



Neutral Citation Number: [2024] EWHC 3305 (Comm)

Case No: CL-2024-000558

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

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

Date: 14/10/2024

Before :

THE HON. MR JUSTICE BRYAN

Between :

Lord Marine Co. S.A

- and -

Vimeksim SRB D.O.O

**Claimant/
Applicant**

**Defendant/
Respondent**

Mr J Watthey (instructed by **Shearwater Law**) appeared on behalf for the Applicant
The Respondent did not attend and was not represented

Hearing dates: 14th October 2024

Approved Judgment

.....

MR JUSTICE BRYAN :

A. INTRODUCTION

1. There is before me today an application by Lord Marine Co. S.A. (“the Applicant”), for an order under section 44 of the Arbitration Act 1996 for the sale of cargo over which the Applicant holds a contractual lien to secure payment of freight.
2. It is said that cargo is at risk of imminent perishment and therefore this application is brought on an urgent basis, seeking an order from the court permitting its sale, to allow owners to realise value from the security conferred by the lien.

B. BACKGROUND

3. Under a voyage charter dated 12 April 2024, (the “Charter Party”) between the Applicant shipowners and the Respondent charterers Vimeksim S.R.B DOO (“Charterers”), Owners’ vessel, the MV Lord Hassan (the “Vessel”) loaded 11,000 metric tonnes of Ukrainian corn in bulk (the “Cargo”) at Chornomorsk in Ukraine on or about 18 May 2024.
4. The Charter Party comprising a Recap and Synacomex 200 standard terms provided, amongst other matters, that,

“21 FREIGHT TO BE PAID BY CHARTERERS 100 PCT
LESS COMMISSION IN USD CURRENCY W/13 ...
BDAYS AFTER SIGNING/ RELEASING BS/L BUT IAC
BBB

...

21. Lien clause

“The Owners shall have a lien on the cargo for freight, deadfreight, demurrage and average contribution due to them under this Charter Party.”

5. Owners issued a Bill of Lading on the Congenform 1994 standard form on 18 May 2024 (the “Bill of Lading”). The Bill of Lading named the consignee as ALTIN ATES KİMYA AS as Receivers (“Receivers”).
6. The front of the Bill of Lading is marked “FREIGHT PREPAID”. However, freight was not in fact prepaid (or indeed paid at any time, on the evidence before me from Mr Harwood’s first witness statement) and Owners duly retain the Bill of Lading. The position, therefore, is that neither Charterers nor Receivers nor any other party (and that, I am told, includes the shippers, NTK Trans Poland) ever had the Bill of Lading in their possession or became lawful holders thereof.
7. To date, at least, no defence to the claim for freight has been advanced nor has any justification for non-payment been identified. Of course, in relation to those matters, they would be matters for determination in the arbitration which has been commenced between owners and Charterers, as I shall refer to below.

8. The reverse of the Bill of Lading contained the following provision,

“All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.”
9. After loading, the Vessel proceeded to the discharge point at Iskenderun in Turkey.
10. As a result of the non-payment of freight, in accordance with the terms of the Charter Party, owners exercised a contractual lien over the Cargo prior to discharge (the “Lien”).
11. The evidence before me is that the Lien was recognised by a court in Iskenderun (Turkey) on 26 May 2024. However, for reasons I will come on to, I indicated during the course of the hearing that a further statement will be necessary from the claimant hereafter in relation to the actual position in relation to any order made by the Turkish court.
12. The Cargo was subsequently discharged to a warehouse near Iskenderun awaiting resolution of the claim. The evidence before me is that the warehouse is owned by the Receivers and that the Owners are paying for the storage.
13. Arbitration proceedings were started by Owners in respect of the unpaid freight on 3 September 2024, with the claimant commencing arbitration in England under the London Maritime Arbitrators Association terms 2022 (“LMAA”) and in accordance with the terms of the Charter Party (the “Arbitration”) by the appointing of Mr Richard Rayfield as arbitrator and giving notice to the Respondents (the “Notice”). The Respondent failed to appoint an arbitrator within the 14 days prescribed within the Notice. Accordingly, on 25 September 2024, the claimant served a section 17 notice upon the Respondent in accordance with the Arbitration Act 1996, the section 17 notice providing a deadline of 3 October 2024 for the Respondent to appoint a second arbitrator, failing which the arbitral tribunal would be composed of a single arbitrator.
14. The Respondent made no response to the section 17 notice and as such on 4 October 2024 Mr Rayfield accepted appointment as sole arbitrator.

