IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

No.CL-2021-000638

[2024] EWHC 210 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday 29 January 2024

Before:

HIS HONOUR JUDGE PELLING KC

(Siting as a High Court Judge)

B E T W E E N :

EUROBANK S.A. — Claimant

- and -

(1) MOMENTUM MARITIME S.A.
(2) TITAN MARITME LTD
(3) MAXIMUM MARINE LTD
(4) ALEXANDROS E. TSAKOS
(5) PANGIOTIS I. MERAMVELIOTAKIS
(6) IOANNIS P. MERAMVELIOTAKIS — Defendants

MR J ROBINSON (instructed by Watson Farley & Williams LLP) appeared on behalf of the Claimant.

MR T STEWARD (instructed by Preston Turnbull LLP) appeared on behalf of the Defendants.

J U D G M E N T

JUDGE PELLING :

1 This is an application for summary judgment by the claimant bank against the borrowers and the guarantors of the obligations of the borrowers. The first to third defendant borrowers are each one-ship companies. The fourth to sixth defendants are each guarantors of the loans. The fourth and sixth defendants are respectively the 51 per cent and 49 per cent shareholders in the first to third defendants. The loan agreement provided for a facility of just over $12 million to the borrowers, and for which the first to third defendants were jointly and severally liable. The loan was secured by the personal guarantees of the fourth to sixth defendants, as I have said, by mortgages over vessels owned respectively by the first to third defendants.

2 It is common ground that, in breach of contract under the loan agreement, the borrowers failed to make two payments, and various insurance policies that the borrowers had covenanted to maintain were terminated for non-payment of premiums. These were events of default under the loan agreement that entitled the claimant to accelerate the repayment of the sums lent, which is what it did on 18 October 2019 when it demanded repayment of the sums then outstanding of about $4.7 million, plus interest and expenses. It made demand of the fifth and sixth defendants under the guarantees. None of the sums outstanding have been paid by the borrowers and, aside from a payment made by a corporate guarantor, nothing has been paid generally. In the result, I am told (and it does not appear to be in dispute) that there is currently due and owing to the claimant $4,233,780.90, €186,327.50, and £59,373.54. None of this, as I say, is in dispute.

3 There was a concern expressed in the course of the hearing that the lender's interest was held in several shares by the by the claimant and one of its associated companies. However, that ceased to be a problem because of an undertaking offered by the claimant, the effect of which would be to account to all those entitled to recover the sums lent, in the event it succeeds in obtaining judgment. A concern that credit would not be given for all sums received from third parties in respect of the debts (to the extent that was required) ceased to be a problem as well because of an undertaking offered by the claimant to give credit as appropriate and inform the defendants of all sums received.

4 Two of the vessels the subject of the mortgages were, from June 2019, arrested in Djibouti by various third-party creditors. One of the vessels was the subject of ten different arrests from various trade creditors, and the other was subject to eight different trade creditor arrests. The vessels were abandoned by their owners on or about 15 September 2019 and then, or thereafter, the ships were arrested by or on behalf of the Djibouti Port Authority.

5 In February 2020, the claimant arrested the vessels at a time when the vessels were each subject to multiple prior arrests. The Djibouti Port Authority applied to the courts in Djibouti for an order requiring the forced sale of the vessels out of court by the Port Authority. On 5 March 2020 that application was granted, and on 28 April 2020 the Djibouti Port Authority announced an auction of the vessels pursuant to the first instance court's order. Concerned at the effect that such a sale might have on its security, the claimant appealed that order, and on 1 June 2020 the Djibouti Court of Appeal set aside the order for sale for want of jurisdiction; ordered the Djibouti Port Authority to pay the costs of the appeal, but authorised the sale of the vessels by a court-supervised process, as is more conventional following the arrest of vessels. Thereafter the Djibouti Port Authority attempted to organise auctions of the vessels at various stages down to October 2020. It is suggested that this was contrary to the requirements of the Djibouti Court of Appeal, but whether that is so or not does not matter for present purposes.

