



Neutral Citation Number: [2020] EWHC 1792 (Comm)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2020

Before :

MR. JUSTICE TEARE

CL-2017-000793

Between :

**(1) KOREA SHIPBUILDING &
OFFSHORE ENGINEERING CO., LTD**
(2) HYUNDAI HEAVY INDUSTRIES CO., LTD
- and -
(1) F WHALE CORPORATION
(2) TMT CO., LTD

Claimant

Defendant

CL-2017-000794

Between :

**HYUNDAI SAMHO HEAVY INDUSTRIES
CO., LTD**
- and -
(1) TMT CO., LTD
(2) B LADYBUG CORPORATION
(3) E ELEPHANT INC

Claimant

Defendant

CL-2018-000350

Between :

**(1) KOREA SHIPBUILDING &
OFFSHORE ENGINEERING CO., LTD**
(2) HYUNDAI HEAVY INDUSTRIES CO., LTD
- and -
(1) TMT CO., LTD
(2) E ELEPHANT INC
(3) B LADYBUG CORPORATION

Claimant

Defendant

CL-2018-000427

Between :

**(1) KOREA SHIPBUILDING &
OFFSHORE ENGINEERING CO., LTD
(2) HYUNDAI HEAVY INDUSTRIES CO., LTD**

Claimant

- and -

**(1) TMT CO., LTD
(2) IRON MONGER 2 CO., LTD
(3) F DUCKLING CORPORATION
(4) ESTABLE SHIPPING S.A.
(5) ADMIRAR VISTA SHIPPING S.A.**

Defendant

CL-2018-000467

Between :

**HYUNDAI SAMHO HEAVY INDUSTRIES
CO., LTD**

Claimant

- and -

**(1) TMT CO., LTD
(2) B LADYBUG CORPORATION**

Defendant

CL-2018-000476

Between :

**HYUNDAI SAMHO HEAVY INDUSTRIES
CO., LTD**

Claimant

- and -

**(1) TMT CO., LTD
(2) E ELEPHANT INC,
(3) F WHALE COPORATION
(4) A MAX CORPORATION
(5) IRON MONGER 8 CO., LTD**

Defendant

**Karen Maxwell (instructed by Squire Patton Boggs) for the Claimants
Wei Jian Chan (instructed by BDM Law LLP) for the Defendants**

Hearing date: 19 June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE TEARE

“Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:00 AM on 09 July 2020.”

Mr. Justice Teare :

1. This is the Defendants' application pursuant to CPR 39.3 to set aside the judgment which I gave on 19 March 2020 following a trial held on 3 and 4 March 2020 in the absence of the Defendants. The claims advanced in these proceedings and in respect of which judgment was given are substantial debt claims arising from a failure to pay deferred instalments due under shipbuilding contracts and under associated guarantees provided by TMT Co., Ltd and other companies in the TMT group. There are six sets of proceedings, each raising materially similar issues of construction. There were no substantial issues of fact and there was no dispute that the sums claimed had not been paid. Nevertheless, in view of the number of claims and their history, a judgment of some 126 paragraphs was required. Certain claims failed on the grounds of limitation. There has been no appeal in respect of those claims which failed.
2. The Claimants are well known shipbuilders in South Korea.
3. The Defendants are part of the TMT group which used to own over 100 vessels. It now owns none. Mr. Nobu Morimoto, or Mr. Nobu Su as he has also been called, describes himself as the principal of the TMT Group. It is, I think, common ground that he is a director of TMT Co. Ltd. He may also be the principal shareholder in some of the companies in the TMT group. He or his companies have been involved in other litigation in this court. He has had the misfortune to have been found, more than once, to have acted in contempt of court and has, in consequence, been imprisoned.
4. At the outset of the trial in this matter I considered an application to adjourn which had been made in writing by Mr. Morimoto purportedly on behalf of the Defendants. In essence the basis of the claim for an adjournment was that he was in custody, serving a sentence for contempt of court. For reasons given on the first day of the trial I refused that adjournment. I have been provided with counsel's note of that ruling. At the end of my ruling, having set out the background in some detail, I summarised six reasons for my refusal to adjourn. Looking at counsel's note they were as follows:
 - i. The Claimants had prepared for the trial and had incurred expense in so doing.
 - ii. The trial date had been fixed for some time and so the trial date should only be vacated for good reason. The need for disclosure had been suggested as a good reason but I was not impressed by that in view of (a) the approach to disclosure taken by Knowles J. at the CMC, (b) it appeared that Mr. Su had the relevant documents and (c) an application for disclosure could have been made before and had not been.
 - iii. The only cogent reason for an adjournment was that the trial date had been fixed for a time when it was thought Mr. Su would have been released from custody. I was asked to infer from certain matters that Mr. Su would not attend trial. I was not sure that I could draw that inference but I accepted that it was not certain that he would attend the trial. I also noted that although Mr. Su had produced a 7 page statement he had not articulated any defences. Although he knew of the trial date and I expected that a skeleton argument would have been in preparation there was none. Nevertheless the Defendants were entitled to be present at the trial.