C. NOTICE FOR THIS HEARING

15. The first matter that arose at the start of this hearing was as to whether to proceed with the hearing in circumstances where Charterers did not appear on this hearing and by the same token the Receivers have not appeared today either.
16. I was satisfied at the outset of this hearing that the Charterers had been properly served with the notice, firstly in relation to arbitration, but also were properly served with notice of today’s hearing and were provided with the email link which would allow them to attend this hearing.
17. Shortly before this hearing commenced, I received a second witness statement from Mr Harwood which updated me in relation to communications with Charterers regarding the hearing. In that witness statement he identified that the Charterers have instructed lawyers (AJA partners in Kiev, Ukraine) and that communications had

followed. As part of that, details of this hearing were provided so that they could attend by remote link should they choose to do so. However, the Charterers' lawyer declined to attend, including in a text message in which they said in response to texts identifying that a remote link would be sent for the hearing the response was as follows.

“OK. Thank you. We will not participate in the English court proceedings as we are not English barristers but as soon as we confirm our letter to you with the Charterers I will send it to you and call to discuss.”

18. The letter that is referred to did not comment upon or concern the Charterers' attendance at the hearing.
19. In such circumstances I was satisfied at the start of the hearing that the Charterers were aware of this hearing, had been sent a link and were in a position to attend if they wished to do so. I am satisfied that they consciously chose not to do so and, in such circumstances, I considered it appropriate to proceed to hear the application.
20. So far as the position of the Receivers of the cargo is concerned, the evidence before me is that the Receivers have been aware of the various steps that the claimant has taken because they have been involved in agreeing to sampling of the Cargo by the claimant's expert, Brookes Bell, and have been clear through the claimant's appointed Turkish lawyer that they do not intend to take any part in relation to it.
21. Notice has been sent to the Receivers but they have not responded. The application and the related bundle was sent to the Receivers via the claimant's appointed Turkish lawyer who has contacted the Receiver's lawyer, which also detailed the time of the hearing before the Commercial Court in London.
22. Mr Harwood has also confirmed that he has contacted the claimant's appointed Turkish lawyer this morning to ensure that all details of the hearing and the bundle are with the Receiver, which it is confirmed they are. It would have been open to the Receiver to attend today to intervene as appropriate. I am satisfied, in circumstances whereby they were aware of this hearing and have not appeared at the start of the hearing that they chose not to attend. In such circumstances, I was satisfied that it was appropriate to proceed to hear this application.

D. THE SAMPLING OF THE CARGO

23. Owners were and are increasingly concerned about the condition of the cargo and the risk of its deterioration. Owners instructed a Cargo Scientist, Mr Elliott of Brookes Bell, to sample and test the Cargo. Charterers were invited to attend this sampling and testing, however they declined to do so and responded informing Owners that the Cargo had been sold to a third party (although it is not clear on the material before me as to who has property in the Cargo).
24. Sampling was initially conducted on 28 September 2024. Mr Harwood had a telephone call with a Cargo Scientist owing to concerns of the Cargo Scientist that the “Cargo was very clearly deteriorating, exhibiting; self-heating in areas, heavy infestation with insects and maggots and showing signs of clumping and significant

mould growth”. Mr Harwood asked the Cargo Scientist to send him a short email detailing those concerns, which he set out as follows:

“[...] the cargo in large areas of this section is deteriorating rapidly. The cargo shows evidence of self-heating, with high temperatures recorded over 45 degrees centigrade. I also note compaction of the cargo underfoot and adhesion of the cargo consistent with caking due to mould growth.

