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IN THE HIGH COURTS OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 12th May 2011

BEFORE:

MR JUSTICE STEEL

BETWEEN:

STELLAR SHIIPPING COMPANY LLP

Claimant

and

COSCO (DALIAN) SHIPYARD COMPANY LIMITED

Defendant

MR COGLEY QC (instructed by Stephenson Harwood) appeared on behalf of the Claimant

MR HOFFMEYER QC (instructed by MFB Solicitors) appeared on behalf of the Defendant

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Approved Judgment

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MR JUSTICE STEEL:

1. This is an application to discharge an injunction obtained ex parte without notice on 29th March 2011. The original return date was 15th April, which was adjourned until 20th April, and then again until 5th May, and yet again to another judge to have some opportunity of reading into the matter and then it came on for hearing eventually on 9th May. The estimate for the hearing was half a day, but in fact the hearing lasted no less than two days.

2. The background is a shipbuilding contract dated December 2006, for the construction of a 79000 ton deadweight bulk carrier with a sale price of $49.8m payable in five instalments. The contract included a London arbitration clause. The Defendants (who I will call the sellers) purported to cancel the contract on 21st October 2010. The Claimants (who I will call the buyers) contend that the cancellation was non-contractual and invalid on the basis that there had been certain extensions of time for the payment of instalments that would otherwise have come due. Furthermore, the buyers seek damages in respect of certain alleged defects in the vessel and failure on the part of the sellers to comply with the specification in performing the building. The vessel was launched in December 2010. She completed her sea trials about a month ago and is now ready for delivery.

3. The present state of play is rather bizarre. Both the sellers and the buyers would be content for the vessel to be delivered on payment of the balance of the purchase price, with reservation for arbitration of outstanding claims for damages in due course. Despite this common ground (involving, the buyers say, a sea change in the attitude of the sellers), the parties have been unable to resolve their dispute leaving the vessel moored up, presumably in the yard's premises in Shanghai.

4. The principal sticking point, as I understand it, is a dispute as to the appropriate period for which interest is due on the outstanding instalments. Those outstanding instalments amount to $15m. At most, the difference between the parties amounts to some $500,000 and may be much less. It is sad to record that the parties have probably incurred costs in that region in the present proceedings alone before any progress is made in the arbitration.

5. Although the buyers had warned the sellers of their intention to seek injunctive relief in correspondence, the original application to Burton J was made ex parte and without any notice of the hearing at all. He granted the order sought. In the result the sellers were restrained from selling the vessel, which has the yard number N243, to any party in any jurisdiction other than the buyer, pending the outcome of an arbitration. When that arbitration would be complete remains obscure, but the issues are substantial and it is likely to be measured in many months.

6. The sellers seek to set aside that order and that application is based on four propositions. First, it is said the case was not one of urgency as to confer jurisdiction on the court under s.44 of the Arbitration Act 1996. Moreover, if it be relevant, any urgency in regard to the alleged threat of a sale to a third party cutting out the buyers did not justify the absence of any notice of the hearing. Secondly, that there was no basis to suppose that the damages would not be an adequate remedy. Thirdly, that there was reason to doubt the adequacy of damages as a remedy for the sellers and, fourthly, if the matter was doubtful, the balance of convenience was, it was contended, in the seller's favour.

7. The threshold issue was or at least is this. If there was no urgency, absent which the court had and has no jurisdiction to grant injunctive relief, it follows that the injunction should be set aside, disregarding, for all purposes at present, that the tribunal has already been constituted, at least by the time of the hearing before me, and no permission to make the application had been sought from the tribunal. The basis on which the buyers contended that the case was one of urgency was the existence of grave concern that the sellers would purport to invoke Article 11.5 of the contract and then fail to comply with it or use it in a non-contractual manner:

8. Article 11.5 reads as follows:
"Article 11.5

SALE OF THE VESSEL

(a) In the event of cancellation or rescission of this Contract as above provided, the SELLER shall have full right and power either to complete or not to complete the VESSEL as it deems fit, and to sell the VESSEL at a public or private sale on such terms and conditions as the SELLER thinks fit without being answerable for any loss or damage occasioned to the BUYER thereby.