6 On a date unknown, the Djibouti Port Authority arranged a private sale of the vessels. The claimant maintains it first discovered that this was so on 11 November 2020. The sale was at a price of $3.2 million-odd to an intermediary based in Dubai, who thereafter sold the vessels for scrap to a ship scrapping operation based in Pakistan. The claimant maintains it had no prior notice of the sale, and details of when and how the sale was brought about is said by the claimant to be unknown to it. The claimant says it has received nothing from the sale.

7 These proceedings were commenced in November 2021, with the defendants defending the claim by pleading at para.18 of their defence that the claimant borrowers had an equitable duty (1) to act reasonably in the realisation of any mortgage property, and/or (2) to obtain a true market price for the mortgaged property, namely the vessels. Their pleaded case as to the breach of these alleged duties involves them alleging that the claimant arrested the vessels, and then asserting that the sale to which I have referred was "... *conducted at its behest* ...", and that as a result the claimant failed to obtain the vessels' true market value, as it was obliged to do.

8 The test to be applied on the summary judgment application is well known, and is that set out in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch). If permission to defend the claim is to be given, I must be satisfied that the defendants have a real, as opposed to a fanciful, prospect of success, and whilst a court should not carry out a mini-trial in deciding applications for summary judgment, that does not mean that a judge must accept at face value everything a defendant says, but at the same time should refuse summary judgment if there are reasonable grounds for believing that at a trial other evidence may be available which might alter the outcome and the perception as it is at the time the summary judgment application is being determined.

9 The critical first point to make is that the only step that the claimant took in relation to the vessels – at any rate on the evidence that is available – was to arrest them, and they did so after a number of other trade creditors had taken the same steps. Although it is alleged in the defence that the claimant was responsible for the sale that eventually took place, ultimately resulting in the vessels being scrapped, that is fanciful on the factual material that is available. That material includes not merely the court orders from the Djibouti first instance and Court of Appeal to which I referred earlier in this judgment, but to third party narrative documents as well, being principally the ILO documentation, but there are others that are material. Where all that a marine mortgagee does is to exercise a power of arrest, the sole duty of the party effecting arrest is to do so in good faith for the purpose of obtaining repayment under the loan agreement secured by the mortgage. The contrary is not, and could not be, suggested. That this was the claimant's purpose of the exercise is consistent with (a) the claimant's appeal against the first instance decision permitting the Djibouti Port Authority to sell the vessels otherwise than under the supervision of the Djibouti court, and (b) the attempts made to stop the vessels being broken up once it became apparent to the claimant that they had been sold for that purpose.

10 It is only if a mortgagee either takes possession of the mortgaged property or exercises a power of sale in respect of it that more complex duties arise. A mortgagee has, however, no duty to take possession or sell. If a mortgagee takes possession, then it assumes a duty to take reasonable care of the property: see Silven Properties v RBS [2004] 1 WLR 997, per Lightman J at [13]. However, there is no basis, on the evidence that is available to me, that the claimant took any form of possession of the vessels. Arresting a vessel is not to take possession of it.

11 It is only when a mortgagee decides to exercise a power of sale that a mortgagee comes under any equitable duties concerning how that sale is to be conducted, and the duty is confined to a duty to obtain the true market price at the date of the sale. There are numerous authorities to this effect which were adopted and applied in respect of a marine mortgage in The Tropical Reefer [2004] 1 All ER (Comm) 904 at [19].

12 Returning to the facts of this case, there is no evidence whatsoever that the sale about which complaint is made by the defendants was a sale by or behalf of the claimant. The sale was a private sale by the DPA. The claimant did not have any prior notice of the sale and did not discover that it had occurred until after it had taken place. There is no evidence to contrary effect, and no reason for supposing that evidence to contrary effect will emerge if only the claim is allowed to proceed to trial. There is no reasonable or indeed any ground for thinking the evidence on this critical point will alter. As I have said, and repeat, the suggestion is inconsistent with both the claimant's appeal to the Djibouti Court of Appeal and its attempts to prevents the ships being broken up once it became aware of the sale of the vessels.

