Neutral Citation Number: [2020] EWHC 103 (Admlty)

Case No: AD 2018 000096

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2020

Before :

MR. JUSTICE TEARE

- -

Between :

QATAR NATIONAL BANK Q.P.S.C	**Claimant**
- and -	
THE OWNER OF THE YACHT FORCE INDIA	**Defendant**

- -
- -

Gideon Shirazi (instructed by **Ince Gordon Dadds LLP.**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing date: 15 January 2020

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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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The Honourable Mr Justice Teare

Mr. Justice Teare :

Introduction

1. This is the trial of an action in rem which the Claimant, Qatar National Bank, seeks to enforce a mortgage on the motor yacht FORCE INDIA. The yacht is described as a superyacht, being a 49.9 metre Mangusta 165. She has been arrested and remains under arrest in Southampton.

2. Unusually, the mortgage was not 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 on an island off the coast of France. The mortgage on the yacht was later granted as additional security for that loan in the following circumstances.

3. The loan (which had been assigned to the Claimant) was due to be repaid in 2015 but negotiations took place with a view to extending the loan. By the First Amendment Letter dated 18 February 2016 the loan was extended to 31 March 2016. However, there was a need for further negotiations and by a Second Amendment Letter dated 29 September 2016 the loan was extended to 30 June 2017 on condition that a mortgage was granted over the yacht FORCE INDIA which was owned by a company related to Gizmo Invest SA. By a side letter dated 27 October 2016 it was agreed that the mortgage was limited to "a principal amount of €5 million". The mortgage and associated deed of covenant were not executed until 15 February 2017. The mortgage was governed by Maltese law (that being the law pursuant to which the yacht had been registered) and the deed of covenant was expressly governed by English law.

4. Due instalments were not paid and the Claimant reserved its rights. By a Third Amendment Letter dated 13 November 2017 it was agreed that if the yacht were sold the sale proceeds would be paid to the Claimant in reduction of the amounts owing under the loan.

5. In January 2018 the yacht was arrested for non-payment of crew wages and judgment in default was obtained in May 2018.

6. On 22 June 2018 the Claimant served a notice of default. The default relied upon was a failure to pay instalments due since January 2018 pursuant to the terms of the Third Amendment Letter. Payment was demanded of the full sum owing of almost €17m. and on 3 July 2018 the Claimant issued a caution against the release of the yacht pursuant to CPR Part 61.8(2).

7. The Claimant's in rem proceedings were issued on 30 August 2018. By this time the crew claim had been discharged and the Claimant decided to arrest the yacht in its own action in rem.

8. The Owner of the yacht defended the claim by alleging that between August and October 2016 it was specifically agreed and understood between the Claimant and the Defendant that the mortgage would only be enforceable in the event that the yacht was in fact sold. That contention was denied.

9. In November 2019 the solicitors acting for the Defendants came off the record. The Defendant did not appear at the trial.

10. It was, however, apparent from a letter from the Defendant's former solicitors to the Court dated 14 January 2020 that the Defendant was aware of the trial. In those circumstances there was no reason why the court should not conduct the trial in the absence of the Defendant pursuant to CPR 39.3(1). The trial had been fixed for some time and the Claimants had prepared for it.

11. The letter from the Defendant's former solicitors dated 14 January 2020 enclosed a letter from a third party who "support(ed) the postponement of the hearing". That postponement or adjournment also appeared to be supported by the Defendant's former solicitors though no formal application for an adjournment appears to have been made by the Defendant. The Claimant opposed any adjournment and in circumstances where the trial had been listed for some time and the Claimants had prepared for it there were no grounds for an adjournment.

12. CPR Part 39.3(1) gives the court power to strike out the Defence if the Defendant does not attend the trial. Counsel for the Claimant applied for an order to that effect and I granted it. In circumstances where the Defendant had not appeared at the trial to advance its defence and where the defence relied upon the evidence of witnesses who had not been brought to court to give their evidence and to be cross-examined upon it there was every reason to strike out the defence and so I acceded to the application.

13. However, since this is an Admiralty claim in rem (albeit one in which the Defendants had acknowledged service) it would not be appropriate to grant judgment in default of a defence unless the Court was satisfied that the claim had been proved; see CPR Part 61.9(3)(a)(iii). That is because other parties may have an in rem against the arrested vessel and their interest might therefore be damaged if judgment is given without the claim having been proved. In any event the Practice Direction to CPR Part 39 contemplates that the claimant must prove its claim where the trial proceeds in the absence of the defendant; see CPR 39 PD 2.2(1)(a).