In the case of sale of the VESSEL, the SELLER shall give telefax or written notice to the BUYER and the BUYER shall be entitled to bid for the VESSEL at a public auction or to make an offer to buy the VESSEL if it receives notice from the SELLER of its intention to sell it privately.

(b) In the event of the sale of the VESSEL in its completed state, the proceeds of sale received by the SELLER shall be applied firstly to payment of all expenses attending such sale and otherwise incurred by the SELLER as a result of the BUYER's default, and then to payment of all unpaid instalments and/or unpaid balance of the Contract Price and interest on such instalment at the interest rate as specified in the relevant provisions set out above from the respective due dates thereof to the date of application.

(d) In either of the above events of sale, if the proceed of sale exceeds the total of the amounts to which such proceeds are to be applied

> as aforesaid, the SELLER shall promptly pay the excesses to the BUYER without interest, provided, however that the amount of each payment to the BUYER shall in no event exceed the total amount of instalments already paid by the BUYER and the costs of the BUYER's supplies, if any.

9. The buyers were contending that the liberty to sell that would otherwise arise under that Article had not arisen, because the cancellation purportedly made was invalid and this will, in due course, be the major matter or a major matter for consideration by the arbitral tribunal. It is material to note in passing that the fact remains that neither instalment 2 or 3 was paid by the buyers (the sellers recovering against certain guarantees). In the result, notice of cancellation was given by the sellers five months before the hearing before Burton J, at a time when, on the seller's case at least, the instalments were long overdue. The focus of the buyer's concern was, or at least is now, what appeared to them to be threats to sell the vessel to a third party within hours or at least the failure to give any assurance that they would not do so and in the process to complete that sale without according any notice to the buyers or even allowing them to make an offer or as would otherwise be in accord with Article 11.5. Indeed, as regards, again as I understand it, the justification for giving no notice of the application hearing, the buyers went so far as to say that there was a real risk that the notice period, however short, would actually be used by the sellers to effect the sale to a third party. Furthermore, as I understand it, the concerns with regard to the threatened sale extended to the suspicion that the yard would sell not to an independent third party, but to a company associated with the yard itself with an ulterior motive.

10. Matters came to a head in March 2011, but as Mr Cogley QC, who appeared for the buyers said, it is necessary to put those final developments into their factual context and for this purpose I will rely, if I may, upon a useful chronology produced by Mr Hoffmeyer QC, who appeared for the sellers, the contents of which were either uncontroversial or not seriously challenged.

11. As I have already indicated, the shipbuilding contract dates from December 2006. As I understand it, at about the same time there was also a contract for a sister vessel (which plays a part in the story) which had the yard number N242. This had a completion schedule somewhat earlier than 243. Three and a half years or so went by and on 5th May 2010 the second instalment of the purchase price fell due. It was unpaid. In June 2010 the buyers of the two vessels requested an extension of time to make payments with regard to each vessel making promises to make payment fairly promptly, which were not fulfilled. In the result, on 6th July 2010 notice of default in respect of the second instalment was served by the sellers.

12. On 10th August 2010 the buyers told the sellers that its bank had re-valued the vessel at $38m against the contractual purchase price of $49 and was reducing the amount of the loan that it had afforded to the buyers. The next day the buyers

added flesh to that information by saying that it appeared to be short of US$12m in terms of its funding for the two vessels and made a request for a change to the payment terms, which was rejected by the sellers.

13. There was then at the end of August a meeting in Shanghai, the first of a number of meetings between the parties, in respect of which there is some considerable controversy as to what was said and/or agreed. For the moment I need only say that in the August 2010 meeting it is the buyer's case that an extension of time for payment of instalments 2 and 3 was agreed and was to be confirmed in an addendum to the shipbuilding contract, although in the result no addendum was ever executed. Shortly after that meeting the brokers, Braemar, were instructed by the buyers to seek further funding in China, but to no avail.

14. On 1st September the sellers informed the buyers of various problems with implementing the specification under the contract. This is the beginning of the dispute in regard to such matters as the steel used on the hatch covers and the extent to which there should have been a double skin and so on, these being items which form part of the buyer's claim for deficiencies and shortfalls from the spec.

