

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

PURCELL BROS LIMITED

Plaintiff

-v-

THE OWNERS, CHARTERERS AND ALL PERSONS CLAIMING TO BE
INTERESTED IN THE MOTOR VESSEL STAR VIKING

Defendants

Purcell Bros Ltd (No 3) - Ruling on the Plaintiff's application for Appraisalment and Sale of the motor vessel Star Viking.

WEATHERUP J

[1] This is the plaintiff's application for an Order for the Appraisalment and Sale of the motor vessel Star Viking. Mr Dunford appears for the plaintiff, Mr Spence for the defendants and Mr Gibson for the new registered owners of the vessel, Nova Negoce SAS ("Nova").

[2] The Star Viking was arrested in the port of Belfast on 10 December 2014. The history of the matter appears in the decision in Purcell Bros Ltd (No 1) [2014] NIQB 137. The defendants applied for release of the vessel from arrest and on 22 December 2014 I ordered release on the provision by the defendants of security in the sum of €300,000.00. The plaintiff applied for an increase in the security to the sum of €3.5m and I dismissed that application on 6 February 2015 in Purcell Bros Ltd (No 2) [2015] NIQB 67. The plaintiff appealed and on 11 February 2015 the Court of Appeal ordered the release of the vessel on payment by the defendants of increased security of €1m. That security was not provided by the defendants. The ship remains under arrest in the port of Belfast.

[3] The plaintiff now applies for appraisalment and sale of the vessel. The background dispute between the parties concerns the alleged breach by the

defendants of a contract of affreightment and an arbitration hearing is scheduled for Dublin in September 2015. The grounding affidavit of Joanne Moody, solicitor for the plaintiff, described the options available to the defendants in relation to the provision of the required security, being a P & I Club letter of undertaking or a bail bond or a payment into Court. Ms Moody stated her belief that after this period of time since the Order for security was made the defendants will not now provide the required security. The plaintiff has given an undertaking to discharge the fees of the Admiralty Marshal and all the expenses that would be incurred in respect of the appraisalment of sale of the vessel.

[4] The power to order the sale of the vessel arises under the inherent jurisdiction of the Court as supplemented by Order 29 Rule 5 of the Rules of the Court of Judicature (N.I.) 1980. Rule 5 provides for the sale of any property, other than land, “which is the subject matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any good reason it is desirable to sell forthwith”.

[5] There must be ‘good reason’ for the sale of the vessel. In the Myrto [1977] 2 Lloyds Rep. 243 merchant bankers agreed to advance funds to FF to enable them to buy the vessel Myrto which was to be registered in Liberia and the debts were to be secured by mortgages on the vessel. FF did not pay the sums due under the mortgages so the vessel was arrested and an application made for an order for appraisalment and sale as she was a wasting asset while under arrest. FF opposed the claim making a challenge to the validity of the mortgages. On the issue of appraisalment and sale the application was granted. It was held first of all that it would be unreasonable to keep the ship under arrest at great expense for seven months or more until the action came on for trial with the result that if the claim succeeded the amount of recovery would be reduced by the costs incurred. Secondly, that the interests of third parties might be less affected by a sale pendente lite than by prolonged arrest.

[6] Brandon J stated that where the action is defended and the defendants oppose the making of an order for appraisalment and sale the Court should examine more critically than it would normally do in a default action the question whether good reason for the making of an order existed or not. If the owners were prepared to bear or contribute to the costs for the time being, in order to prevent a sale, different considerations might apply.

[7] The process of appraisalment and sale was described by Teare J in Bank of Scotland v mv Union Gold [2013] EWHC 1696 as follows -

2. A claimant *in rem* who has obtained judgment against a vessel may seek an order that the vessel be sold so that his claim may be satisfied from the proceeds of sale. A claimant may also seek such an order before obtaining judgment if the circumstances require it; see the Myrto [1977] 2 Lloyd's Rep.243. It is often the case that, in

addition to the claimant *in rem* who has obtained the order for sale, there are other claimants *in rem* against the vessel. When the vessel is sold by the Marshal the purchaser acquires title to the vessel free of all encumbrances and liens and so existing rights *in rem* against the vessel are transferred to the proceeds of sale. The Marshal must therefore sell the vessel for the best possible price. If the proceeds of sale are not sufficient to enable all claims *in rem* to be satisfied then the proceeds will be distributed in accordance with an established order of priorities.