14. Accordingly counsel opened the case by taking the court to the documents which proved the claim, calling the evidence of two witnesses and making appropriate submissions in order to be able to satisfy the court that the claim was sound.

15. At the outset counsel sought permission to amend the Particulars of Claim by correcting the name of the Claimant, making certain typographical corrections and bringing the sums claimed in respect of principal, interest and the costs of collection up to date. I granted that permission. By the end of the hearing it appeared that certain further amendments to the costs of collection were required and I gave permission in principle, on terms that the supporting evidence be provided within 7 days.

16. By letter dated 21 January 2020 the Claimant provided the court with the Amended Particulars of Claim. Those particulars also included reference to a clause relied upon at the hearing and to an additional claim in respect of mortgagee interest.

<u>The Facility Letter, its amendments and the mortgage on the yacht</u>

17. The Facility Letter was dated 28 August 2008 and was issued by Ansbacher who had agreed to lend €27 million to Gizmo of Luxembourg. Repayment was provided by clause 2.1 and envisaged that the loan would be repaid within 7 years. Clause 2.3 provided for repayment of the outstanding sum in the event of a default in the following terms:

> "2.3 In the case of an Event of default as defined in paragraph 13 below we may demand repayment of the outstanding amount of the Loan, and you shall immediately pay to us such amount together with accrued interest."

18. Security for the loan was provided in clause 5 and included a charge on the French property (to be purchased with the loan) and a personal guarantee from Dr. Mallya, an individual closely connected with the borrower.

19. Interest was payable pursuant to clause 8. Clause 8.1 set out the rate. Clause 8.2 provided for the interest to be calculated daily and for any interest to itself attract interest. Thus this was a provision for compound interest, although that adjective was not in fact used. Clause 8.3 provided for a penalty rate of interest, 3% above the rate provided in clause 8.1.

20. Clause 13.1 listed the events of default which included:

> "(i) default is made in the payment on the due date of any amount payable under this facility letter."

21. Clause 13.2 provided that:

> "13.2 Immediately upon the occurrence of an Event of Default the Loan shall be cancelled …….and all amounts outstanding under the Loan shall become immediately due and payable by you without presentment, demand, protest or any other notice whatever."

22. Clause 17 provided for the facility letter to be governed by English law.

23. By a deed of general assignment dated 12 May 2011 the loan was assigned to the Claimant who had purchased the share capital in Ansbacher.

24. By the First Amendment Letter dated 18 February 2016 the loan was extended to 30 June 2016 when all amounts drawn and outstanding were to be repaid.

25. By the Second Amendment Letter dated 28 September 2016 the loan was extended until 30 June 2017. Provision was made for monthly repayments followed by a balloon repayment of almost €17 million on or before 30 June 2017. Additional security was provided for in the form of a first priority statutory ship mortgage on the yacht FORCE INDIA and a deed of covenant collateral to the mortgage.

26. The deed of covenant dated 15 February 2017 was executed between the Claimant and Force India Limited, the Maltese owner of the yacht. By clause 2.1 the Owner covenanted to pay, in effect, the liabilities of Gizmo under the Facility Letter. The clause also provided that:

> "The Owner's liability under this covenant is limited to a principal amount of €5,000,000 together with interest, costs and expenses of collection."

27. Clause 3.1 provided as follows:

> "In consideration of the agreement of the Mortgagee as lender to consent to the extension of the Loan to the Borrower pursuant to the Facility Documents and in order to unconditionally secure and guarantee as principal obligor and nor merely as surety the repayment of a principal amount of €5,000,000 under the Loan together with interest, costs and expenses of collection, and to secure the performance and observance of and compliance with the covenants, terms and conditions in the Yacht Mortgage and in the Facility Documents, the Owner with full title guarantee hereby mortgages and charges to and in favour of the Mortgagee, all its rights, title and interest present and future in and to the Yacht."