15. On 9th September 2010 the third instalment of the purchase price fell due or at least fell due as the sellers understood the position. On 15th September the buyers promised or confirmed that they would not cancel the contract or purport to cancel the contract in the face of the specification problems, but would look to an adjustment of the price and also added that they would be in a position to make the outstanding payments by mid-October, albeit on the face of it that being a date prior to the extension of time apparently agreed in August. In any event payments were not made in fact and on 26th September 2010 the notice of default in respect of the third instalment was issued by the sellers.

16. There was then a meeting between the parties at the yard on 14th October 2010 and again there were discussions about an extension of time, this time in respect of a period of 10 days. As I understand it there is some dispute as to whether there was any agreement and if so, what the 10 day extension applied to and the extent to which there was any inter-relationship between that extension and the extension said to have been agreed earlier. Once again these are matters which may in due course have to be determined by the arbitrators.

17. Importantly, on 21st October 2010 the sellers issued a notice of cancellation on the basis that on their understanding the second instalment had been overdue for about six months and the third instalment overdue for about 40 days. In fact, notice of cancellation on that day was also issued in regard to N242 for non-payment of the fourth instalment due on that vessel. The detail is not before the court, but during the course of late 2010 it is clear that the seller or sellers were indicating that they were disposed to invoke the Article 11.5 rights of sale in regard to N242 and indeed, on 13th January 2011 the sellers told the buyer that if it was interested in buying 242 it should put together its best offer. In fact, following negotiations between the parties N242 was delivered to the buyers on 11th February 2011, that is about a month later. An agreement, as I understand it,

had been reached whereby the purchase price would be reduced by US$1m, but in return that any claim in regard to the condition of the vessel or its compliance with the specification should be abandoned.

18. On 2nd March 2011 there was another meeting between the parties. Again, I will not go into the detail of the evidence, but in very summary form it is contended by the buyers that during the course of the meeting the sellers threatened that if the buyers were not disposed to enter into an agreement the same as or similar to that reached in regard to N242 they, they sellers, would invoke Article 11.5, but in doing so nonetheless would ensure that the vessel was sold to a third party other than the buyers and indeed prevent the buyers making any bid by failing to give them any notice of the sale.

19. The buyers have also adduced some evidence to the effect that the brokers had passed on a similar threat later in March. The buyers instructed solicitors and on 21st March 2011 their solicitors wrote to the sellers asking them to confirm, as it was put, that they would deliver the vessel to the buyers in accordance with the shipbuilding contract and raising the question as to whether the buyers were proposing to sell the vessel to a third party and, as I think I have already indicated, threatening to seek injunctive relief. The sellers were asked to respond promptly within 48 hours. Indeed they did so on 23rd March and made it plain that it was their position that the contracts had been cancelled and thus they, the sellers, would take action as per Article 11.5 of the contract "later."

20. Almost immediately, that very same day, the buyer's solicitors wrote again demanding confirmation again, with the period of 48 hours, that the vessel would not be sold to any party other than the buyer pending the outcome of the arbitration proceedings. By this stage the buyers had appointed an arbitrator and it was suggested in the letter of 23rd that the arbitration be expedited, although perhaps it should be noted there was no request that the sellers should appoint their arbitrator promptly or even arequest that they waived the entitlement to take 20 days to do so. There was no reply to that letter and on 29th March 2011 the buyers made the without notice application to Burton J.

21. Before turning to the issue of urgency and the absence of any notice of the hearing, there is just one point that perhaps should be made by way of introduction. It has to be borne in mind that the injunction was granted by Burton J, if I may respectfully say so, an extremely experienced colleague in the Commercial Court. There is a short note of the hearing, although it is pretty unrevealing, but it can be treated I think as a given that he would have given consideration to the issue of urgency. But this is not an appeal against the decision of Burton J, but a rehearing and with the benefit of evidence adduced by the sellers and further evidence adduced by the buyers and the benefit of argument from counsel for the Respondents.