3. When an order for sale is made the Marshal must appraise the vessel, that is, have the vessel valued. He does this by seeking the advice of an experienced ship broker. Once appraised the sale of the vessel is advertised and offers to buy are invited. The Marshal will then sell to the highest bidder. However, he cannot sell the vessel for less than the appraised value without the leave of the court; see the *Halcyon The Great* (No.2) [1975] 1 Lloyd's Rep. 525.
4. It is in the interests of the claimants *in rem* and of the defendant shipowner that the vessel is sold for the best possible price. The Marshal's method of sale - appraisal, advertisement and invitations to bid - is designed to achieve just that. The Marshal is an officer of the court whose role is essential to the administration of justice in the Admiralty Court. He acts impartially. He does not act for any of the claimants *in rem* or for the defendant shipowner.
5. The title which a sale by the Marshal confers on the purchaser, free of liens and encumbrances, is recognised not only by the courts of this country but by the courts of all other countries. Similarly, the courts of this country will recognise sales by competent courts of admiralty in other jurisdictions; see the *Acrux* [1962] 1 Lloyd's rep. 405 and the *Cerro Colorado* [1993] 1 Lloyd's Rep. 58. It is therefore important that the reputation of the Admiralty Court for impartiality is not tarnished; see the *Halcyon The Great* (No.2) 1975 1 Lloyd's Rep.525.
6. Any interference with the performance by the Marshal of his duty to sell the vessel, and therefore with the administration of justice, is capable of being a contempt of court; see the *Ruth Kayser* (1925) 23 Lloyd's List Rep. 95, the *Jarvis Brake* [1976] 2 Lloyd's Rep. 320 and the *Cerro Colorado* [1993] 1 Lloyd's Rep. 58.

[8] Thus, in the Union Gold, on an application by the bank for four small cargo vessels to be sold by the Admiralty Marshal and for the Admiralty Marshal, instead of appraising and selling the vessels to the highest bidder in accordance with the usual practice, to sell the vessels at a certain price to a certain buyer, the Court did not approve. Only exceptionally was it appropriate to permit the Admiralty

Marshal to sell without appraisal by the Admiralty Marshal. As there were special circumstances appertaining to the proposed sale of one of the vessels a departure from the general principle was justified.

[9] The companies that previously enjoyed a beneficial interest in the vessel, Rossmarine Ltd and Zinnia Holdings Ltd, were controlled by the Hanley family. Daniel Joseph Hanley filed a replying affidavit on this application and stated that the Star Viking is entered with the Shipowner's Mutual Club in London for insurance purposes for both P and I (Protection and Indemnity) and FDD (Free of Demurrage and Defence). The latter cover is said to be relevant as it provides cover for the legal costs of defending claims such as that made by the plaintiff. However there is said to be no cover for the potential liability for the contractual claim brought under the terms of the contract of affreightment.

[10] In order for the P & I Club to produce a letter of undertaking in response to the initial order for security it was necessary for the defendants to deposit the sum of €300,000.00 with the Club. It is said that that sum was finally deposited with the Club in early February 2015. However, the Court of Appeal ordered the security to be increased to €1m and as a consequence a further sum of €700,000.00 was required to be deposited before the P & I Club would issue a letter of undertaking. It was decided by the defendants that a bank guarantee from the Allied Irish Bank, with whom the defendants already had a facility, might produce a more flexible form of financing and an application was made to the Allied Irish Bank to provide the necessary funding. That matter has been on-going since March 2015 as attempts have been made to secure a suitable form of funding from the Allied Irish Bank.