28. The deed of covenant was expressly governed by English law, as provided by clause 14.1.

29. The mortgage on the yacht was also dated 15 February 2017 and was granted by Force India Limited to the Claimant. The mortgage is written on a standard form document. The standard form contains boxes to be filled in which describe the mortgaged vessel and a number of gaps to be filled in, each prefixed by a bracketed letter. In the footnotes to the document there is guidance, corresponding to each bracketed letter, as to how each gap is to be filled in. Insofar as it is relevant, the guidance provides:

> "(a) Here state by way of recital the details of the security giving the full name and address of Mortgagor or Mortgagee, the nature of the transaction and the manner and time of payment…"

30. In the mortgage, in the gap prefixed "*whereas (a)*", the parties set out a description of the security. That description included the following:

> "…and whereas pursuant to the Deed of Covenants the Mortgagor has agreed to and does hereby execute this mortgage in favour of the Mortgagee for the purpose of securing, (a) payment by the Borrower to the Mortgagee of all sums (limitedly up to the amount of €5,000,000 (five million Euro)) for the time being and from time to time owing to the Mortgagee by the Borrower under the Facility Documents whether by way of principal and interest or otherwise as well as other moneys whatsoever now or at any time hereafter owed or to be owed to the Mortgagee (whether actually, contingently, presently and/or in the future) including all costs, charges, expense or other money connected with or for the purpose of creating, preserving, maintaining, administering, protecting, enforcing or attempting to enforce this security in the manner and at the times set forth in the Deed of Covenants, and (b) the due and punctual performance and fulfilment of all the obligations of the Borrower under the Facility Documents and of the Mortgagor under the Deed of Covenants…"

31. The mortgage then went on to provide as follows:

> "Now we the (b) Force India Limited in consideration of the promises for ourselves and our successors, covenant with the said (c) Qatar National Bank S.A.Q and (d) its assigns, to pay to him or them or it the sums for the time being due on this security, whether by way of principal or interest at the times and manner aforesaid. And for the purpose of better securing to the said (c) Qatar national Bank S.A.Q. the payment of such sums as aforesaid, we do hereby mortgage to the said (c) Qatar National Bank S.A.Q. all the shares, of which we are the Owners in the Ship above particularly described, and in her boats and appurtenances."

32. I was referred to evidence from a Maltese lawyer that the mortgage was valid and effective in accordance with Maltese law. I accept that evidence.

33. By the Third Amendment Letter dated 10 November 2017 the loan provided by the Facility Letter was agreed to be € 16,570,000 and to be repayable by 31 July 2018. There were to be monthly repayments from October 2017 and a balloon repayment of € 14,620,000 on or before 31 July 2018.

The Events of Default

34. The events of default are set out in the Facility Letter dated 28 August 2008 and include default in the payment on the due date of any amount payable under this facility letter; see clause 13.1(i). The Third Amendment Letter also provides that lateness in making any loan repayments will be an event of default (see clause 8(c)) and further provides that "all other terms and conditions of the Facility Documents shall remain in full force and effect" (see the penultimate clause).

35. The pleaded event of default is the non-payment of sums due since mid-January 2018. The sums required to be paid are set out in the Third Amendment Letter. Clause 4.1 requires monthly repayments of principal in the sum of €50,000 from October 2017 until July 2018. Clause 4.2 requires an additional payment of €750,000 to be repaid in January 2018 and clause 4.3 requires a further sum to be paid in May 2018. The final (balloon) payment of €14,620,000 was payable by 31 July 2018 pursuant to clause 4.4.

36. It is established by a computerised schedule dated 16 July 2018 produced by the Claimant that in January 2018 only a small payment of €472.36 was made and that no payments were made before 16 July 2018. Thus there have been several failures to pay the sums due. Notice of default was served on Gizmo by letter dated 22 June 2018 and repayment of the outstanding amount under the loan as at 15 June 2018 (almost €17 million) was demanded pursuant to clause 2.3 of the Facility Letter.

The claim

37. The sum claimed in this action in rem is €5 million (the figure stated in the Side Letter) plus interest and the costs of "collection" which the Claimant is entitled to recover pursuant to clauses 2.1 and 3.1 of the Deed of Covenant. Gizmo's liability under the facility letter as amended is of course much greater

38. During the hearing a question arose as to whether the limit of € 5 million was the limit of the claim, inclusive of interest and the costs of collection. That question arose because of the terms of the recital in the mortgage which have been quoted above. They place the €5million limit "*on all sums… owing to the Mortgagee by the Borrower under the Facility Documents whether by way of principal and interest or otherwise as well as other money whatsoever now or ant time hereafter owed or to be owed to the Mortgagee*". By virtue of the conjunction "*as well as*" it also arguably places that limit on "*other money whatsoever… owed or to be owed to the Mortgagee*".

