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CORRIGENDA

NORFOLK v. MY TRAVEL GROUP PLC [2004] 1 Lloyd's Rep. 106, (PART 2, VOL. 1).
At p. 106, par. 3, line 1:
the first citation from Regulation 15 shoud be "15(1)" and not "15(b)".
At p. 107, par. 3, line 6:
the first citation from Regulation 15 should be "15(1)" and not "15(b)".

LLOYD'S LAW REPORTS

Editor: Miss M. M. D'SOUZA, LL.B., Barrister

COURT OF APPEAL

Oct. 29; Nov. 7, 2003

DEN NORSKE BANK ASA
v.
ACEMEX MANAGEMENT COMPANY LIMITED
(THE "TROPICAL REEFER")

[2003] EWCA Civ 1559

Before Lord Justice BROOKE,
Lord Justice LONGMORE and
Lord Justice JACOB

Banking — Guarantee — Summary judgment — Defendants provided guarantee as security for loan on ships — bank applied for summary judgment — Whether bank owed defendants duty of care in equity in relation to arrest of vessel — Whether bank owed duty not to interfere with shipowner's contracts.

The claimant bank agreed to make available to the borrowers a loan of U.S.$6 m. for the purchase of three vessels, one of which was the *Tropical Reefer*. The security for the loan included mortgages on the three vessels. Further security included a guarantee provided by the defendants. The guarantee was governed by English law.

Thereafter there were various events of default and on July 25, 2001 the bank arrested the *Tropical Reefer* in Panama pursuant to its rights under the mortgage of that vessel. At the time of the arrest the *Tropical Reefer* was laden with a cargo of bananas which were to be discharged in Germany. In order to sell the vessel in Panama the bananas had to be discharged overboard at sea. The expense of doing so, U.S.$204,140, was part of the costs of arrest and formed a deduction from the proceeds of sale of the ship. In addition the owners of the cargo began proceedings in Panama against the proceeds of sale claiming damages for breach of the contract of carriage. In respect of that claim the cargo owners said they had a maritime lien and on that account claimed to be entitled to payment out of the proceeds of sale in priority to the claim under the mortgage.

The bank demanded payment of the outstanding indebtedness from the defendants, as guarantors, and on the defendant's failure to pay, issued proceedings for sums due under the loan facility.

The bank applied for summary judgment under CPR Part 24. The defendants contended that the bank owed them a duty of care in equity in deciding when to arrest the vessel and that the bank had been negligent in arresting the vessel in Panama instead of arresting the vessel after she had arrived in Germany where the proceeds of sale would not have been diminished by the costs of disposing of the bananas or encumbered by a lien on those proceeds in respect of a cargo damage claim.

———*Held*, by Q.B. (Com. Ct.) (NIGEL TEARE, Q.C. sitting as a Deputy Judge), that the defendants had no prospect of establishing at trial that the bank owed a duty of care to the defendants in deciding when to arrest the vessel or in deciding whether to release the vessel from arrest.

The defendants appealed. They contended (a) that the bank owed them a duty of care in equity, and had been "negligent" in arresting and maintaining the arrest of the vessel and causing it so be sold in Panama (the argument in equity), and (b) that in the absence of any express term in the mortgage to the contrary a mortgagee of a ship was not entitled to interfere with a shipowner's contracts, and that the activities of the bank constituted a breach of its obligation to allow the mortgagor to enter into and perform engagements for the employment of the vessel (the shipping argument).

———*Held*, by C.A. (BROOKE, LONGMORE, and JACOB, L.JJ.), that (1) in relation to the argument in equity, a mortgagee had an unfettered discretion to sell when he liked to achieve repayment of the debt which he was owed, and his decision was not constrained by reason of the fact that the exercise or non-exercise of the power would occasion loss or damage to the mortgagor; he was entitled to sell the mortgaged property as it was, and was under no obligation to improve it or increase its value; when and if the mortgagee did exercise the power of sale, he came under a duty in equity (and not tort) to the mortgagor and all others interested in the equity of redemption to take reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for

the mortgaged property at the date of the sale, and not the date of the decision to sell; he had to take proper care to obtain the best price reasonably obtainable at the date of sale; the remedy for breach of that equitable duty was not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received; and a mortgagee was entitled to sell the property in the condition in which it stood without investing money or time in increasing its likely sale value (*see* par. 23);

————*Silven Properties Ltd. v. Royal Bank of Scotland Plc* [2003] EWCA Civ 1409 applied.