- iv. I concluded that the determining factor, if Mr. Su was truly intent on attending the trial, was CPR39.3 which provides a “safety net” where an adjournment is refused and the trial proceeds. If the conditions set out in that rule are satisfied there will be a powerful case for setting aside any judgment. I referred to *Bank of Scotland v Pereira* §§25-6, *TBO v Mohun* and *Solanki v InterCity*.
 - v. For those reasons proceeding to trial was not a denial of a fair trial. Where the court decides to proceed and refuses to adjourn such procedure is fair because of the CPR39.3 remedy. The Court can take account of the Claimant’s legitimate expectation that the trial will proceed.
 - vi. The fair and just decision was to proceed with the trial in the absence of the Defendants. That was not unfair to the Defendants because if they can satisfy the necessary conditions the judgment may be set aside.
5. CPR 39.3(3)-(5) provides a discretion to set aside a judgment granted at trial in the absence of a party in the following terms:
- (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
 - (4) An application under paragraph (2) or paragraph (3) must be supported by evidence.
 - (5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –
 - (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
 - (b) had a good reason for not attending the trial; and
 - (c) has a reasonable prospect of success at the trial.
6. It is accepted that condition (a) is satisfied.

Good reason for not attending

- 7. Condition (b) requires the applicant to show a good reason for not attending trial. Mr. Morimoto was in custody for contempt. That explains why he was unable to attend the trial. However, he is not a party to the proceedings and the question is whether the Defendants had a good reason for not attending the trial.
- 8. Counsel for the Defendants submitted that there was good reason, namely, that the Defendants’ “sole principal”, Mr. Morimoto, was unable to attend the trial. Mr. Morimoto was a director of TMT Co. Ltd. and was said to have “unique knowledge” of this dispute.
- 9. Counsel for the Claimants submitted that the Defendants could have been represented by solicitors and counsel or, failing that, by Mr. Banerji, another director of TMT. Thus they could not show a good reason for not attending trial. This was not a case

where the personal attendance of Mr. Morimoto was required. There was no dispute of primary fact and so there was no necessity for him to attend as a witness. Any points taken by way of defence could be advanced by lawyers instructed on behalf of the Defendants. For a discussion of the relevant principles concerning Article 6 of the ECHR reference was made to *RP Explorer Limited v Malhotra* [2020] EWHC 1225 (Comm) at paragraphs 33-37 and 41 per Christopher Hancock QC.