13 It was submitted on behalf of the defendants that it was more than fanciful that the equitable duties that arise when effecting an arrest should be viewed as sufficiently flexible so that the scope of any duty, beyond a duty to act in good faith, should be viewed as ultimately depending on the facts and therefore that there should be atrial at which the allegedly relevant facts can be found. The defendants relied for this proposition on Medforth v Blake [2000] Ch 87 at [102]. In my judgment, that authority has no application in the circumstances of this case. It was precisely the argument advanced by the defendants in this case that was rejected at first instance in The Tropical Reefer (ibid) per Nigel Teare QC (as he then was) at paras.33 to 34, where it was pointed out that the context in which the statement relied on made was wholly different to that which applied in that case (and this), being an allegation that receivers had negligently conducted the business of which they had been appointed receivers. It has no impact either on the duty which arises when a marine mortgagee effects arrest, nor has it any impact on the duties that can arise only if and when a mortgagee exercises a power of sale.

14 It was suggested that there was arguably a duty to force a sale where offers had been received, as was apparently the case here (taking the evidence in favour of the defendants at its highest for present purposes). That is wrong. A mortgagee has an unfettered discretion whether to sell or not and, if he decides to sell, when to sell: see Silven Properties (ibid.) at [14], where the point was made that the decision maker is not constrained by the fact that the decision taken will, or might, result in loss for the mortgagor. That being so, the fact that the claimant received offers for the vessels (if that is how the interest apparently expressed is to be construed) and the fact they were not accepted is not to the point. That the vessels were ultimately sold by the DPA is not material either. Although it was suggested that there was a duty to prevent the DPA from selling the vessels, no attempt was made to explain what legal basis there is for such a suggestion nor what legal or other mechanism would be available to the claimant in order to prevent such a sale, other than perhaps commencing proceedings in the Djibouti courts even if, contrary to its case and the evidence, it was aware at the time of the sale by the DPA that it was selling the vessels.

15 It was suggested that either there was a duty owed by the claimant to the defendants to collect, or attempt to collect, some or all of the proceeds of sale apparently received by the DPA, or that in breach of that duty the claimants failing to make any or any adequate attempts to do so. In my judgment, this is entirely unarguable. First, there was no such duty owed by the mortgagee, who had merely arrested the vessel. Secondly, it is entirely unclear

what the claimant could be expected to do to collect any part of the sums obtained by the DPA from its sale of the vessel.

16 It was suggested at one point that the claimant took possession of the vessels. However, there is no evidence at all to support such a proposition, and no reasonable grounds for thinking such evidence might emerge in the future. First, by the time the claimant came to arrest the vessels, they were already subject to multiple prior arrests by other trade creditors, as is apparent on the face of the bailiff report for the arrests effected pursuant to the applications made by the claimant. The ILO reports about the vessels are entirely inconsistent with the claimant having taken possession of the vessel. Those reports report the abandoning of the vessels by the owners and that the Djibouti authorities had prevented the crews or, at any rate, all of the crews leaving, for reasons of port security and public health, non-compliance with minimum manning certificates and insurance. Had the claimant taken possession of the ships, none of that could or would have arisen.

17 Finally, the act of arrest is not an act of taking possession. As was explained in the first instance judgment in The Tropical Reefer (ibid.) [29], arrest is the first step taken by a ship mortgagee who wishes to enforce his security by having the vessel sold by an Admiralty Court in whichever jurisdiction arrest is affected. It does not involve either taking actual or deemed possession of the vessel concerned. The contrary is unarguable.

18 A further suggestion made on behalf of the defendants is that the claimant was under a duty to discharge the liability of all the creditors who had purported to arrest the vessels that were outstanding, and then take possession of the ship, before moving the vessels to another jurisdiction where sale at a higher price might be obtained. This is plainly unarguable: (a) because that is not what an arrest entitles a mortgagee to do; (b) because taking those steps would be at least potentially adverse to the commercial best interests of the claimant, and (c) there is no duty to take such steps, even if the equitable duty arising on the sale of the vessel (which is the highest level of equitable duty that can be imposed on a mortgagee) applied, which it did not.

