because (a) clause 4.5 makes clear that the failure to pay an instalment *"shall not constitute an Event of Default during such thirty day period"* and (b) under clause 4.7 it is the occurrence of the Event of Default that makes the entire Indebtedness become immediately due and payable. I consider the second approach to be the more natural one, because it treats the words *"such amount"* in clause 7.1 as meaning the amount on which default interest becomes due, rather than meaning the individual scheduled repayment whose non-payment triggered the Event of Default. In any event, I would if necessary have resolved the possible ambiguity by construing clause 7.1 *contra proferentum* i.e. in favour of the Borrowers on this point.

30. Clause 11 of the Fourth Supplemental Agreement contained a notice provision providing *inter alia* for service of notices under the agreement on the Borrowers and the Corporate Guarantor c/o Kyla Shipping Enterprises Corp for the attention of Dimitris Charalampopoulos, specifying an address in Kallithea and a fax number for that purpose; and for service of notices under the agreement on the Guarantor c/o Kyla Shipping Enterprises Corp. for the attention of Nikolaos Livanos (i.e. the Guarantor himself) specifying the same address and fax number.

31. Clauses 12.1 to 12.3 provided that the Fourth Supplemental Agreement (and any non-contractual obligations connected with it) were governed by English law and that the courts of England shall have exclusive jurisdiction to settle any disputes which may

arise out of or in connection with it, subject to the right of the Creditor Parties (as defined) to sue in any other court having or claiming jurisdiction. Clause 12.4 provided:

> "Each of the Borrowers and the Corporate Guarantor irrevocably appoints Saville & Co. at their office for the time being, presently at One Carey Lane, EC2V 8AE, London, England, to act as their agent to receive and accept on their behalf any process or other document relating to any proceedings in the English courts which are connected with this Supplemental Agreement."

(3) The Personal Guarantee

32. By the Guarantee, dated 25 November 2016 and made between the First Claimant and the Guarantor, the Guarantor guaranteed the due payment of all amounts payable by the Borrowers, and the performance by the Borrowers of their obligations, under or in connection with the Loan Agreement and the Fourth Supplemental Agreement.

33. Clause 2.1 of the Guarantee provided:

> "**Guarantee and indemnity.** The Guarantor unconditionally and irrevocably:
>
> (a) guarantees the due payment of all amounts payable by the Borrowers, and the performance by the Borrowers of their obligations, under or in connection with the Fourth Supplemental Agreement and every other Finance Document, including, but not limited to, the Scheduled Repayments set out in Clause 4.5 of the Fourth Supplemental Agreement and (where Clause 2.3 applies) the whole of the Indebtedness;
>
> (b) undertakes to pay to the Security Trustee, on its demand, any such amount which is not paid by the Borrowers when payable …"

34. Clause 2.3 further provided:

> "**Initial limitation of liability.** The initial liability of the Guarantor under Clause 2.1 shall be US$3,000,000 equating to the aggregate of the Scheduled Repayments, pursuant to the provisions of clause 4.7 of the Fourth Supplemental Agreement. However, the Guarantor acknowledges and agrees that, should the Borrowers fail to pay to the Lenders any of the Scheduled Repayments in the amounts and on the dates set out in clause 4.5 of the Fourth Supplemental Agreement (subject always to the maximum thirty (30) day grace period referred to in clause 4.5 of the Fourth Supplemental Agreement) or should the Guarantor breach any of the provisions of Clause 11 hereof, then this shall constitute an Event of Default and the entire balance of the Indebtedness (less any Scheduled Repayments

> actually received by the Lenders and less the Net Sale Proceeds received and applied by the Lenders under the Fourth Supplemental Agreement) shall become immediately due and payable to the Lenders in full, and this Guarantee shall secure the entire Indebtedness."

35. The Guarantee thus secured (as events transpired) the Borrowers' obligation to pay the net Indebtedness of US$ 11,741,758.12 to the Claimants following the Borrowers' failure to pay by 31 January 2019 or by the end of the 30-day rectification period, the first of the instalments due under clause 4.5 of the Fourth Supplemental Agreement.

