Neutral Citation Number: [2019] EWHC 2918 (Comm)

Case No: CL-2018-000440

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

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 01/11/2019

Before :

MR JUSTICE PHILLIPS

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Between :

(1) TMF TRUSTEE LIMITED **(2) TMF GLOBAL SERVICES (UK) LIMITED** **(3) BURLINGTON LOAN MANAGEMENT DAC** **(4) BANK OF AMERICA N.A** **(5) HAWKES VIGO IV CORP**	**Claimant**
- and -	
(1) FIRE NAVIGATION INC **(2) HURRICANE NAVIGATION INC** **(3) OD INVESTMENT LTD** **(4) OXYGEN MARITIME MANAGEMENT INC** **(5) IGOR VIATCHESLAVOVICH KOZIN**	**Defendant**

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Robert Bright QC and Charles Holroyd (instructed by **Reed Smith LLP**) for the **Claimants**
James Collins QC and John Snider (instructed by **Holman Fenwick Willan LLP**) for the First to Third **Defendants**

Hearing dates: 24 May and 19 June 2019

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Judgment Approved by the court

Mr Justice Phillips :

1. By a loan agreement, originally dated 29 June 2009 but amended and re-stated on 23 December 2016 ("the Loan Agreement"), the third and fourth claimants ("the Lenders") provided the first and second defendants ("the Borrowers") with a loan facility of US$69,020,047 to finance the acquisition of two vessels, the Megacore Honami and the Megacore Philomena ("the Honami" and "the Philomena"). The first and second claimants were parties to the Loan Agreement as Security Trustee and Agent respectively. By a deed of Guarantee dated 31 July 2013 the third defendant guaranteed the obligations of the Borrowers under the Loan Agreement.

2. The Loan Agreement provided, at clause 21.1, that "all amounts due from the Borrowers … shall be paid (a) without any form of set-off, cross-claim or condition …" ("the No Set-Off Clause").

3. The first defendant purchased the Honami and the second defendant purchased the Philomena. Each of the Borrowers granted a mortgage over its vessel to secure the obligations under the Loan Agreement, the mortgagee now being the first claimant. The fifth claimant is said to be the assignee of the Lenders' rights under the Loan Agreement.

4. The Loan Agreement obliged the Borrowers to repay the facility in 11 equal quarterly instalments, with a final "balloon" payment of approximately US$40 million on the Maturity Date (defined as 31 December 2017, but requiring payment on 29 December 2017, the immediately preceding Business Day). By clause 18.1(a), non-payment when due or demanded was an Event of Default.

5. On 20 October 2017 the second claimant purported to serve an Acceleration Notice under the Loan Agreement, based on an alleged failure of the Borrowers to pay additional security for the Loan. The defendants dispute the validity of that notice and, as explained below, its invalidity is to be assumed for present purposes.

6. The defendants did not repay the principal sum of US$34,287,297.61 following service of the purported Acceleration Notice. Neither did they make repayment on 29 December 2017.

7. On 18 December 2017 the first claimant caused the Philomena to be arrested at Los Angeles and thereafter successfully applied in California for a court sale of the vessel (the vessel being sold at auction for US$19,000,000 to the fifth claimant) and summary judgment on its claim in rem for US$34,287.297.61 plus interest. The court did not determine the validity of the acceleration, but acted on the basis that the Loan would in any event have become repayable on 29 December 2017.

8. The claimants commenced these proceedings on 28 June 2018, seeking payment of the principal and interest said to be due under the Loan Agreement, their primary case being that the Loan had been validly accelerated on 20 October 2017, but in the alternative alleging that it was in any event repayable on 29 December 2017.

9. Following interim orders of Andrew Baker J in this court dated 22 and 25 September and 18 October 2018, the first claimant obtained possession of the Honami and sailed her to Singapore, where the first claimant caused the vessel to be arrested. The first

claimant has applied in Singapore for a judicial sale of the vessel and intends to progress the proceedings in that jurisdiction to a judgment in rem enforceable against the proceeds of sale.

10. The claimants now apply in these proceedings for summary judgment against the first to third defendants ("the defendants") for a money judgment, but primarily for declarations that (i) the principal amount of the Loan became repayable no later than 29 December 2017; and (ii) that an Event of Default under the Loan Agreement occurred no later than that date.