22. As regards the absence of any notice of the hearing, I confess I am somewhat surprised that such was thought by the buyers to be appropriate. Ex parte applications without any notice are to be avoided, except in cases where the risk of action rendering the application redundant as a result of the notice goes almost

without saying. But here the letters notifying the other side of the potential application for an injunction had been given eight days earlier and again six days earlier and if a sale was to take place within hours, one might have expected it would have been accomplished. The rules only require three days notice and even short notice of one day only would have been better than none. That said I regard the issue of the absence of notice as in effect been overcome by events. The essential question is one whether there was sufficient urgency to justify not arranging for the constitution of the tribunal in the first place and then seeking their permission. But one is left with the impression, and maybe it is superficial, that the application for an injunction was governed more by tactical considerations than by careful consideration of the need, if possible, to give proper notice to the opponents.

23. The buyers have put forward a number of matters in support of the case on urgency. Some of these (and I will refer to it in a moment) have rather faded from the scene leaving two principal alleged concerns. First, the alleged lack of adequate response to the solicitor's letters in late March and second, the alleged threats to sell only to a third party, cutting out the buyer. Whilst those are now the principal concerns it is striking that before Burton J "The biggest cause for concern," was put forward as being the lack of clarity in regard to the effect and meaning of Article 11.5. This was said to give potential to the sellers to exercise some form of leverage. In particular it was suggested that the uncertainties of the clause were such that they might be able to serve a notice of sale without any deadline and then sell the vessel within hours. This concern in the event formed no part of the submissions on behalf of the parties before me. This is perhaps not surprising, since the terms, I would respectfully suggest, are entirely clear. Indeed, they are almost standard terms in shipbuilding contracts and the arrangements that were duly made in respect of hull 242 were entirely consistent with that. The discussions to reach an accommodation extended over a period of several weeks and there is no evidence before me of an attempt meanwhile to sell to a third party cutting out the buyers.

24. The second cause of concern raised before Burton J, was the alleged evasive responses to the request for information made by the solicitors. I have already referred to the two letters written on 21st March and 23rd March. Whilst the first was responded to the second was not in the lead up to the application on 29th. In this connection in considering the urgency or otherwise of the matter, it has to be borne in mind that when these exchanges were taking place the sea trials had yet to be completed and the vessel was a month short of being ready for delivery.

25. The initial letter of 21st March is notable in various respects. First, it contended that whether or not cancellation was legitimate, the sellers had in fact affirmed the contract. Indeed, the buyer's position was that there was good and proper liaison with the brokers for the conduct of the sea trials and the subsequent delivery, despite the fact that the sellers were purporting to be in a position to cancel the contract.

26. So far as clarification of the seller's intentions with regard to the sale of the vessel to a third party was concerned, a response was sought within 48 hours, I

assume a period chosen to reflect the sort of time in which matters could be taken by the sellers in respect of a sale to the disadvantage of the buyers. The answer duly came within that 48 hour period. It was pretty brief. It simply said:

> "We are regret to receive your below email and we have to inform you again that it is in undoubt and indisputable that Stellar Shipping Co., LLC has been in repudatory breach of the shipbuilding contract which directly caused the Shipbuilding contract of N243 which directly caused the Shipbuilding contract of N243 to be terminated by our Notice of 21st October 2010.
>
> Under the precondition of the contract termination, we will take action as per contents of Article XI 5 of the Contract N243 later."

As I see it, given the clarity of Article 11 and the machinery that it establishes, it is difficult to see in what respect further information was needed with regard to the intentions of the sellers.

27. The next letter, as I have stated, was by return. It notified the sellers of the appointment of an arbitrator and the request was made to the buyers not to invoke Article 11.5 until after the arbitration was complete. There was no answer to that letter within 48 hours the time once again set, or at all. And that is perhaps not surprising, since the sellers had made it entirely clear that they maintained there had been a valid cancellation and therefore, they were in a position to invoke Article 12.5.

28. The buyers had suggested an expedited hearing, although had not encouraged, the early appointment of the seller's arbitrator. In my judgment, there is no basis for saying against this background that the buyers viewing the correspondence in isolation were somehow to be shut out of the Article 11 sale, assuming the cancellation was valid or, that if the cancellation was invalid a sale would or even could be accomplished before the tribunal was in place. Again, viewed in isolation the suggested evasiveness of the seller's responses in my judgment is not made out. Perhaps all the more so now the suggestion of any lack of clarity on the part of the Article 11 machinery is no longer suggested.