36. Clause 3.1 provided that the Guarantor was liable under the Guarantee as a principal and independent debtor and accordingly shall not have, as regards the Guarantee, any of the rights or defences of a surety.

37. Clause 7 provided:

> "**7 INTEREST**
>
> **7.1 Accrual of interest.** Any amount due under this Guarantee shall carry interest after the date on which the Security Trustee demands payment of it until it is actually paid, unless interest on that same amount also accrues under the Fourth Supplemental Agreement
>
> **7.2 Calculation of interest**. Interest under this Guarantee shall be calculated and accrue in the same way as interest under clause 7 of the Fourth Supplemental Agreement.
>
> **7.3 Guarantee extends to interest payable under Fourth Supplemental Agreement.** For the avoidance of doubt, it is confirmed that this Guarantee covers all interest payable under clause 7 of the Fourth Supplemental Agreement."

38. Clause 16 provided for any notices to the Guarantor to be sent to him by letter at a specified address in Drosia, Greece or at a specified fax number.

39. Clauses 18.1 to 18.3 provided that the Guarantee (and any non-contractual obligations connected with it) were governed by English law and that the courts of England shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with it, subject to the right of the Creditor Parties (as defined) to sue in any other court having or claiming jurisdiction. Clause 18.4 provided:

> "**Process agent.** The Guarantor irrevocably appoints Saville & Co. at their registered office for the time being, presently at One Carey Lane, London EC2V 8AE, England to act as his agent to receive and accept on his behalf any process or other document relating to any proceedings in the English courts which are connected to this Guarantee."

40. The execution page at the end of the Guarantee stated at the top:

> "**BY SIGNATURE OF THIS GUARANTEE, THE GUARANTOR CONFIRMS HIS FULL COMPREHENSION OF THE TERMS OF THIS GUARANTEE AND DECLARES THAT HE HAS RECEIVED INDEPENDENT LEGAL ADVICE AS TO SIGNATURE OF THIS DOCUMENT AND AS TO THE CONSEQUENCES THEREOF.**"

The signatures of both Mr Livanos and the signatory for the First Claimant were witnessed by a member of Constant & Constant's Piraeus office, who added the following confirmation:

> "I confirm that, prior to the execution of this document, I explained the contents and effect of this document to Mr. Nikolaos Livanos, who informed me that he understood the contents and effect of this document."

(4) Notice of Demand

41. On 5 April 2019 the Claimants served a Notice of Default and Demand for Payment of the Indebtedness of US$ 11,741,758.12 on the Defendants. The notice was sent by courier and by fax to all three Defendants c/o Kyla Shipping in accordance with the details set out in the Fourth Supplemental Agreement and, in the case of the Guarantor, also to the address and fax number set out in the Guarantee. The Notice indicates that it was also sent by email.

(5) Assumption of rights by Second Claimant

42. No payment was made in response to the Notice. However, there was some email correspondence between Mr Little of the First Claimant and Mr Livanos, the Guarantor. Mr Little sent an email to Mr Livanos on 5 April 2019 which among other things said:

> "You should have received a formal default notice regarding the missed payment in January. …
>
> I note from recent media reports that the Nord LB portfolio sales are progressing and I wondered if you were aware if your Nord LB claim exposure was part of the recent sale to Cerberus?"

43. The reply from Mr Livanos, dated 8 April 2019 and sent from the email address nel@kylashipping.com, included the following point:

> "… With reference to your question on Nord LB, I would like to clarify that we have never been officially notified by the Agent on the transfer of Bremer's share of the facility to Nord LB …"

44. This exchange may have been the stimulus for a Notice of Waiver of Transfer Certificate dated 24 July 2019, sent by the First Claimant as Agent to itself (as lender), to the Second Claimant and to the Borrowers, and copied to the Guarantor. This notice referred to clauses 26.2, 26.5 and 26.6 of the Loan Agreement, and notified the addressees as follows:

> "5. Please note that on 31 August 2017 one of the Lenders, Bremer Landesbank Kreditanstalt Oldenburg – Girozentrale (**"Bremer Landesbank"**) – with registered offices in Bremen and Oldenburg (Local Court of Bremen HRA 22159 and Local Court of Oldenburg HRA 3637), transferred, by way of merger without liquidation (the **"Merger Transfer"**), its entire property to Norddeutsche Landesbank – Girozentrale (**"Nord LB"**) – with registered offices in Hannover, Braunschweig and Magdeburg (Local Court of Hannover HRA 26247, Local Court of Braunschweig HRA 10261 and Local Court of Stendel HRA 22150). The effect of the Merger Transfer is that Nord LB is the legal successor in title to Bremer Landesbank and that, as at the date of the Merger Transfer, all assets, rights and liabilities and other resources and holdings of Bremer Landesbank passed to Nord LB. Bremer Landesbank in fact ceased to exist.
>
> 6. The above is confirmed by the attached Certificate on legal succession dated 22 January 2018 (as prepared by the German law firm, Schackow, and notarised and apostilled). This Certificate also confirms that the merger became effective by publication in the Ministerial Gazette of Lower Saxony No. 35/2017, page 1153 *(Niedersächsiches Ministerialblatt Nr. 35/2017, Seite 1153*) on 31 August 2017."

45. By means of the transaction summarised in this Notice, and the service of the Notice itself, the Second Claimant became a Lender for the purposes of the Loan Agreement, and hence also the Fourth Supplemental Agreement (which was expressly supplemental to the Loan Agreement), and entitled to sue under both agreements.

(D) PERMISSION TO SERVE PROCEEDINGS ON DEFENDANTS' PROCESS AGENTS

46. As already noted, the relevant agreements each contained a term providing for the service of "*any process or other document relating to any proceedings in the English courts*" on Saville & Co on behalf of the Defendants.

47. The Claimants served the claim form on the Defendants via Saville & Co in accordance with CPR 6.11(1), which provides:

> "(1) Where –
>
> (a) a contract contains a term providing that, in the event of a claim being started in relation to the contract, the claim form

> may be served by a method or at a place specified in the contract; and
>
> (b) a claim solely in respect of that contract is started,
>
> the claim form may, subject to paragraph (2), be served on the defendant by the method or at the place specified in the contract."

48. There is no equivalent CPR provision applicable to the service of documents other than the claim form.

49. However, the court may grant retrospective and prospective permission to serve such documents on process agents within the jurisdiction in the circumstances of this case pursuant to CPR 6.15 and CPR 6.27: *Societe Generale v Landmont Ltd* [2019] EWHC 1660 (Comm) §§ 20-24 (Nicholas Vineall QC). CPR 6.15(1) applies to service of the claim form within England and Wales (or, in some cases, the EEA) and provides that *"Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place".* CPR 6.27 extends CPR 6.15 to documents other than the claim form.

50. It has been held that the test is whether there is good reason to authorise service by this method: *Aquila WSA Aviation Opportunities II Ltd v Onur Tasimacilik A.S.* [2017] EWHC 1259 (Comm) §§ 43-61 (Sara Cockerill QC, as she then was). The 'good reason' test applies whether alternative service is sought prospectively or retrospectively: *Societe Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2017] EWHC 667 (Comm) (Popplewell J), quoted in *Aquila* at § 52.

51. On the other hand, as summarised in note 6.40.3 to the White Book, the courts have reached different conclusions in different cases as to the position where service could be effected abroad under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 or a bilateral service treaty which is exclusive in its application. In the most recent case cited there, *Punjab National Bank (International) Ltd v Srinivasan* [2019] EWHC 89 (Ch) Chief Master Marsh reviewed the case law and concluded that "*exceptional circumstances*", rather than merely good reason, must be shown in these circumstances before an order for alternative service other than in accordance with the terms of the treaty can be used, and that mere delay or expense in serving in accordance with the treaty cannot in itself constitute such "*exceptional circumstances*".