19 In the light of these conclusions, it is not necessary that I comment on the scope and effect of clause 19.8 of the loan agreement, simply because the issue does not arise.

20 In the end, the defendants submit that this case is a very unusual one because the claimant engaged in efforts to sell the vessel when the DPA sold the vessel out of court and in apparent defiance of the Djibouti Court of Appeal's order. Even if those facts were correct as far as they go, they do not begin to justify the conclusion that even arguably the claimant owed or breached any relevant duty. At all times the claimant did nothing other than arrest the ship. It did not take possession, nor did it exercise a power of sale. Assuming the defendants were able to show that the claimant attempted to sell the vessels that leads nowhere because the duties that arise when a mortgagee sells the property over which it is secured, not any prior steps and certainly not simply by soliciting offers. In my judgment, therefore, the defendants have no realistically arguable defence to this claim and the claimant is entitled to judgment.

LATER

21 There is a short issue of construction which arises in relation to a provision within the loan agreement contained in clause 20.3. That is entitled "*Costs of variations, amendments, enforcement etc*." It provides that the borrowers (i.e. the defendants in this context) or the

guarantors standing in their shoes should pay to the agent (that is the claimant in this context):

> "... for the account of the Creditor Party concerned the amount of all expenses incurred by the Creditor Party in connection with: ...
>
> (d) any step taken by the Creditor Party concerned with a view to the protection, exercise or enforcement of any right or Security Interest created by a Finance Document or for any similar purpose."

It was not suggested that the costs of and occasioned by this application are not costs which come within the scope of para.(d) as I have so far quoted it. The clause then goes on:

> "There shall be recoverable under paragraph (d) the full amount of all legal expenses, whether or not such as would be allowed under rules of court or any taxation or other procedure carried out under such rules."

22 There are two possibilities as to what this might mean. The first (contended for by the claimant) is that the last 2 ½ lines of the clause take effect literally in accordance with the language used, which would mean that any amount identified by way of legal expenses would be recoverable, irrespective of how extreme the sums involved were (not that I am suggesting that in this case in fact the sums claimed are extreme).

23 The alternative construction contended for by the defendants and which I accept should be preferred is that the effect of this clause is to entitle the claimant to recover its costs on the indemnity basis, and that any costs that are to be recovered must be assessed on the indemnity basis by the court either at a summary or detailed assessment. That is, to my mind, the preferable construction because it eliminates the possibility of the absurdity I have identified that could arise if the phrase was given a literal wording. It also gives effect to the requirement that the full amount of all legal expenses will be allowed by having those costs assessed on the indemnity, as opposed to the standard, basis of assessment, because the control exercised by assessment on an indemnity basis is a much lighter and less restrictive. Its attraction, however, is that it eliminates any possibility of extreme or unjustified costs being recoverable in a way which would operate punitively against a defendant.

24 In those circumstances, I construe this clause to mean that costs recoverable must be costs assessed on the indemnity basis, but they must be assessed by the court, and that means that the court must be satisfied that the work for which the claimant has claimed is reasonable and the amount claimed for that work must be reasonable in amount.

LATER

25 The issue I now have to determine is the summary assessment of the successful claimant's costs. The costs are to be assessed on the indemnity basis, because that is the contractual basis on which the claimant is entitled to recover costs. The first issue concerns hourly rates. The complaint which is made by the defendants is that the hourly rates are too high, and in particular too high for the grade A fee earner. I agree that the hourly rates being charged are in excess of the guideline rates that were published only at the beginning of this month, but those guideline rates exist primarily for the purpose of working out the proportionate costs of solicitors' time in relation to summary assessment. It is of less

assistance where proportionality is not in play and the only question concerns reasonableness.

