

Neutral Citation No. [2015] NIQB 67

Ref: **WEA9535**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: **06/02/2015**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (ADMIRALTY)**

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**PURCELL BROS LIMITED**

**Plaintiff**

**v**

**THE OWNERS DEMISE CHARTERS AND ALL PERSONS CLAIMING TO BE  
INTERESTED IN THE MOTOR VESSEL STAR VIKING**

**Defendants**

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**Purcell Bros Ltd (No 2) - Reasons for the dismissal of the plaintiff's application to increase security.**

**WEATHERUP I**

[1] These are the reasons for the dismissal of the plaintiff's application for an Order that the mv Star Viking, now under arrest and in the custody of the Admiralty Marshall, shall not be released from arrest, save upon the increase in the provision of security to the amount of €3.5m in a form reasonably acceptable to the plaintiff. Accordingly the vessel remains under arrest pending the provision of security in the amount of €300,000 in a form reasonably acceptable to the plaintiff. Mr Dunford appeared for the plaintiff and Mr Spence for the defendant.

[2] In December 2014 I ordered the arrest of the vessel on the ex parte application of the plaintiff. On the defendants' application for the release of the vessel I found that the plaintiff has a good arguable case in the pending arbitration proceedings in Dublin concerning the dispute over the contract of affreightment between the parties and on 22 December 2014 ordered the release of the vessel upon the defendants providing security in the sum of €300,000 - Purcell Bros Ltd (No 1) [2014] NIQB 137.

While the defendants made arrangements to provide the necessary security the plaintiff made this application for the security to be increased, based on further affidavit evidence, to which the defendants responded on affidavit.

[3] I proceed to consider this application on the basis of recognising the plaintiff's reasonably arguable best case in relation to the amount of the claim against the defendants, together with interest and the costs of proceedings, being those in personam in the arbitration in Dublin and these proceedings in rem in this Admiralty jurisdiction - The Moscanthy [1971] 1 Lloyd's Law Reports 37..

[4] The plaintiff claims entitlement to damages in the arbitration at €3.5m. That sum has been broken down by the plaintiff. The first item is loss of profits on 24 voyages in the sum of some €3.4m. Secondly, interest on the loss of profits claim up to July 2015, which is the anticipated date of the arbitration award, in the sum of €35,000. The third item is the estimated costs of the arbitration in the sum of €125,000. The fourth item is the estimated costs of these proceedings at €34,000. This gives a grand total of approximately €3.6m which for the purposes of this application the plaintiff has rounded down to €3.5m.

[5] The bulk of the plaintiff's claim is for loss of profits at €3.4m. This sum has been calculated on the basis of the contract of affreightment between the plaintiff and the defendants for the shipment of livestock from Ireland to Africa over a two-year period comprising a minimum of 10 voyages and a maximum of 24 voyages. The plaintiff has produced an estimated profit and loss per shipment which claims a net profit of some €140,000 per voyage and therefore for the total of 24 voyages the sum of €3.4m.

[6] Turning to the calculation of damages to date, the plaintiff contends that there should have been two voyages on foot of the contract, one in October and one in December 2014. In the October voyage the shipment was thwarted by the vessel leaving Waterford without the cargo. As a result the cattle that the plaintiff had ready for shipment had to be sold for slaughter. The loss sustained on that transaction is not known because the proceeds received from the sale of the livestock have not been disclosed. I am assuming that the actual loss on that voyage is considerably less than €140,000 given that the plaintiff was able to resell the livestock in Ireland. A second voyage was planned for December 2014. That voyage did not proceed. The plaintiff has not indicated that any cattle were bought in respect of that voyage. However there would be a loss of profit in respect of the lost transaction.

[7] As far as the future loss is concerned there are a maximum of 24 voyages to be made over the contract period. However 24 voyages might yet be made once the shipments commence. The defendants state on affidavit that they are ready and willing to commence the contract of affreightment and perform the contract as soon as approval is obtained from the Irish authorities for shipment from Waterford. Thus the defendants contend that the contract could yet be performed and I have not

heard from the plaintiff that it would not be possible for the 24 voyages yet to be completed.

[8] The plaintiff puts its reasonably arguable best case on repeated breaches by the defendants in failing to complete any of the voyages anticipated under the contract of affreightment over the two-year period. The plaintiff's case proceeds on the basis that the contract of affreightment commenced in October 2014 when the plaintiff gave notice to the defendants, the vessel arrived in Ireland and the plaintiff's livestock were ready for shipment. The defendants' case is that the contract of affreightment was not to commence until remedial work to the vessel was completed and approval obtained from the relevant Irish authorities. The remedial work was not completed until late January 2015 and according to the defendants the vessel has now to sail to Waterford for approval by the Irish authorities before the contract commences. The issue about the commencement of the contract will be determined in the arbitration.