11. Mr Bright QC, for the claimants, emphasised that the primary purpose of the application is to obtain a determination that there has been an Event of Default under the Loan Agreement, both (i) to demonstrate that the interim orders of this court were rightly granted and (ii) to assist the first claimant in enforcing its security over the vessels in the proceedings in California (at the appellate level) and in Singapore. Mr Bright further stressed that the claimants were not interested in enforcing any judgment against the first and second defendants (other than by exercising their existing security rights) and would undertake not to apply to wind up the Borrowers, ensuring that the Borrowers would be able to pursue their cross-claims.

12. The claimants further accepted, but only for the purpose of this application, that the court should proceed on the basis that the claimants' purported acceleration notice was invalid and ineffective, that the arrest of the Philomena was therefore unlawful, that the claimants were thereby in repudiatory breach of the Loan Agreement, that such breach had caused the Borrowers inability to repay the Loan at maturity and that the Borrowers have a valuable cross-claim as a result.

13. Mr Bright submitted that, even on the above basis, the claimants are entitled to summary judgment as (a) the assumed repudiation of the Loan Agreement was never accepted by the Borrowers, so the Loan Agreement was in force at the Maturity Date, at which point the Loan became repayable and (b) the No Set-off Clause prevents the defendants from resisting such judgment (or obtaining a stay) on the basis of the assumed wrongdoings of the claimants, or any cross-claim to which they give rise.

14. Mr Collins QC, for the defendants, developed two alternative defences to the claim, each of which he submitted had a real prospect of success. The first was that the Loan Agreement was terminated before the Maturity Date because either (i) the claimants' repudiatory breach was such that the Loan Agreement terminated automatically; or (ii) the Borrowers accepted the claimants' repudiation by their conduct in failing or refusing to perform their own obligations thereafter. The second (alternative) argument was that, as it is accepted (for present purposes) that the claimants caused the Borrowers' inability to repay the Loan on maturity, the Borrowers have a defence based on the broad "prevention principle", namely, that a party in breach of contract is excused where he has been prevented from performing the relevant obligation by the breach of the other party. Such a defence, Mr Collins argued, is not by way of set-off of a cross-claim, and so does not fall foul of the No Set-off Clause.

15. For reasons set out below, I consider that Mr Collins' second defence has at least a real prospect of success (on the basis assumed for the purposes of this application), requiring the refusal of the current application, with the result that the claim will proceed to trial. In those circumstances I do not propose to express a view on the first

defence, which in my judgment is highly fact-sensitive. Neither is it necessary for me to consider Mr Collins' further arguments that there is in any event "some other compelling reason" why the case should proceed to trial.

16. There is a subsidiary dispute between the parties as to the default interest rate applicable. As that issue turns purely on the proper interpretation of the relevant provisions of the Loan Agreement, and as it was argued fully, with no suggestion that further evidence could be relevant, I will determine the matter below.

The essential facts

17. On 8 September 2017 the second claimant served a notice that the loan-to-value ratio between the fair market value of the vessels was less than provided for in the Loan Agreement, requiring the Borrowers to rectify the shortfall within a month by pre-payment or provision of additional security ("the LTV Notice"). The stated amount of the shortfall in the LTV Notice was some US$400,000 greater than it should have been at the date of service.

18. On 5 October 2017 the Borrowers emailed the Lenders informing them of the intended sale of the vessels, attaching signed Memoranda of Agreement ("the MOAs") in relation to such sale, and seeking a waiver of the shortfall.

19. On 20 October 2017, as the Borrowers had not remedied the shortfall (and no waiver had been agreed), the second claimant served the purported Acceleration Notice, stating that the Loan and all accrued interest was immediately due and payable and demanding immediate repayment. The claimants took no steps to enforce against the vessels because of the purportedly imminent sales.

20. Following service of the Acceleration Notice, the parties entered into without prejudice negotiations for a standstill agreement to permit the orderly sale of the vessels or the refinancing of the loan. However, no standstill was agreed.

21. On 13 November 2017 the Borrowers emailed the Lenders saying that the delivery date under the MOAs had been pushed back to between 15 December 2017 and 15 January 2018. By mid-December 2017, the Lenders considered that the sales were unlikely to materialise.

22. On 15 December 2017 the first claimant issued proceedings in the US District Court for the Central District of California – Western Division against the Philomena *in rem* and the second defendant *in personam* to enforce its mortgage. On 18 December 2017 the first claimant caused the Philomena to be arrested at Los Angeles. Subsequently the Philomena was sold at auction to the fifth claimant at the court-determined minimum price of US$19,000,000 under an order for sale obtained by the first claimant.