26 So far as that is concerned, the grade A fee earner is significantly higher than the guideline rate, and the view I have come to in relation to that is that the appropriate adjustments are to reduce the grade A rate by £100, to £667.88. But I leave unadjusted the B and D rates, on the basis that this is an indemnity assessment rather than a standard basis assessment.

27 I have not heard any complaints in relation to attendances, other than in relation to attendance at the hearing. So far as that is concerned, that has been put down at five hours for both the grade A and the grade B fee earner. The grade A fee earner has not attended. If this was a standard assessment, I would be querying the need for a B as opposed to a D fee earner to attend a hearing of this sort, but since this is an assessment on the indemnity basis and the question is whether it is reasonable, not whether it is proportionate, I allow five hours for the grade B fee earner. Travelling time of two hours is reasonable, having regard to location of the solicitors.

28 The next question concerns the brief fees. So far as that is concerned, there is a difference between counsel of £2,000. That is within the range of what is reasonable. Had proportionality been a relevant consideration, I would have queried whether a £20,000 brief fee for a summary judgment application that has lasted less than a day would satisfy that criterion, but because this is an assessment on the indemnity basis, I am not prepared to interfere with that.

29 The principal area of difficulty concerns the schedule of work on documents. So far as that is concerned, there are four items which are identified. The first is considering Tsakos/2, which is said to be three hours of grade A time, and was said to be reasonable. Had that been three hours in addition to either a B or D fee earner, then I could have seen some point that was being made, but this was a statement which was lodged relatively late. It was considered in a modest amount of time by a grade A fee earner who was able to reduce, I am sure, the amount of time taken because of the seniority that he has. I am prepared to let that through, though I might have been less sanguine had it been an assessment on the standard basis.

30 The next one is the work on the bundle, which is claimed at a B fee earner for 15.9 hours. Bundles are normally done by D fee earners with some supervision by the grade B fee earner. As counsel has rightly submitted, there were difficulties with this bundle: it was not hyperlinked, for example, and, more particularly, the page numbers on the PDF did not coincide with the hard copy volume, which adds needlessly to the amount of work that has to be done in the course of the hearing, and it is entirely contrary to the protocol and practice directions which have been in place for many years as to how these bundles are meant to be prepared. In those circumstances, it seems to me that if a grade B fee earner was going to do the bundles, then, (a) less time would be required, and (b) there is less excuse for defects in it. I reduce that to eight hours.

31 The next one is work on the authorities bundle, which is said to be 2.1 hours. I accept that the authorities would have to be identified by counsel but someone has to do the bundling. Two hours is reasonable, even if is not proportionate.

32 Works on statement of costs, however, at five hours is in excess of what is reasonable. This has been a short hearing, and the work necessary to formulate a schedule that is accurate is

not the work of 15 minutes but it is certainly not the work of five hours either on a reasonable basis. I allow that at two and half hours.

33 Subject to those adjustments, I assess the costs as claimed.

LATER

34 This is an application for permission to appeal. The basis on which I am asked to give permission to appeal is by reference to the assertion that the claimant came under a duty to consider offers that had been made. I rejected that on the basis that it is unarguable in law. and in my judgment there is no real prospect of success in the Court of Appeal. The scope of duties owed by parties who are mortgagees is now well established. The claimant has rightly distinguished between duties which arose on arrest, duties that arose on taking possession of the mortgaged property, and those which arose when a sale was effected. As I have explained in the judgment, at no stage was a sale effected, or being effected, by or on behalf of the claimant so as to engage the relevant duties that arise in that context. The claimant never took possession so the duties that would have arisen on the occurrence of such an event did not arise either and, in any event, could have no impact on the need to consider an offer from a third party. In fact, all that the claimant did was to arrange an arrest of the ships. The duty on making an arrest is confined to ensuring that the arrest is made in good faith for the purpose of enforcing of security, and, once that is understood, then the suggestion that there was any wider duty owed by the claimant disappears. In those circumstances permission to is refused.

CERTIFICATE

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