52. However, even if (which has not been established) service in the present case could be made on any of the Defendants under the Hague Convention or other treaty setting out exclusive arrangements for service, I do not consider it logical that exceptional circumstances need to be shown if the parties have agreed that service may be effected by delivery to an agent within the jurisdiction of England and Wales. Alternatively, I would if necessary hold that such an agreement does constitute exceptional circumstances, justifying an order for service by the alternative means of serving the documents in question on the duly appointed agent for service.

53. In the present case:

i) The Defendants agreed to appoint Saville & Co to act as their agents to receive and accept on their behalf any process or other document relating to proceedings in the English courts in relation to *inter alia* the Fourth Supplemental Agreement and Guarantee. The whole purpose of that agreement was to avoid the delay, inconvenience and expense involved in the Claimants having to serve documents out of the jurisdiction.

ii) Saville & Co confirmed in a letter to the First Claimant dated 10 May 2017 that they had been appointed by the Defendants, for a period of at least six years, to accept service of process on behalf of each of them in respect of any proceedings that may be issued in England and Wales under the Fourth Supplemental Agreement and Guarantee. Paragraph 5 of the letter confirmed that Saville & Co had agreed to notify the relevant party of any legal process or other documents received by them:

> "the duties of the undersigned will be limited to accepting and promptly notifying the relevant party, at their details as specified to Saville & Co, of any legal process, summons, notices or other documents received by the undersigned as agent for service as aforesaid".

iii) There is no reason to suppose that Saville & Co failed to comply with that duty of notification. I conclude that Saville & Co will have notified the Defendants that the claim form and other documents had been served on them.

iv) The Defendants are aware of these proceedings and the applications. Mr Nicholas Little, a Senior Vice President of the First Claimant, exchanged "*without prejudice*" correspondence with the Third Defendant on 13 August 2019 in which these proceedings were discussed. Because of its 'without prejudice' nature, Mr Little correctly does not exhibit this correspondence, but I accept his evidence that it occurred and that it related to these proceedings. Further, copies of the application notice, supporting evidence and draft order were sent by email to the Guarantor. Copies were also sent by post to the Guarantor's address in Greece and to Kyla Shipping Enterprises Corp (a company nominated to receive notices on behalf of the Defendants as per clause 11.2 of the Fourth Supplemental Agreement), though these were rejected at the recipient addresses.

v) The Claimants have acted promptly in serving the relevant documents. The Particulars of Claim and response pack were served on Saville & Co on 1 August 2019, and the application notice, original supporting evidence and draft order on 20 January 2020.

54. In the circumstances, there is in my judgment good reason to order (and, if necessary, exceptional circumstances justifying an order) that the Claimants have permission to serve, and have retrospective permission to have served, documents relating to these proceedings (other than the claim form) on the Defendants by delivering the documents by registered post or by hand to Saville & Co; and I conclude that the Particulars of Claim, response pack, application notice, supporting evidence and draft order were therefore validly served on the Defendants.

55. Finally, the witness statement of Mr Kang and its exhibit were on 31 March 2020 sent by email to Saville & Co and also to the nel@kylashipping.com email address. Automated delivery confirmations were received. I do not read the appointment of Saville & Co as extending to documents received by email, and assume that service by this means was used in view of the short amount of time left before the hearing on 3 April. Mr Kang's witness statement provided an update on recent developments, including service of documents and the reasons for wishing to apply for summary judgment. Because the documents were sent to the nel@kylashipping.com email address, which has been used for correspondence with Mr Livanos as noted earlier, I am sure they will have come to his attention (and thereby to the attention of the First and Second Defendants as well). It also seems highly probable that Saville & Co would promptly have passed the documents on to the Defendants. In all these circumstances it is in my view appropriate to dispense with the need formally to serve these two documents, pursuant to CPR 6.28.