23. Between January and August 2018, the first claimant sought to arrest the Honami but she evaded arrest. Andrew Baker J granted an urgent *ex parte* injunction on Saturday 22 September 2018 which resulted in the first claimant gaining possession of the Honami (and on 19 October 2018 dismissed an application by the first defendant to set it aside). The Honami remains under arrest. The first claimant has issued proceedings in Singapore for judicial sale of the vessel *pendente lite*.

The assumed position for the purposes of this application

24. For the purposes of this application only, the claimants accept that certain matters set out in the third witness statement of Charilaos Loukopoulos dated 5 April 2019 should be assumed to be correct. The relevant matters are as follows:

> *"13…the Lenders:*
>
> *a. issued (through TMF) a loan to value notice on 8 September 2017 […] ("the LTV Notice") demanding additional security or prepayment to eliminate an alleged shortfall in security required under the Loan Agreement in circumstances where (i) the shortfall was materially and recklessly overstated by TMF, and not calculated as required by the Loan Agreement due to failure to take into account sums held in "Retention Accounts" […], (ii) the shortfall was calculated in reliance on valuations of the vessels which did not conform with the requirements provided for in the Loan Agreement and (iii) the information in the LTV Notice was deficient and incomplete;*
>
> *b. orally consented to obviously reasonable sales of the vessels pursuant to MOAs dated 4 October 2017 at sums which would pay off the loans with return of substantial equity to the Borrowers but, at the same time, sought to extract unreasonable terms from the Borrowers in a "Standstill Agreement" as the price of deferring enforcement of the Acceleration Notice. [sic]*
>
> *c. issued (through TMF) a notice on 20 October 2017 […] ("the Acceleration Notice") purporting to accelerate the repayment of the loan based on the LTV Notice in circumstances where the [Third and Fourth Claimants], through TMF, had readily available information which showed that the LTV Notice overstated the amount of the shortfall;*
>
> *d. in circumstances where the Borrowers reasonably would not agree the unreasonable terms of the "Standstill Agreement", wrongfully arrested the "Megacore Philomena" in California in December 2017 in reliance on the Acceleration Notice thereby causing (i) the cancellation of MOAs which had been entered into for the sale of the vessels, (ii) damage to the marketability and value of the vessels, (iii) inability of the Borrowers to repay the loan and (iv) loss and damage to the Borrowers.*
>
> *14. I believe that by the wrongful actions to which I have referred above, the Claimants have repudiated or renounced the Loan Agreement, and committed actionable wrongs, and have caused loss and damage to the Borrowers which they are entitled to recover from the Claimants…."*

25. As acknowledged in the thirteenth witness statement of Charles Grainger Weller dated 8 May 2019, the claimants are therefore content for it to be assumed that they "*were in repudiatory breach of the Loan Agreement, that the breach caused the borrowers to be unable to repay the Loan on maturity and that the Borrowers have a valuable counterclaim for damages arising from the assumed breach*".

The "prevention principle"

26. Mr Collins emphasised that the defendants were not asserting (at least at this stage) that the Borrowers' repayment obligations under the Loan Agreement were subject to an implied duty of cooperation (or non-prevention) on the part of the claimants so as to engage the principle recognised in cases such as *Mackay v Dick* (1881) 6 App Cas 251 and *Law Debenture Trust v Ukraine* [2019] 2 WLR 655. It was accordingly not the defendants' case that a mere failure of the claimants to cooperate in the sale of the vessels (or even to hinder such sales), thereby preventing the Borrowers from repaying the Loan, gave rise to a defence to a claim for such non-payment.

27. The defendants instead rely upon the common law principle that a party in breach of contract cannot rely upon his own wrong, the corollary of which being that the party in breach is excused if such breach was caused by a prior breach by the other party.

28. Thus in *Roberts v The Bury Improvement Commissioner* [1870] L.R. 5 C. P. 310 a contractor's failure to begin works on time was caused by failure of the employer supply plans and lay out the land within a reasonable time, in breach of an implied obligation to do so. The majority of the Court of Exchequer Chamber held that the contractor's breach was not actionable. Blackburn and Mellor JJ stated that:

> "*... it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself .. and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract*".