(2) the defendants' argument that if, in the course of carrying out the sale of a mortgaged ship, the mortgagee impaired the value of the ship, he was in breach of his duty to obtain the best reasonably obtainable price for the ship, would be rejected on the facts of the present case; first, the submission fell foul of the many statements that the mortgagee was entitled to decide the time at which he sold without regard to the interests of the mortgagor; secondly, the bank was in any event entitled to take the view that releasing the vessel from arrest and permitting her to travel to Germany with her cargo on board was fraught with risk (*see* pars. 24, 25 and 26);

(3) the Deputy Judge had been correct to conclude on this part of the case that the defendants had no prospect of establishing at trial that the bank owed them a duty of care in deciding whether to arrest the vessel or in deciding whether to release the vessel from arrest;

(4) in relation to the shipping argument, in appropriate circumstances a third party might have rights against an interfering mortgagee, but even if a third party (who was, for example, a party to a contract of carriage made with a shipowner/mortgagor) could restrain a mortgagee from interfering with contract, it did not follow that the mortgagor was entitled to say that any such interference was a breach of the contract of loan; all depended on the terms of the contract of loan and the mortgage contract (*see* par. 28);

(5) the relationship between the mortgagor and the mortgagee was contained in the written contracts of loan and the deed collateral to the mortgage; those documents conferred many rights on the mortgagee, in particular to take possession of the vessel and to institute legal proceedings (which included the arrest of the vessel) if there was an event of default; for good measure it was provided that the mortgagees should be entitled to exercise their rights and powers notwithstanding any rule of law or equity to the contrary; in those circumstances once there was an event of default it was impossible to argue that arresting the vessel (and keeping the vessel under arrest until it was sold by order of the court) constituted, of itself, a breach of contract or duty on the part of the mortgagee; the appeal would be dismissed (*see* pars. 29 and 33).

The following cases were referred to in the judgment:

De Mattos v. Gibson, (1859) 4 De G. & J. 284;

Downsview Nominees Ltd. v. First City Corporation, (H.L.) [1993] A.C. 295;

Fletcher and Campbell v. City Marine Finance Ltd., [1968] 2 Lloyd's Rep. 520;

Johnson v. Royal Mail Steam Packet Co., (1867) L.R. 3 C.P. 38;

Meftah v. Lloyd's TSB Bank Plc, [2001] 2 All E.R. (Comm) 741;

Myrto, The [1977] 2 Lloyd's Rep. 243;

Palk v. Mortgage Services Funding Plc, (C.A.) [1993] Ch. 330;

Silven Properties v. Royal Bank of Scotland Plc, (C.A.) [2003] EWCA Civ 1409;

Yorkshire Bank Plc v. Hall, (C.A.) [1999] 1 W.L.R. 1713.

This was an appeal by the defendant guarantors Acemex Management Co. Ltd. from the decision of Mr. Nigel Teare, Q.C. sitting as a Deputy Judge of the Queen's Bench Division granting summary judgment in favour of the claimant bank on its claim under the guarantee.

Mr. Michael Davey (instructed by Messrs. Hill Taylor Dickinson) for the defendants; Mr. Luke Parsons, Q.C. (instructed by Messrs. Stephenson Harwood) for the claimant bank.

The further facts are stated in the judgment of Lord Justice Longmore.

Judgment was reserved.

Friday, Nov. 7, 2003

JUDGMENT

Lord Justice LONGMORE:

Introduction

1. Is a ship mortgage inherently different from a mortgage on land? On the facts of this appeal Mr. Davey submits that it is; Mr. Parsons, Q.C. submits that it is not. I can gratefully adopt the Deputy Judge's account of the facts.

2. By a U.S.$6 m. secured Loan Facility Agreement dated Dec. 1, 1997 between the claimants and three companies collectively described as the borrowers the claimants Den Norske Bank ASA ("the bank") agreed to make available to the borrowers a loan of U.S.$6 m. for the purchase of three vessels, one of which was *Tropical Reefer* the vessel with which this appeal is concerned. The loan agreement was subject to English law. The security for the

loan included mortgages on the three vessels which were governed by the law of Cyprus, where the vessels were registered. Further security included a guarantee provided by the defendants. That was governed by English law.