29. The third ground for concern raised before Burton J was the seller's behaviour "in regard to hull 242." I confess I do not understand this to add anything to the point that the responses of the sellers in regard to 243 were vague.

30. It is the fourth ground for concern which is of the greatest importance in the debate before me. This was put to Burton J on the basis that comments had been made by the brokers to the effect that, unless the buyers agreed to take 243 on the same terms as 242, the vessel would be sold to a third party connected with the sellers. That is the nature of the concern as put to Burton J. Since that hearing these brokers comments are, it is suggested, supported by some additional evidence filed by the buyers by reference to the observations which I have referred to said to have been made a the 2nd March meeting.

31. There are undoubtedly some difficulties with the buyer's case in this regard. First, there is later evidence produced by the sellers from the brokers themselves, which is inconsistent with the suggestions made by the buyers. Secondly, that the buyer's version as to what the threat was made up of is somewhat variable. It was said that the broker's position was that the sellers were threatening a quick sale in contrast to the buyer's position in the light of the meeting on 2nd March, was that there was a threat of the imposition of different and difficult terms in any sale.

32. But perhaps most striking of all is that neither of the letters from the solicitors, to which I have referred, written by way of notice of intended applications for injunctive relief makes any reference whatsoever to the threats now relied on, despite the fact they had been made earlier in the very same month. To the contrary, they rehearse the fact that the brokers are liaising for the purpose of the sea trials and indeed, the point is made that the sellers had affirmed the contract rather than threatened to break it.

33. There is another difficulty, in my judgment. The suggestion that the threat, and again there is detail on the content of the threat, had remarkably varying formulations. One of them was to the effect, and this was the point put to Burton J, that the threatened sale would be to a connected party i.e. I assume a party associated with the sellers. This is said to give rise to a concern that the sellers would abuse Article 11.5 by selling at a below market rate to the connected party and then selling on at a market rate to a third party, an independent third party, and pocketing the difference. In my judgment, there is simply no evidence whatsoever to support this allegation of in effect dishonesty.

34. This allegation was said to be supported by some further material, which was adduced before me. It dealt with the content of the website, which was said to record a transfer of the registration of the vessel from the buyers to a company called Fleet Management on 30th April 2011. But in my judgment, this is of no assistance, let alone in support of the allegation of sale to a connected company with the intention to have a double sale or even with the threat to cut the buyers out altogether. Firstly, a secret sale does not seem to be consistent with the allegation of a threat to sell to a third party unless there was a settlement. Second, the website concerned has a disclaimer and in one respect it is clearly erroneous. The buyers could not have possibly been the registered owners before delivery. Thirdly, the alleged transfer actually occurred a month after the injunction was sought and fourthly, it would appear from some other evidence that it more likely that any change in registration was undertaken for the purposes of sea trials as a matter of Chinese law. It is thus material that cannot be relevant to the question of the state of play on 29th March.

35. In summary, I am not persuaded on the material available, assisted as I am by submissions from both parties, that there was any or any sufficient urgency to permit the buyers to invoke s.44. I am not minded to accept that there was any genuine concern that the vessel might be sold to a third party in a matter of hours cutting out the buyers i.e. that the yard would completely disregard their contractual obligations. There was, it seems to me, no basis for thinking the

sellers would not properly proceed in accordance with Article 11.5, give notice to the buyers and allow them an opportunity to bid. Indeed, for my part I can see no possible motive for the sellers adopting any other course which would only increase their exposure in the arbitration. The suggested motive of making a corrupt profit by selling in-house I have rejected. There was no urgency which, in my judgment, inhibited the appointment of a tribunal in good time to make an application or at least to seek permission to apply to the court and it follows that the injunction must be set aside.