10. With regard to the instruction of solicitors I was told by counsel for the Defendants, on instructions, that the Defendants had dis-instructed their previous solicitors BDM Law LLP because they wished to instruct MFB Solicitors, a partner in which firm was familiar with the relevant contracts. However, “they attempted to engage him but they faced difficulties in organising payment because of Mr Morimoto’s imprisonment and also because the defendants were subject to a freezing order in other proceedings”. Thus MFB were never on the record. Meanwhile BDM provided informal advice whilst Mr. Morimoto was in prison. With regard to Mr. Banerji I was told that he was focused on business development in the Middle East and was not involved in the relevant shipbuilding contracts. It was therefore inappropriate for him to represent the Defendants. I gave permission for a further witness statement to be provided setting out those matters. Mr. Morimoto therefore provided a fourth witness statement dated 23 June 2020. That statement evidences what I was told by counsel with respect to the difficulty of instructing a firm of solicitors. (Following the provision of this judgment in draft a question has arisen as to whether Mr. Morimoto was in prison at the time at which he first wished to instruct MFB. There is, however, no dispute that there was a freezing order in existence against the Defendants.) With regard to Mr. Banerji Mr. Morimoto accepted that he had some involvement with one of the vessels but said that only he, Mr. Morimoto, had knowledge of all the disputes and so it was necessary for him to attend the trial and represent the Defendants.
11. Counsel for the Claimants invited the court to be sceptical about this evidence. It had not been given in Mr. Morimoto’s previous evidence. Moreover, there was a history of Mr. Morimoto and the companies he represents instructing and dis-instructing solicitors (see paragraph 18 of Counsel’s skeleton argument and in particular *Latakamia Shipping Company and others v Nobu Su and others* [2020] EWHC 865 (Comm) at paragraphs 11-12 per Foxton J.) It was pointed out that for this very application the Defendants had instructed both solicitors and counsel. In relation to that last point Mr. Morimoto said in his most recent statement that this was done “as a favour” and that the solicitors were again off the record. There was no denial of the suggestion that in other litigation Mr. Morimoto had engaged in frequent changes of representation.
12. After service of that witness statement Mr. Park of the Claimant’s solicitors served a further witness statement. It provides, at paragraph 9, a powerful list of reasons for not accepting Mr. Morimoto’s evidence that he and his companies are unable to instruct solicitors.
13. Having considered these matters and in particular the fact that the Defendants were represented by solicitors and counsel before me I am deeply sceptical of Mr. Morimoto’s evidence. However, I must bear in mind the guidance given on this subject by Lord Dyson MR in *Mohun-Smith v TBO Investments Ltd* [2016] EWCA Civ 403 at paragraph 24:

“.....the judge must have regard to the guidance given in *Pereira* and *Estate Acquisition* and the need, when applying rule 39.3(5)(b), to seek to give effect to the overriding objective of dealing with cases ‘justly’ and to comply with article 6 of the European Convention on Human Rights (‘the Convention’). This is particularly important where, as in the present case, the party has a reasonable prospect of success at the trial. In such a case, the court should usually not adopt a very rigorous approach to the question whether the litigant has shown a good reason for not attending.”

14. I therefore caution myself against adopting too rigorous an approach in assessing this question. It is plausible to suggest that the freezing order to which reference has been made has inhibited the ability of Mr. Morimoto and the Defendants to instruct lawyers to represent the Defendants. On the other hand exceptions are usually granted for the payment of legal expenses. What I have been told of the history of Mr. Morimoto’s litigation in this court suggests that he can, when he wants to, instruct lawyers to represent him. But I do not have all the details of that other litigation. In these circumstances I do not think it can be said that the Defendants have produced cogent evidence that they are unable to pay for legal representation. But, having regard to the need not to adopt too rigorous an approach, I am prepared to accept, despite my doubts, that the Defendants have shown a good reason for their not attending the trial by way of legal representation.
15. Similarly with regard to Mr. Banerji I consider, taking care not to apply too rigorous approach, that it is likely that Mr. Banerji had little knowledge of the case and was therefore not an appropriate person to represent the Defendants.