3. Thereafter there were various events of default and on Jul. 25, 2001 the bank arrested *Tropical Reefer* in Panama pursuant to its rights under the mortgage of that vessel. At the time of the arrest *Tropical Reefer* was laden with a cargo of bananas, which had been shipped in Ecuador and were to be discharged in Germany. The bananas were a perishable cargo and in order to sell the vessel in Panama they had to be discharged overboard at sea. The expense of doing so, U.S.$204,140, was part of the costs of arrest and formed a deduction from the proceeds of the sale of the ship. In addition the owners of the cargo began proceedings in Panama against the proceeds of sale claiming damages for breach of the contract of carriage. In respect of that claim the owners of the cargo said they had a maritime lien and on that account claimed to be entitled to payment out of the proceeds of sale in priority to the claim under the mortgage. Subsequently, on Feb. 6, 2002 the bank demanded payment of the outstanding indebtedness from the defendants, as guarantors, and on Feb. 19 the bank issued proceedings in the Commercial Court against the defendants under the guarantee for the sums due under the loan facility. A Part 24 application for summary judgment was made in those proceedings and Mr. Nigel Teare, Q.C. sitting as a Deputy Judge of that Court, has given judgment for the bank.

4. The claim is resisted by the defendants on the grounds that the bank, in breach of duty to the defendants, arrested *Tropical Reefer* in Panama when she was laden with bananas instead of arresting the vessel after she had arrived in Germany where the proceeds of sale would not have been diminished by the costs of disposing of the bananas or encumbered by a lien on those proceeds in respect of a cargo damage claim. It was said that the proceeds of sale would have been sufficient partially or entirely to discharge the outstanding debt and that in those circumstances the bank are unable to proceed against the defendants under the guarantee for the sums claimed.

The loan facility and mortgage

5. Nothing turns upon the wording of the loan facility. But it is important to observe that under cl. 12, it was an Event of Default if the borrower (a) failed to make a payment as and when such payments were due and (b) failed to maintain P&I insurance on the vessel. Both these events were also Events of Default under the deed of covenant collateral to the mortgage. Moreover, cl. 8 of that deed expressly provided:

> 8.1 If an Event of Default shall occur and the Mortgagees shall make demand for all or part of the Indebtedness, the security constituted by the mortgage and this Deed shall become immediately enforceable and the mortgagees shall be entitled to exercise all or any of the rights, powers, discretions and remedies vested in them by this Clause without any requirement for any court order or declaration that an Event of Default has occurred.
>
> . . .
>
> The Mortgagees shall be entitled to exercise their rights, powers, discretions and remedies notwithstanding any rule of law or equity to the contrary and whether or not any previous default shall have been waived and in particular without the limitations imposed by law.
>
> 8.2 In the circumstances described in Clause 8.1, the Mortgagees shall be entitled (but not obliged) to:
>
> 8.2.1 take possession of the Vessel wherever she may be;
>
> . . .
>
> 8.2.4 in their own name or the name of the Owners, demand, sue for, receive and give a good receipt for all sums due to the Owners in connection with the Vessel and, in their own name or the name of the Owners or the name of the Vessel, commence such legal proceedings as they may consider appropriate or conduct the defence of any legal proceedings commenced against the Vessel or the Owners in their capacity as owners of the Vessel.

6. Pursuant to cl. 3 of the Guarantee and Indemnity dated Dec. 1, 1997 the defendants "irrevocably and unconditionally guarantee to discharge on demand the Borrowers' Obligations, including Interest from the date of demand until the date of payment, both before and after judgment". Pursuant to cl. 15.6 "any certificate or statement signed by an authorized signatory of the bank purporting to show the amount of the Indebtedness or of the borrowers' Obligations or of the Guarantors' Liabilities (or any part of them) or any other amount referred to in any of the Security Documents shall, save for manifest error or on any question of law, be conclusive evidence as against the Guarantor of that amount." Nothing turns upon any other provision of the guarantee.

The events which led up to the arrest in Panama

7. On Dec. 9, 1999 the bank gave notice to the borrowers of two events of default under the loan

facility, first a failure to make a repayment instalment of U.S.$450,000 on Sep. 9, 1999 and secondly a failure to make a further repayment instalment of $450,000 on Dec. 9, 1999. On Aug. 30, 2000 the bank agreed to postpone payment of the balance of the loan pending a refinancing which was to be completed by Sep. 30, 2000. However such refinancing was not completed and so in January, 2001 the bank gave notice of a further event of default (the failure to make a repayment instalment on June 30, 2000) and reserved the right to declare the whole indebtedness of U.S.$2,233,290 due and payable together with interest. This notice was copied to the defendants.