The cargo is also heavily infested with insects.

I would advise that this cargo is sold and used as soon as possible in order to prevent further deterioration and the potential for a total loss...”

25. A further update was provided by the Cargo Scientist by email on 1 October 2024 in these terms:

“...Based on my inspections of the cargo in situ, including observations of the cargo in the stockpiles and measurement of cargo temperatures, it is my current view that the entire stockpile is at immediate risk of deterioration to the point where it can no longer be used as intended. Indeed, large areas of the cargo service are already undergoing significant self-heating and mould growth, and any delay in using the cargo will result in rapidly escalating loss of quality and deteriorating condition. Furthermore, all cargo is infested with storage pest insects...”

26. In a further update from the Cargo Scientist, the Cargo Scientist stated as follows.

“...I have been inspecting the cargo in section 4 today and I am now able to comment with more certainty on the entirety of the cargo in the stockpile:

- A large proportion of the cargo in the warehouse is clearly experiencing well-established self-heating. Many areas of the cargo are damaged and are exhibiting mould growth, caking, discolouration, heat damage and poor odour.
- Many areas of the cargo do not yet appear to be damaged upon visual inspection, although sample analysis will be required to quantify both damaged and undamaged cargo.
- There is also a significant live insect infestation present.
- The quantum of damaged cargo is unknown, nor whether the cargo as a whole is within specification. Deterioration will continue, however, and likely

accelerate and therefore the cargo must be sold and used as soon as possible to avoid total loss...”

27. Further interim reports have been made available by the Cargo Scientist as the sampling continued and are in the same vein as to the continuing deterioration of the cargo. I am told that while samples have been taken, the analysis of the cargo, which has to be in Turkey by a Turkish laboratory, has not yet been completed and there is no evidence before me at this stage as to whether the cargo remains on specification, per any contractual specification, or the extent of the deterioration, including as to whether or not it has become contaminated. It is against that backdrop that the claimant is seeking an urgent order for the sale of the cargo from this court.

E. APPLICABLE PRINCIPLES

28. It is well-established that the court has the power to order sale of a cargo in circumstances such as the present.
29. Section 44 of the Arbitration Act 1996 provides in material respect as follows:

“44 court powers exercisable in support of arbitral proceedings.

(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purpose of and in relation to legal proceedings.

(2) Those matters are –

[...] (d) the sale of any goods the **subject of the proceedings**...

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary **for the purpose of preserving evidence or assets**.

(4) If the case is not one of urgency the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.”
(emphasis added)

E.1 “Subject of the Proceedings”

30. This provision has been analysed in the context of a sale by a shipowner of liened cargo in the case of *The Moscow Stars* [2017] EWHC 2150 (Com).
31. In that case, Males J considered that the requirement the Cargo be “the subject of the proceedings” were satisfied (at paragraph 32) in circumstances:

“[...] where a contractual lien is being exercised over a defendant’s goods as security for a claim which is being advanced in arbitration. That does not depend on whether there is formally a claim in the arbitration for a declaration that the claimant is entitled to exercise such a lien, although as it happens the claimant has made such a claim. It is sufficient that the lien is being exercised in support of the arbitral claim and that, as a result, there is an impasse between the parties pending issue of an award. I would add that in this case the defendant is the owner of the cargo. There is no need to say anything about what the position would be if the cargo were owned by a third party, not a party to the arbitration.”