29. Kelly CB and Channell B expressed the principle as follows:

> "*... the rule of law applies which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party.*"

30. In *Alghussein Establishment v Eton College* [1988] 1 WLR 587 the House of Lords affirmed that it was established by a long line of authority that a party will not in normal circumstances be entitled to take advantage of his own breach as against the other party. The principle was not limited to cases in which a party was seeking to avoid a contract.

31. More recently, in *Stolt Tankers Inc v Landmark Chemicals SA* [2002] 1 Lloyd's Rep 786, Andrew Smith J considered the question of whether a charterer's obligation to

pay demurrage to the shipowner for delay in loading or discharging the vessel was dependent on the owners fulfilling a qualified obligation to have the vessel ready and able to give discharge in accordance with the contract. In finding that the charterer's obligation was so conditional, Andrew Smith J. cited the following dictum of Lord Esher MR in *Budgett & Co. v Binnington* [1891] 1 QB 35:

> "*Speaking generally of all contracts a breach is excused where the party committing the breach has been prevented by the other side from carrying out his contract. Here the condition is that the cargo should be out of the ship in a certain number of days: and if the shipowner, by an act of his, has prevented the discharge, then, though the freighter's contract is broken, he is excused.*"

32. Mr Bright did not dispute the existence of the prevention principle or its formulation as set out in the above authorities. The claimants' position was that the principle has no application in the present case.

<u>Application of the "prevention principle" in the present case</u>

33. Mr Collins submitted that the principle clearly applied on the assumed facts of the present case: it is expressly accepted that the claimants' repudiatory breach caused the Borrowers to be unable to repay the Loan, so the Borrower's Breach in that regard is to be excused.

34. In the course of argument, I questioned whether, on the assumed facts, the claimants' breach was properly to be regarded as having <u>prevented</u> the Borrowers repaying the Loan. Whilst that breach may have caused the Borrowers' impecuniosity and made it difficult for the Borrowers to fulfil their repayment obligations, it did not necessarily prevent the Borrowers paying in the sense of making it impossible for them to do so.

35. However, as Mr Collins pointed out in response, the assumed basis for the current application is the unqualified acceptance that the claimants' breach caused the Borrowers' inability to repay the Loan, not merely that it caused the Borrowers to be impecunious or to render it difficult for them to pay. I accept that it is at least arguable that the claimants' concession amounts to an acceptance (for present purposes) that the claimants' breach prevented the Borrowers from performing their obligation to repay the Loan at maturity. Mr Bright did not seriously argue to the contrary.

36. The claimants nevertheless contend that they are entitled to summary judgment because of the No Set-Off Clause. Mr Bright submitted that the true basis of the prevention principle is the implication of a term that performance would not be prevented, and that such an implied term could be excluded or otherwise be seen to be inconsistent with another express term of the contract. Whether or not that is indeed the basis of the principle (and the authorities appear to support a broader common law basis), it was recognised in *New Zealand Shipping Co. v Societe des Ateliers et Chantiers e France* [1919] AC 1, referred to with approval in the *Alghussein* case, that the language of a contract could constrain the court to hold that the prevention principle was not applicable.

37. In support of his contention that the No Set-Off Clause has the effect in the present case of excluding reliance by the Borrowers on the prevention principle, Mr Bright relied on *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd.* [2018] EWHC 2977 (Comm), in which Teare J decided that a defence based on alleged breaches of contract by the claimant and the "prevention principle" had no real prospect of success because of no set-off clauses in the relevant contract.

38. However, in that case the relevant clause was, as Teare J expressly recognised, "*rather wider in effect than simple no set off clauses*", including as it did an express provision that no default of the claimant of its obligations under the agreement shall suspend terminate or extinguish the defendant's payment obligations.

39. The *Cargill* case therefore does not provide support for the contention that the No Set-Off Clause excludes the application of the prevention principle, but rather highlights what might be expected by way of excluding that principle, but is notably absent in Loan Agreement.

40. Mr Bright nevertheless argued that a standard no set-off clause should be construed as excluding the application of the prevention principle so as to give effect to the commercial and legal purpose of such clauses, recognised as being to ensure that sums which are otherwise due remain immediately due and payable notwithstanding that there may be other disputes between the parties: see *Credit Suisse International v Ramot Plana OOD* [2010] EWHC (Comm) at [43] per Hamblen J, cited by Teare J in the Cargill case at [18].