(E) PERMISSION TO APPLY FOR SUMMARY JUDGMENT

56. CPR 24.4(1) provides:

> "A claimant may not apply for summary judgment until the defendant against whom the application is made has filed – (a) an acknowledgement of service; or (b) a defence, unless – (i) the court gives permission; or (ii) a practice direction provides otherwise."

57. There is no requirement for a party to obtain permission under CPR 24.4(1) before issuing a summary judgment application: both applications can be made in the same application notice: *F BN Bank (UK) Ltd v Leaf Tobacco A Michailides SA* [2017] EWHC 3017 (Comm) § 17 (Andrew Baker QC); *European Union v Syria* [2018] EWHC 1712 (Comm) § 62 (Bryan J); and *Punjab National Bank (International) Ltd v Boris Shipping Ltd* [2019] EWHC 1280 (QB) § 30-32 (Christopher Hancock QC).

58. Bryan J summarised the principles relevant to the exercise of the court's discretion under CPR 24.4(1) in *European Union v Syria*:

> "(1) The purpose of the rule are to ensure that no application for summary judgment is made before a defendant has had an opportunity to participate in the proceedings and to protect a defendant who wishes to challenge the Court's jurisdiction from having to engage on the merits pending such application.
>
> (2) Generally, permission should be granted only where the Court is satisfied that the claim has been validly served and that the Court has jurisdiction to hear it. Once those conditions are met there is generally no reason why the Court should prevent a claimant with a legitimate claim from seeking summary judgment.
>
> (3) The fact that a summary judgment may be more readily enforced in other jurisdictions than a default judgment is a

> proper reason for seeking permission under CPR 24.4(1)." (§ 61)

I would add, in relation to (3), that it would in my view be sufficient that the claimant has a reasonable belief that a summary judgment may be more readily enforced than a default judgment. There is no justification for the court subjecting any such belief to minute examination, when the permission the claimant is seeking is in reality no more than the opportunity to obtain a reasoned judgment on the merits of its claim.

59. In the present case:

i) The Claimants validly served the claim form on the Defendants in accordance with CPR 6.11. The Defendants have had an ample opportunity to participate in these proceedings or to challenge jurisdiction, and have chosen to do neither.

ii) The court has jurisdiction to hear the claims, since the Loan Agreement, the Fourth Supplemental Agreement and the Guarantee all contained exclusive jurisdiction agreements in favour of the English courts. The court thus has jurisdiction under Article 25 of Regulation (EU) 1215/2012 ("***the Recast Brussels Regulation***").

iii) A summary judgment may be more readily enforced in other jurisdictions than a default judgment. The Claimants make the point that the Guarantor's assets are most likely to be found in Greece – the Guarantor is a Greek national and a member of the Livanos family, a well-known shipping-owning family from Greece with numerous interests in or connected to the shipping industry – though they may be found elsewhere. The Claimants' evidence, based on Greek legal advice, is that a reasoned judgment would likely be more readily enforceable than a default judgment.

60. The Claimants explain that when the present applications were issued, there was considerable uncertainty as to whether English judgments would be enforceable in EU Member States after the UK's exit from the EU. That uncertainty has been ameliorated by the ratification of the Withdrawal Agreement by the Council of the European Union on 30 January 2020, Article 67(2) of which provides:

> "In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall apply as follows in respect of the recognition and enforcement of judgments, decisions, authentic instruments, court settlements and agreements:
>
> (a) Regulation (EU) No 1215/2012 shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period;"

61. This suggests that a judgment of the English court would be enforceable in Greece under the Recast Brussels Regulation following the UK's withdrawal from the EU, so long as the proceedings were issued before the end of the transition period, which the present proceedings were. However, Greek counsel has advised the Claimants that the Greek courts shut down earlier this year for an indefinite period, so that obtaining an enforcement order in Greece would be likely to be delayed; and in any event that there is a risk that an enforcement order based on a simple default judgment, even if obtained before 31 December 2020, might be set aside on public policy grounds. Greek counsel advised that the Greek courts would be much less likely to refuse to recognise and enforce a reasoned English judgment following a hearing on the merits.