32. In that case the court considered, I am satisfied rightly, that there was a power to order the sale of the Cargo. In this regard the court has under section 44(1), the same power “as it has for the purposes of and in relation to legal proceedings.” The relevant power in relation to legal proceedings is contained in CPR 25.1; namely the power to make an order for “the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly.”
33. In *The Moscow Stars* Males J went on to consider whether that power should be exercised as a matter of the court’s discretion. On the facts of that case the cargo was oil that was not perishable but the cargo had remained on board for over nine months and in the absence of an order would remain there for many months to come. The court considered it appropriate in those circumstances to order a sale of the cargo. That is to be contrasted with the facts of the present case, where I am satisfied on the evidence before me, including the various reports from Brookes Bell, that not only is the cargo by its very nature perishable but it is deteriorating rapidly.

E.2 “For the Purposes of Preserving Evidence or Assets”

34. Section 43(3) provides that, in case of urgency, the court may make an order in the absence of both the tribunal’s permission and written consent of the other parties where it is necessary to do so “for the purposes of preserving evidence or assets.” If it had been necessary to make an order in the absence of the tribunal’s permission, I am satisfied it would have been appropriate to do so in circumstances where the evidence before me is that the Cargo is deteriorating (see *Cetelem v Roust* [2005] 1 WLR 3555 (CA)) per Clarke LJ at paragraph 65:

“...in my opinion, if the court thought it was necessary so to order in order to preserve the value of the fish, which would otherwise be diminished or lost by putrefaction, the court could properly conclude that the order was necessary for the purpose of preserving assets. The asset would be the value of the fish rather than the fish itself.”
35. However, that point is academic in the present case, because on 8 October 2024 and following notification of the application that was being made to the court attaching Mr Harwood’s first statement and exhibit and the application notice, the arbitrator Mr Richard Rayfield has confirmed by email on 8 October as follows:

“I hereby give my consent to the claimant’s proposed application to the Commercial Court under section 44(2)(d) of the Arbitration Act 1996.”

E.3 The Submissions

36. I am satisfied, as Males J was before me in *The Moscow Stars*, that there is jurisdiction to order sale of a liened cargo such as the present under section 44(2)(d) in circumstances where a contractual lien is being exercised over a defendant’s goods as security for a claim which is being advanced in arbitration. The court, therefore, has the same powers as it holds under CPR Part 25. I am also satisfied that the criterion of being for the purpose of preserving evidence or assets is also satisfied in this case as it was in the example given by Clarke LJ in *Cetelem*. Here the Cargo is corn, which is also perishable by its very nature, and the evidence before me is that it is deteriorating rapidly and will deteriorate further if it is not sold and used within short order.
37. I am satisfied that the court has power to order the sale of relevant property under CPR Part 25, given that it is, “of a perishable nature or which for any other good reason it is desirable to sell quickly.” I am satisfied that the former criteria is satisfied in the present case. The evidence before me from the Brookes Bell Cargo Scientist is clearly to the effect that not only is the Cargo perishable but is at risk of imminent perishment in the context of the observations as to the current state of the Cargo that I have quoted and as is further evidenced by the further updates from Brookes Bell.
38. I am satisfied that if a sale is not ordered, the value of the lien to owners would be impaired, potentially to an extent whereby the value of the lien was zero in circumstances where the Cargo will continue to deteriorate and ultimately perish, and with it the value of the security confirmed by the Charter Party and the Bill of Lading. I am satisfied that this is a paradigm case in which sale should be ordered.
39. In this regard, I have considered the fact that it appears the cargo has been sold to a third party, which is a distinguishing feature from the Cargo in *The Moscow Stars*. I am satisfied, however, that this does not give rise to any defence to owners’ claim or their right to assert the lien. Indeed it might well be the case that the Receivers have a claim against Charterers under their sale contract, albeit that is not a matter for the Owners.
40. For the reasons that I have already identified, this is not a case where the Bill of Lading has been released and is in the hands of a lawful holder who could legitimately object to the exercise of the lien. Whilst academic in the present case, Owners’ obligation in that case would be to deliver the Cargo to the lawful holder of the Bill of Lading on the terms set out therein. Here, the terms incorporate the lien clause set out under clause 21 of the Charter Party. Therefore, it appears to me that had this been the position, the lawful holder of the Bill of Lading would likewise have been bound by the lien, which is “Readily incorporated [into the Bill of Lading] by general words” (see *Bills of Lading*, Third Edition at paragraph 7.104), and as such would be effective against them as it is against charterers (as to which see *Voyage Charters* at paragraph 17.17).