8. On May 21, 2001 a meeting took place in Havana, Cuba between the bank and the borrowers. The bank were informed that *Tropical Reefer* and, her sister vessel, *Blue Reefer* were under charter but that each had debts to suppliers and repair yards of approximately U.S.$235,237 and U.S.$376,488 respectively. *Sky Reefer* was awaiting work on the spot market but also had debts to suppliers and repair yards of approximately U.S.$293,923. *Spring Reefer* was shortly to be sold for scrap.

9. A further meeting took place in Havana on June 26, 2001. The bank were then informed that one of the borrowers' P&I Clubs, the West of England, was owed calls and had withdrawn cover on *Tropical Reefer* but would re-instate cover if U.S.$250,000 were paid by July 5/6, 2001. Thereafter the balance due to the West of England of about U.S.$600,000 was to be paid in instalments. The bank were also informed that *Tropical Reefer* was en route for Ecuador to load bananas for shipment to Europe and that *Blue Reefer* had suffered an engine problem and was due to be towed by *Sky Reefer* to Las Palmas. The proceeds of scrapping *Spring Reefer*, expected to be about U.S.$110,000, were to be paid to the bank. In addition U.S.$200,000 was to be paid to the bank on July 15, 2001.

10. The sums agreed to be paid by the borrowers to the West of England and to the bank on July 5 and 15, 2001 were not paid. The borrowers' managers later informed the bank on July 23, 2001 that the payments had not been paid "due to lack of liquidity".

11. On July 19, 2001 the bank gave notice to the borrowers of events of default, in particular the failure to make payments when due and the failure to observe covenants made in the Loan Agreement. The latter was a reference to the failure to maintain P&I cover. The indebtedness was said to be over U.S.$2 m. This notice was also copied to the defendants.

12. On or about July 23, 2001 a company called Tramp Oil arrested *Tropical Reefer* in Panama on account of payments due in respect of bunkers supplied to a sister vessel.

13. The borrowers' managers informed the bank on July 23, 2001 that they proposed to sell *Blue Reefer* for scrap and transfer the net proceeds to the bank. They also intended to recover from underwriters about U.S.$1 m. in respect of her engine damage which sum would be paid to the bank. They proposed a renegotiation of the loan facility in respect of *Tropical Reefer* and *Sky Reefer* with instalments commencing in January, 2002 "considering that the 2nd part of this year 2001 the reefer market is down season."

14. On July 24, 2001 the bank, by a letter to the borrowers copied to the defendants, declared that the outstanding indebtedness of over U.S.$2 m. was immediately due and payable pursuant to the terms of the loan facility. On the same day arrangements were made to arrest *Tropical Reefer* in Panama and the next day, July 25, the vessel was arrested.

15. On July 27, the bank replied to the borrowers' managers' letter dated July 23, informing them that the bank had demanded repayment of the outstanding indebtedness and had commenced enforcing its security by arresting *Tropical Reefer.* They said that the proposal made by the managers was unacceptable. On the same day the arrest made by Tramp Oil was set aside due to a procedural problem with the proceedings commenced by Tramp Oil in that they had, apparently, sued the managers rather than the owners of the vessels.

The events after arrest

16. On July 30, 2001 Spanish lawyers acting for the owners of *Tropical Reefer* advised the bank that the cargo of bananas was deteriorating and suggested that the vessel be released from arrest in order that she might proceed to Hamburg "where the bank might act in the way it would think better for its interests". On Aug. 1, Stephenson Harwood replied on behalf of the bank saying that the bank had lawfully exercised their right to arrest the vessel but would not oppose any reasonable application by the cargo interests to the court in Panama as to how to deal with the cargo.

17. On Aug. 2, 2001 the borrowers' managers complained to the bank that their arrest (1) was preventing the payment of hire or freight which would fall due five days after the vessel had emerged from the Panama Canal and (2) would damage the cargo of bananas. They offered to pay U.S.$260,000 in return for the vessel being released from arrest. The bank rejected that offer the same day.

18. On Aug. 8 and 9 the Havana office of ING Bank informed the bank that it would pay U.S.$700,000 on Aug. 15, in order to secure the

release of the vessel. It appears from the terms of an e-mail dated Aug. 13, 2001 from Stephenson Harwood to lawyers acting on behalf of the cargo interests that this offer was not accepted because terms could not be agreed.