39. By contrast clauses 2.1 and 3.1 the Deed of Covenant places the €5million limit only on the principal amount guaranteed; *"The owner's liability under this covenant is limited to a principal amount of €5,000,000 together with interest, costs and expenses of collection*. The words "*together with*" indicate that "*interest, costs and expenses of collection"* are not subject to that limit.

40. Thus the Mortgage appears to be inconsistent with the Deed of Covenant.

41. However, it is well-established that in the case of an inconsistency between the recitals and the operative part of a contract, the operative part prevails: see Lewison, *The Interpretation of Contracts* (6th Ed 2015), at 10.14.

42. Applying that principle here, clauses 2.1 and 3.1 in the Deed of Covenants must prevail over the recital in the Mortgage insofar as they are inconsistent. Insofar as the mortgage misdescribes the Deed of Covenant, the parties must have intended that the Deed of Covenant would prevail.

43. The proper construction of the Deed of Covenants and mortgage read together is therefore that the €5million limit was only to apply to the principal sum due under the loan facility and the "*interest, costs and expenses of collection"* also guaranteed by the Deed of Covenant was not so limited. Further, the background against which the parties' Agreement must be construed supports this construction. In particular, the Side Letter specifically provided "*The Yacht Mortgage shall now be restricted to a* ***principal*** *amount of €5,000,000*" (**emphasis** added). This indicates that the parties' intention was for the limit only to apply to the principal sum and not to interest on that sum or costs and expenses of collection.

Interest

44. The amount of interest claimed on the sum of €5 million has been set out in a schedule prepared for the trial. Although the notice of default was issued in June 2018 it is clear from clause 13.2 of the facility letter that the interest runs from the date of the default. The schedule therefore assessed interest as from 18 January 2018 immediately after the first event of default. The rate of interest claimed is 6.625%. That is made up of the interest rate of 3.625% provided by clause 7 of the Third Amendment Letter plus the penalty rate of 3% in clause 8.3 of the Facility Letter. Interest was compounded in accordance with clause 8.2 of the Facility Letter. It was compounded monthly whereas clause 8.2 envisaged that it would be compounded daily. This is a concession for the benefit to the Defendant. It therefore appears to me that the interest claimed as at 15 January 2020 in the sum of €713,528.02 has been correctly calculated.

Costs and expenses of collection

45. Clause 3.2 provided that the mortgage was to secure not only payment of €5 million plus interest but also the "the costs and expenses of collection".

46. Following the arrest of the yacht the Claimant took out port risk insurance on the yacht because, as explained in evidence by Mr. Tim Pereira, the credit risk manager of the Claimant until his retirement in August 2019, there was no evidence that the yacht was insured and there had been problems with the insurance on the property in France. The premiums paid from June 2018 amount in total to €99,000. In addition, the Claimant, from January 2019, instructed a company to inspect and maintain the yacht whilst under arrest. The fees charged were in total £103,197.26. Further, the Claimant incurred the mooring and electricity costs of the yacht whilst under arrest in Southampton from September 2018 in the total sum of £98,554.33. Finally, premiums in the total sum of €5,508.82 in respect of mortgagee interest insurance were paid from January 2018. The purpose of this insurance was to protect the Claimant in the event that the underwriters of the port risks policy did not respond to a claim.

47. These costs, which have been proved by the provision of invoices and the evidence of Mr. Pereira and Mr. Ilghiz Fazylov, Mr. Pereira's successor, are secured by the mortgage to the extent that they costs or expenses of "collection". I accept that the costs of inspection, maintenance and electricity are costs of "collection" because they are incurred to ensure that the sums secured by the mortgage can be recovered or "collected" from the proceeds of sale of the yacht. Similarly, I accept that the costs of insurance are costs of "collection" within the meaning of the Deed of Covenant because they are incurred to protect the mortgagee's interest in the yacht and so enable the mortgagee to recover or "collect" in respect of the sums secured by the mortgage. Indeed, clause 6 of the Deed of Covenant acknowledges the mortgagee's right to protect or maintain its security by insurance.

Conclusion

48. The court will therefore give judgment for the sums claimed in the Amended Particulars of Claim.

49. Ancillary orders, such as an order for the yacht to be appraised and sold, may be addressed when judgment is handed down.