41. In the present case, because the freight was not paid and owners therefore retain the Bill of Lading, neither Charterers nor Receivers nor any third party became a lawful holder of it. Thus, I am satisfied this is not a situation where there can be any argument that Owners are prevented from having and/or exercising a lien.
42. Contrast the position if the Bill of Lading had been released, in which case it being marked “freight prepaid” could potentially give rise to an estoppel in relation to the consignee or endorsee who had relied upon the fact that the Bill of Lading was marked as freight having been prepaid. Such a scenario is addressed in both *Carver on Charterparties*, Third Edition (“*Carver*”), and *Voyage Charters* where it is noted as follows, in *Carver* at paragraph 13-038:
- “Freight prepaid.** There will be no lien for freight on the cargo of a third party who has a freight pre-paid bill of lading, if the freight has actually been paid before the lien is sought to be exercised, because there is no freight on which the lien can operate. Even where the freight has not been paid, the lien may be of little value against a consignee or an endorsee who has relied on the bill being marked freight prepaid and who may therefore be able to rely on estoppel as against the ship owner.”
43. Equally, the editors of *Voyage Charters* state as follows, at paragraph 18.213:
- “‘Freight prepaid’ bills of lading.** 18.213 The effect of marking the bill of lading ‘freight prepaid’ is not a matter of agreement but of estoppel. Thus, when a lawful holder of such a bill of lading who claims under it has taken it in reliance on the representation by the ship owner that the bill of lading freight has been received, even if it has not been, the ship owner is precluded from claiming it from him, either by action or by the exercise of a lien. Because, however, the effect of the term is as an estoppel and not as a matter of contract, it does not estop the ship owner from asserting a right to unpaid freight under such a bill of lading against a party who has not relied on the representation about the payment of freight or who knows the truth.”
44. In the present case, the lien cargo remains in owners’ possession. It is stored with a storage man or agent appointed by owners on the evidence before me (in this regard see *Carver* at paragraph 13-100 to 13-101). In such circumstances I am satisfied that although it happens to be the case that the warehouse belongs to owners, owners retain a right of possession and for this purpose Receivers are owners’ agents (ibid). I am satisfied that this is not a situation in which Owners can be said to have lost the lien by reason of parting with possession (cf *Carver* at 13-099). Were it to transpire that the lien had been wrongly exercised, there would of course be protection for the Charterers in the form of an undertaking in damages.
45. A further distinction to the position in *The Moscow Stars* is that in that case the cargo was owned by the Charterer (a national oil company that had taken the tanker on time charter). Males J added:

“There is no need to say anything about what the position would be if the cargo were owned by a third party, not a party to the arbitration.”