Reasonable prospect of success

16. Although various possible defences were aired in Mr. Morimoto’s witness statement and a reduced number in counsel’s skeleton argument only two matters were advanced in oral submissions as being arguments which had a reasonable prospect of success were the judgment to be set aside. The court should be careful not to pre-judge any suggested defence, particularly when there is an issue of fact. The question is whether a suggested defence has a real prospect of success in the sense of one which carries some degree of conviction.
17. The first of the suggested defences related to a demand (made in respect of certain of the guarantees) contained in an email dated 20 January 2012. It was said that it was marked “without prejudice” and therefore that it should not have been relied on in evidence. My judgment refers to this email at paragraph 24 (and in some later paragraphs) where I held that it amounted to a written demand for the purposes of those guarantees which required a written demand.
18. The email is indeed marked “without prejudice” but there is no indication that there were any negotiations underway to settle a dispute and there is no evidence from Mr. Morimoto suggesting that there were such negotiations. It appears simply to be a demand. Indeed, I recall that during the trial mention was made of this when it was said that, there being no negotiations, the email could be received in evidence. I did

not however refer to this point in my judgment. In the absence of any evidence suggesting that there were in fact negotiations this suggested defence fails to carry any degree of conviction. When this point was taken by counsel for the Defendants (in his oral submissions), counsel for the Claimants observed that if the label “without prejudice” made the email inadmissible (which, it was submitted, it did not) the Claimants could rely upon the demands made subsequently every month, none of which were marked without prejudice. After the hearing I was provided with the demands sent in February, March, April and May 2012, none of which is marked without prejudice. Thus it is clear that the marking of the January demand as “without prejudice” cannot give rise to a defence. The defendants have no reasonable prospect of showing at any subsequent trial that where a written demand was required none was made.

19. A related point of construction was also taken, namely, that the demand had to be by registered airmail or facsimile because that was what was required by the shipbuilding contract. I dealt with this point in paragraph 25 of my judgment where I said that the guarantee only required the demand to be in writing. It was suggested that the requirement in the shipbuilding contract applied to demands under the guarantees because those demands were “in connection with the contract”, namely, the shipbuilding contract. However, counsel accepted that this argument could only avail the Defendants if the parties to the shipbuilding contracts and guarantees were common. Counsel fairly accepted that he was unable to say that they were. However, counsel for the Claimants was able to tell me that they were different. That seems to be right because TMT, the guarantor, was not party to the shipbuilding contracts. I am not persuaded, therefore, that there is a reasonable prospect of establishing that the demand under the guarantee had to be by registered airmail or facsimile. In any event, where the guarantees themselves expressly require merely a written demand that must be the requirement. (Further, the claims under the corporate guarantors did not require a demand; see paragraph 56 of the judgment).
20. There was a suggestion that it was sufficient to say that the Defendants should be given the “opportunity to present their case” in this regard. That is not sufficient. The Defendants have to show a reasonable prospect of success at trial and they cannot.
21. The second point taken related to the title to sue of HHI and whether title to sue had been transferred from KSOE to HHI. I dealt with this in paragraph 8 of the judgment where I accepted the expert evidence of Mr. Chung, a South Korean lawyer, that title to sue had passed. It is suggested that the Defendants should have the opportunity to cross-examine Mr. Chung and to make submissions on this point. But what must be shown is a reasonable prospect that Mr. Chung’s opinion was wrong. That has not been done or even attempted. In any event if title to sue did not pass, judgment would be given to KSOE who remained party to the proceedings.
22. It therefore follows that the Defendants have been unable to establish a reasonable prospect of success.

Conclusion

23. In circumstances where the Defendants have not been able to establish a reasonable prospect of success it follows that their application to set aside the judgment and the

related orders must be dismissed. This conclusion is not contrary to the overriding objective of the CPR which is to deal with cases justly. There can be no injustice to the Defendants because they are unable to show any defence to these substantial claims (in addition to the limitation defences upheld by the court) which has a reasonable prospect of success.