41. Mr Bright accepted, however, that he could point to no case in which a no set-off clause had been interpreted as having such wide effect. In my judgment the plain and obvious meaning and effect of the No Set-Off Clause is that the Borrowers cannot resist liability for amounts due by reason of any alleged set-off or cross-claim, but that does not in any way stop the Borrowers from arguing that the amounts claimed are not due in the first place. As Hamblen J stated in *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm) at [329(2)(a)]: "*The clause does not prevent the debtor from contesting whether the sums are actually due. It comes into play only if the sums are either admitted or, if contested, have been proven to be due*".

42. The authorities referred to above demonstrate that the prevention principle "excuses" a breach where performance was prevented by the other party's breach, giving rise to a defence to liability for the breach itself, not merely defence by way of a set-off. The one exception is the reference in *Roberts* to circuity of action, but in my judgment this was by way of explanation of why liability is excused, not an exposition of the mechanics of how the principle is applied. In my judgment, therefore, the No Set-Off Clause does not exclude the application of the prevention principle.

43. For the same reasons as set out above, I see no merit in Mr Bright's alternative argument that, even if the prevention principle applies, there was nevertheless an Event of Default on 29 December 2017. If that principle does apply, the Borrowers were excused performance and so were simply not in default.

44. I therefore conclude that, on the basis of the matters assumed for the purposes of this application, the defendants have an arguable defence to the claim and the application must be refused.

Interest

45. A discrete issue arises as to the default rate of interest payable under the Loan Agreement, centred on the proper interpretation of the provisions relating to the Margin payable. The relevant terms were as follows:

> "*6.2* ***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 per annum determined by the Agent to be 2 per cent above:*
>
> *(a) in the case of an overdue amount of principal, the higher of the rates set out at paragraphs (a) and (b) of Clause 6.3; or*
>
> *(b) in the case of any other overdue amount, the rate set out at paragraph (b) of Clause 6.3.*
>
> *6.3* ***Calculation of default rate of interest.*** *The rates referred to in Clause 6.2 are:*
>
> *(a) the rate applicable to the overdue principal amount immediately prior to the relevant date (but only for any unexpired part of any then current Interest Period);*
>
> *(b) the aggregate of the Mandatory Costs (if any) and the Margin plus, in respect of successive periods of any duration (including at call) up to 3 months which the Agent may select from time to time:*
>
> *(i) LIBOR; or*
>
> *(ii) if any Lender determines that Dollar deposits for any such period are not being made available to it by leading banks in the London Interbank Market in the ordinary course of business, a rate from time to time determined by the Agent by reference to the cost of funds to the Lenders from such other sources as the Lenders may from time to time determine.*"

46. Clause 1 defined the Margin for specific time periods during the currency of the Loan Agreement at increasing rates, the last of which was: "*(e) from and including 1 October 2017 until the Maturity Date, eight per cent per annum*" (emphasis added). There was, however, no express provision as to the level of Margin applicable after the Maturity Date.

47. The claimants contended that the reference to Margin in the default interest provisions at clause 6.3 of the Loan Agreement could only be interpreted, in relation to the period post the Maturity Date, as being to the 8% margin which applied as at that date. The defendants, on the other hand, contended that, as the provisions as to the level of Margin stated the exact periods to which they applied, the correct interpretation was that the Margin after Maturity was zero.

48. I see no merit in the defendants' contention, which is wholly uncommercial and gives no meaning or content to the use of the term "Margin" in the context of default interest. The Loan Agreement clearly recognises that there will be a Margin in that context, and it is absurd to suggest that it will be zero, the one level which is most certainly not expressed. I accept the claimants' submission that it would make no sense for Margin to fall from eight per cent to zero on the Maturity Date in the event that the Borrowers did not repay and thereby defaulted on the most important obligation in the Loan Agreement. Something has gone wrong in the drafting such that there is a lacuna on the face of the wording. I find that, taking into account the clear commercial sense of the provisions, and indeed common sense, the intended meaning and effect of the clause is that a Margin of 8% is applicable beyond the Maturity Date until payment.

Conclusion

49. For the reasons set out above, the claimants' application for summary judgment is dismissed. However, if the claimants ultimately establish that they were entitled to repayment of the Loan at the Maturity Date (or earlier), I determine that the default rate of interest for the period after the Maturity Date includes a Margin of 8%.