[9] On the plaintiff's reasonably arguable best case the defendants are in breach of contract in failing to complete any voyages to date and may be unable to complete the specified number of voyages. On the assumption that the remedial works to the vessel are up to standard and that there will be no undue delay in obtaining approval from the Irish authorities, the defendants may yet comply with the obligation under the contract to complete a maximum of 24 voyages within 2 years of last October. Thus the plaintiff's profits can yet be earned when the vessel gets to Waterford and commences the shipments. If the defendants so perform the contract the value of the plaintiff's claim will be limited.

[10] The plaintiff's claim for security of €3.5m based on loss on profits on 24 voyages is excessive. When the security was originally fixed at €300,000 I did not have the particulars that have been produced for the purposes of this application. With the production of those particulars I have not been persuaded that the security should be increased. I limit the security to €300,000 because if the value of the plaintiff's reasonably arguable best case is limited substantially to such losses as have occurred to date together with any losses that may occur in the near future while the vessel is made ready, interest will be reduced accordingly and the claimed costs of the arbitration and the overall liability of the defendant would be limited.

[11] Apart from the issue about the plaintiff's reasonably arguable best case the defendants' challenge the plaintiff's approach on a number of grounds on which I would comment as follows.

[12] First of all the defendants challenge the sale price relied on by the plaintiff that might be achieved from the sale of the cattle in Africa. The defendants refer to current cattle prices and contend that in the present market the plaintiff would not make any profit on the shipments. I cannot determine that dispute on affidavit and it is a matter that will be considered in the arbitration.

[13] Secondly, the defendants contend for mitigation by the plaintiff by the use of other ships to transport the cattle. The plaintiff's evidence suggests there are no ships available to undertake these voyages in place of the Star Viking. It is said by the defendants that the plaintiff's account of the unavailability of alternative shipping is misleading. Again this is in dispute that cannot be resolved on affidavit and is a matter for the arbitration. The alternative mitigation suggested by the defendants is that the cattle should be transported overland. I have not been satisfied that the plaintiff is equipped to undertake the transport of cattle overland to Africa. Again this issue may feature in the arbitration.

[14] The third matter that the defendants refer to is the credit that should be given for the slaughtered cattle that could not complete the October voyage. I have referred above to that matter on which particulars are not presently available.

[15] The fourth matter is that the defendants contend there is no evidence of a contract with the purchaser of the cattle in Africa. The defendants produce exhibits to verify statements made on affidavit about the African market. The plaintiff produced a statement of the makeup of the plaintiff's claim but not the exhibits to verify the items claimed nor the proofs of the basis of the loss claimed. On an application such as this the plaintiff is not required to produce the proofs of claim. To require that to be done would be to involve this Court in a trial of the plaintiff's claim. That is a matter for the arbitration. The plaintiff is required to establish a reasonable arguable case, which the plaintiff has done to the extent I have indicated above.

[16] The fifth matter concerns the merits of the plaintiffs claim that the defendants are liable for breach of contract. The defendants contend that the contract has not commenced, that there has been no breach by the defendants and that no liability attaches to the defendants. I have found that the plaintiff has a reasonably arguable case in the arbitration based on the defendants' breach of contract.

[17] The sixth matter is the defendants' contention that the security already required exceeds the value of the ship. The Star Viking is said to be worth US\$250,000. In effect the defendants seek a reduction in the security. The defendants take the figure of US\$250,000 from the sale price of the vessel by Rossmarine Ltd, the former registered owner, to Zinnia Holdings Ltd, the present registered owner. This does not take account of the €6m mortgage on the vessel, some of which provided funding for the repairs and refit of the vessel and which would have affected the value of the vessel. I am not satisfied that the value of the vessel is less than the security of €300,000.

[18] I have not been satisfied that the plaintiff's reasonably arguable best case extends to any significant element of future loss, given that the defendants have made the commitment on affidavit to a readiness to undertake the contract once the vessel sails to Waterford and is approved by the authorities. Mr Dunford for the plaintiff has challenged the credibility of the defendants' affidavit evidence in

several respects. There have been some questionable averments made in the affidavits sworn in proceedings in Dublin and in these proceedings. However the vessel has been undergoing this refit for the purpose of transporting livestock and is now said to be ready to do so, subject to approval, and the owners of the vessel have undertaken to perform the contract of affreightment. I have no basis for concluding that the defendants will not seek to do so. In any event future breaches of the contract will give rise to further rights to arbitration under the contract. Accordingly I dismiss the plaintiff's application for increased security.