46. In contrast, it is possible in the present case that the Cargo is not owned by the Charterers who are the party to the arbitration. I do not, however, consider that this distinction is a reason not to grant the order for sale that is sought. In this regard, first, although it did not arise for consideration in that case, there is nothing in the reasoning in that case that would indicate it and would or should many differences that the Cargo was not owned by Charterers. Second, *Carver*, at paragraph 13-031 to 13-037, considers the extent to which the lien is binding on third party cargo owners. In summary, this will depend on whether the lien clause is incorporated into the Bill of Lading (which, as I note below, will be “readily” found to be the case).
47. The editors of *Carver* conclude at paragraph 13-036 that the ship owner can exercise a lien over cargo of third party shippers or consignees until the freight is paid. I am satisfied that the views expressed by the editors of *Carver* reflect the applicable legal principles. In the circumstances of this case, I am satisfied for present purposes that the lien binds Receivers. I also bear in mind that unless Owners can sell the Cargo, the lien, especially in the context of perishable cargo, is likely to be of limited, if any, value.
48. I would only add that it would be relatively unusual for a charterer also to be the owner of a cargo, as Mustill J noted in the *Miramar* [1983] 2 LR 319 at 324, only in a minority of cases will the cargo be owned by a charterer. In this regard, the lien would be robbed of its utility in the majority of cases if it could only be enforced where the Charterer, who was the respondent to the arbitration, was also the owner of the Cargo.
49. In fact, as the editors of *Bill of Lading* note (at paragraph 7.104) the lien clause mitigates what would otherwise be the difficulty of relying upon charter party provisions against a Bill of Lading holder, and of course, it is not necessary, even for any verbal manipulation of the lien clause (for example, to read “receiver” for “charterer”).
50. Yet further, there is in fact precedent for ordering the sale of cargo owned by a third party, albeit not in this jurisdiction. In “*The Corinna*” *Five Ocean Corporation v Cingler Ship PTE Ltd (PT Commodities and Energy Resources, intervenor)* [2015] SGHC 311 (“*The Corinna*”) a Singapore decision which was referred to by Males LJ in *The Moscow Stars*, the cargo was not owned by the head voyage charter who had failed to pay freight (“Cingler”) who were being pursued by their disponent owners (“FOC”). As in this case, notice was given to the other interested parties (namely sub-voyage charterers/shippers (“CER”)) and the receivers named in the Bill of Lading (“Adani”). CER intervened in the application while someone from the Adani Group appeared at the hearing to express an interest in buying the cargo and supporting CER's application to adjourn.
51. The present application, as I have already noted, is made only against Charterers, with Receivers not being a party. Owners do not have a contractual dispute with Receivers in circumstances where the evidence before me is that they never became lawful holders of the Bill of Lading and so an arbitration could not be commenced against

them. Thus, a direct section 44 application against the Receivers would not be possible.

52. However, as I have already indicated, the Receivers have had an opportunity to be heard, and I am satisfied had the ability to attend and intervene upon this hearing had they wished to do so (as occurred in *The Corinna*). As already noted, I am satisfied that they chose not to attend or to intervene.
53. I am satisfied that this is an appropriate case for the making of an order under section 44 of the Arbitration Act 1996 for the sale of the Cargo over which the Applicant holds a contractual lien for payment of freight, in circumstances where there is an urgent need to sell that cargo, in circumstances where it is at an immediate risk of deterioration to the point whereby it could no longer be used as intended, with large areas of the Cargo service already undergoing significant self-heating and mould growth, with cargo infestation and in circumstances where I am satisfied that any delay in the sale and use of the Cargo will result in rapidly-escalating loss of quality and deterioration in condition of the Cargo.
54. I also note that as at the time of this hearing and following both Mr Harwood's first and second witness statements, no representations have been made, either by the Charterers or the Receivers or any third party giving any reason as to why the Cargo should not be sold.

F. CONCLUSION

55. In the above circumstances, I make an order under section 44 of the Arbitration Act 1996 for the sale of the Cargo in the terms set out in the draft order which I will shortly finalise with counsel.
56. As part of that order, Owners will give an appropriate undertaking in damages in the event that the exercise of the lien transpires to be wrongful. I do consider that the undertaking should be fortified. Whilst it may well be the case as Males LJ said in the context of the facts in *The Moscow Stars* that "the probability, to say the least, is that the defendant owes the claimant substantial sums by way of hire, although this will ultimately be a matter for the arbitrators", it is not unforeseeable that losses may be suffered for which owners will be obliged to recompense anyone who suffers loss as a result of the sale in the event that the lien transpires to be wrongful.
57. I accordingly consider that the undertaking should be fortified in the sum of \$75,000 either in the form of a letter of undertaking to that extent from the Owners' P&I Club or alternatively by the payment of such sum of \$75,000 into an account at the claimant's solicitors where it shall be held by the claimant's solicitors on the terms of the undertaking.