19. Thereafter, in September, 2001, the cargo of bananas was discharged overboard at sea and in October, 2001 the vessel was sold by the court in Panama. The gross proceeds were U.S.$1,150,000. However, after deducting the costs of the sale including the costs of disposing of the bananas the net proceeds in Court are about U.S.$780,000.

The outstanding indebtedness

20. Certain payments have since been made to reduce the outstanding indebtedness, including payment of the proceeds of sale of *Sky Reefer* and of the proceeds of an insurance claim on *Blue Reefer*. The sum for which judgment has been given is U.S.$815,277.09. That sum is proved by a statement pursuant to cl. 15.6 of the guarantee. On the application for summary judgment it was not challenged that there had been events of default under the security documentation, that the bank were entitled to declare the outstanding indebtedness due and owing and that the statement pursuant to cl. 15.6 of the guarantee was conclusive evidence of the amount due, subject of course to the defences now put forward.

Arguments

21. Mr. Davey for the defendant guarantors had two main arguments. The first argument, made at the time when the proceedings for summary judgment were instituted, were that the bank had been "negligent" in arresting (and maintaining the arrest of) the vessel and causing it to be sold by the Panamanian Court; this conduct gave rise to the expense of discharging the cargo from the vessel and disposing of it as well as the cargo claim, which was the subject of the alleged maritime lien. This "negligence" was said to constitute a defence to the claim. As this argument came to be developed in front of the Deputy Judge, Mr. Davey accepted that he could not rely on any common law duty of care in "negligence" but had to rely on the general equitable duties which the law imposes on a mortgagee (1) that the power of sale must be exercised in good faith for the purpose of obtaining repayment and (2) that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price, all as set out in *Downsview Nominees Ltd. v. First City Corporation*, [1993] A.C. 295, 315 per Lord Templeman and *Yorkshire Bank Plc v. Hall*, [1999] 1 W.L.R. 1713, 1728 per Lord Justice Robert Walker. He submitted to the Deputy Judge and to this court that the bank, having decided to sell, had not taken reasonable care to obtain a proper price because it was obviously more sensible to have allowed the vessel to proceed to Hamburg to discharge its cargo in the ordinary course of events and arrest the vessel there. There would then have been no problem about the costs of discharge or any cargo claim taking priority to the bank's mortgage. For these submissions Mr. Davey relied on the ordinary law of mortgages as applied to real and personal property and I will call it "the argument in equity".

22. Mr. Davey had a second argument specific to ship mortgages and based on the fact that a ship was a chattel habitually used for trading purposes. This was that, in the absence of any express term in the mortgage to the contrary, the mortgagee was obliged not to interfere with contracts made by a shipowner for the carriage of cargo unless such contracts impaired the mortgagee's security. For this purpose he relied on a line of authority beginning with *De Mattos v. Gibson*, (1859) 4 De G. & J. 276 and ending with *The Myrto*, [1977] 2 Lloyd's Rep. 243. He, particularly, relied on the following statement of Mr. Justice Willes in *Johnson v. Royal Mail Steam Packet Co.*, (1867) L.R. 3 C.P. 38. 42:

> Without entering into the question of mortgages of land further than to say we have given it our consideration — the case of a mortgagee and mortgagor of a ship appears to be one of a quite different complexion, because the mortgagee so long as he does not interfere and claim possession, may fairly be taken to have allowed the mortgagor to enter into all engagements for the employment of the ship of the sort usually entered into by a person who has the apparent control and ownership of a vessel.

The activities of the bank constituted a breach of the obligation to allow the mortgagor to enter into and perform engagements for the employment of the vessel and such breach amounted to an arguable defence to the claim. Mr. Davey complained that, although the Deputy Judge had been referred to the *Johnson* case, he did not refer to it in his judgment. The argument can conveniently be called the "shipping argument".

The argument in equity

23. The task of this Court has been made easier (and Mr. Davey's harder) by the fact that eight days before the hearing of the appeal this Court handed down its decision in *Silven Properties Ltd. v. Royal Bank of Scotland Plc*, [2003] EWCA Civ 1409, Oct. 21, 2002. In that case this Court, speaking through Mr. Justice Lightman, concluded that the general equitable duties of a mortgagee were owed by receivers of mortgaged properties who were