62. Further and in any event, there may be assets belonging to the Defendants that are found outside the EU, in which case the Claimants' solicitor states in his witness statement (and I accept) that a simple default judgment may not be effective for enforcement purposes.

63. In all the circumstances it is clearly just to grant the Claimants permission to apply for summary judgment and I shall therefore do so.

(F) SUMMARY JUDGMENT

64. CPR 24 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial"

65. The Court of Appeal in *The LCD Appeals* [2018] EWCA Civ 220 §§ 38-39 set out the principles to be applied to applications for summary judgment and strike-out:

> "The court may strike out a statement of case if, amongst other things, it appears that it discloses no reasonable grounds for bringing the claim: CPR 3.4(2)(a). It may grant reverse summary judgment where it considers that there is no real prospect of the claimant succeeding on the claim or issue and there is no other compelling reason why the case should be disposed of at trial: CPR 24.2(a)(i) and (b). In order to defeat an application for summary judgment it is only necessary to show that there is a real as opposed to a fanciful prospect of success. Although it is necessary to have a case which is better than merely arguable, a party is not required to show that they

> will probably succeed at trial. A case may have a real prospect of success even if it is improbable. Furthermore, an application for summary judgment is not appropriate to resolve a complex question of law and fact."

66. The Court of Appeal quoted with approval the following considerations applicable to summary judgment applications, taken from passages in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and *Swain v Hillman* [2001] 1 All ER 91 at 94:

    i) the court must consider whether the claimant has a "*realistic*" as opposed to a "*fanciful*" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

    ii) a "*realistic*" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 § 8;

    iii) in reaching its conclusion the court must not conduct a "*mini-trial*": *Swain v Hillman*;

    iv) this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* § 10;

    v) however, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

    vi) although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 3;

    vii) on the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply

to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725; and

viii) a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objective as contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose; and it is in the interests of justice. If the claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position: *Swain v Hillman* [2001] 1 All ER 91 § 94.

67. I have also had regard to the helpful summary given by Bryan J in *European Union v Syria* § 66.

68. In the present case, the Defendants have no real prospect of success in defending the Claimants' claims. The Claimants' claims are for debts due under written contracts of loan and guarantee whose authenticity and validity are unquestionable and have never been challenged by the Defendants. The sums claimed, including contractual interest as claimed, are undoubtedly due. The Defendants have never put forward any defence or any basis on which the Claimants' claims might be challenged. The only point any of them has raised in response is the one relating to the Second Claimant's succession to the rights of Bremer, raised in Mr Livanos's email 8 April 2019 quoted in § 43 above. I have addressed that point in §§ 44-45 above. I am satisfied that the Claimants' legal team have considered whether any other possible defences might be available to the claims, and drawn them to my attention. I have addressed earlier in this judgment the issue concerning the date from which default interest runs.

69. There is no compelling reason for the claims to be determined at trial. There are no disputed facts nor any reason to believe that further investigation into the underlying facts would reveal any material matters. There is no other reason why a trial would be appropriate: on the contrary, it would waste court time and legal costs. In such circumstances, summary determination is clearly appropriate (*Sagicor Bank Jamaica Ltd v Taylor-Wright* [2018] UKPC 12 § 16 per Lord Briggs).

70. The Claimants' application for summary judgment therefore succeeds. Subject to any further submissions as to the detailed terms of the order, the Claimants are entitled to:

i) judgment for both Claimants against the Borrowers (the First and Second Defendants) in the sum of US$ 11,741,758.12, plus interest at the rate of 3.5% per annum pursuant to clause 7.2 of the Fourth Supplemental Agreement as from 2 March 2019 until the date of judgment; and

ii) judgment for the First Claimant against the Guarantor (the Third Defendant) in the sum of US$ 11,741,758.12, plus interest at the same rate and for the same period pursuant to clause 7.2 of the Guarantee.

(G) CONCLUSION

71. The Claimants' application accordingly succeeds. I am grateful to the Claimants' counsel for his clear and candid submissions.