36. Although not strictly necessary, I go on to consider the merits of the application. The debate before me primarily centred on the issue as to whether damages were an adequate remedy for the buyers. Let me put one point aside, it was said by the buyers that since the same issue would arise in the arbitration by virtue of the claim that would be made for specific performance I should not rule on this topic and simply leave that matter to be left to the arbitrators. This was said to be permissible under s.44.6 of the Arbitration Act.

37. In my judgment, that proposition is not arguable. On the basis that s.44 is engaged and that is the premise for this part of the case, the court must necessarily consider the validity of the ex parte order at the inter partes hearing. The only relevant order for the purposes of s.44.6 would be an injunction preserving the assets granted by the court and it is that order which the court is enabled to permit the tribunal to determine as to when it would cease to have effect. There is no basis for allowing the court to determine some of the relevant issues, such as a good arguable case or the balance of convenience, but leave other issues such as the adequacy of damages and indeed the overall decision on the appropriateness of an injunction to the tribunal.

38. The general approach to an injunction of this kind is set out in the judgment of Clarke J Sabmiller Africa v. East African Breweries [2010] 1 Lloyd's Reports 392 and I will not repeat them. It is common ground that there is a serious issue to be tried. So the first question is, would damages be an adequate remedy and in that regard I suppose the initial point is whether the sellers are in a financial position to meet a claim for damages. This is not admitted, although no positive case is advanced. But in my judgment, on any realistic basis it must be accepted that the sellers are a well funded state enterprise with a substantial income and significant assets. The buyer's potential claim for losses accruing by reason of having to engage other vessels and perhaps more modest vessels to carry out their trade is going to be a relatively small claim. China is a signatory to the New York Convention. I conclude the sellers are probably able to meet any legitimate claim which may be advanced in the arbitration.

39. What about adequacy of damages as such. The buyer's case, and the onus is on them, is that vessel 243 has a sufficiently unique quality to disqualify the presumption that non-delivery of a chattel could be recompensed in terms of damages. The leading authority in the field of ships is Societe des Industries v. Bronx [1973] 1 Lloyd's Reports 465. In summary, the Court of Appeal concluded: (a) that a vessel as such does not have the necessary unique quality, (b) this is so even where it is urgently required and a replacement might not be

available for another year and (c) that the mere fact that quantification lost maybe difficult is irrelevant or at least not significant.

40. The alleged unique quality of 243 is said to arise from one feature only, namely that she is a geared Kamsarmax, which can be employed in trades where discharge is made to lighters. But even assuming that this vessel is unique, the buyers are not going to be prevented from purchasing her and using her. If Article 11.5 is invoked the buyers have in effect the first call on it. As the buyers emphasise, it is ready for immediate delivery. The price to be paid, other than perhaps the cost of sale, would be merely the outstanding instalments under the contract. And it follows that from the trading perspective there will be no prejudice and it follows that, in my judgment, that damages must be an adequate remedy.

41. But leaving that point aside, the evidence establishes that she is not unique. Apart from 242 there are 43 other geared Kamsarmaxes in operation. Although none are presently available for purchase a few may be available for charter. Even absent a similar ship for purchase or charter, the buyers could make use of the myriad of smaller geared bulkers until the replacement could be obtained or built. There is also the possibility of installing cranes on an existing similar un-geared vessel.

42. Against all that background I conclude that damages are an adequate remedy to the buyer and, that even if this was a case in which urgency was established, injunctive relief would not be appropriate.

(Post Judgment Discussions)

Cost Judgment

MR JUSTICE STEEL:

1. Well, the buyers must pay the seller's costs, save for the costs thrown away by the hearings on 15th and 20th April, in respect of which I make no order.

2. There will be a payment on account of £50,000. That would, in the normal run, be payable in 14 days.

(Further Post Judgment Discussions)

Ruling

MR JUSTICE STEEL:

1. Well I have listened carefully to Mr Cogley's helpful submissions and sought to review the conclusions I reached. I am not persuaded that there would be a realistic prospect of success either on the issue of urgency or even if that was overcome, on the issue of the adequacy of damages. I believe the relevant legal principles have been applied properly. That I have not taken account of anything

that is irrelevant or failed to account of relevant material. It seems to me that the court has carefully exercised its discretion in regard to this form of relief and I must refuse leave to appeal.