[11] In the meantime there was a further development with the intervention of Nova who lodged a caveat against the release of the vessel. An affidavit was filed by Michael Brian King, solicitor for Nova, a company having its registered office in Paris. His instructions were that Nova had purchased the mv Star Viking from Zinnia Holdings Limited on 9 January 2015 and that ownership was registered with St Vincent and the Grenadines maritime administration. That matter had not previously been disclosed to the Court.

[12] Joanne Moody responded in summary as follows. First of all that the Hanleys and Zinnia Holdings Ltd, the vendors of the vessel to Nova, had therefore acquired the proceeds of sale of the Star Viking in the sum of €2.5m from which they could have provided the required security of €1m. Secondly she asked why the Hanleys had not disclosed in any of the proceedings in this Court that in January 2015 there had been a sale of the vessel to Nova and why this had not emerged until the intervention of Nova in March 2015. Thirdly, she asked how Nova came to purchase the vessel without notice of the encumbrances on the vessel or the arrest of the vessel.

[13] A response was filed by Mark Lowth, CEO of FDML, trading as the FD Network, a network of qualified finance professionals who deal with managing and

obtaining finance in respect of small to medium sized businesses. Mr Lowth stated that he first met Joseph Hanley on 14 August 2014 as the Hanleys wanted assistance in securing finance to refurbish the Star Viking and to provide working capital to load the vessel with livestock. On 22 September 2014 an approach was made to Nova.

[14] Nova was registered as the owner of the vessel in January 2015. A meeting of Nova representatives and the Hanleys took place in Gormanston, County Meath on 24 February 2015 and shortly after entering the meeting the Hanleys are said to have confessed that they had a problem insofar as the vessel had been placed under arrest. There then followed what was described as a rather terse discussion as to how the vessel had been arrested and why the Hanleys had failed to notify anyone that the vessel had been arrested. The Hanleys provided various excuses. Joseph Hanley asserted that the reason they had gone ahead with the deal was that they were certain that the transfer of the ship from Rossmarine to Zinnia Holdings removed any possibility that the Plaintiff would be able to arrest the ship.

[15] Olivier Piot on behalf of Nova, stated that Nova was established on 16 March 2012 as a special purpose company dedicated to financing under various forms including leasing and conditional sale of large assets including seagoing vessels. Mr Piot repeated that Nova acquired the vessel without notice of encumbrances or arrest as the Hanleys had not disclosed that information.

[16] Daniel Joseph Hanley's affidavit of April 2015 described the transfer having taken place by means of a hire purchase agreement entered into through High Hopes Limited and two monthly repayments of €79,000 having been made. Mr Hanley sought to explain what has happened to the €2.5m obtained from the sale of the vessel. €500,000 had been returned to Nova, €500,000 had been provided to the Turkish shipyard which had refurbished the ship, cattle had been purchased for €800,000 and fees had been paid of €200,000. There are no details of the transaction in relation to the cattle or the nature of the fees. Mr Hanley referred to attempts to raise the security of €1m through discussions with AIB which at the time of swearing of the affidavit were ongoing.

[17] Hugh Noel Hanley, retired veterinary surgeon, swore an affidavit which stated that the work of refurbishment of the vessel had been completed. The Star Viking was said to be in pristine condition and ready for sea. A crew of 11 including a captain and an engineer remained on the vessel. The crew had been paid and the Hanleys were endeavouring to meet all other expenses and outgoings as they fell due. Mr Hanley addressed some deficiencies that were found in the vessel but which were not considered to be of significance.

[18] The Allied Irish Bank provided a letter of guarantee for €1m, with the period of the guarantee limited to May 2016 and that has not proved acceptable to the plaintiff. While the arbitration hearing in relation to the affreightment dispute is to be conducted in Dublin in September 2015, that may not be the end of the

proceedings. There are limited circumstances in which an appeal may be brought against an arbitration award.

[19] In the days since the hearing of this application various additional items have been forwarded to the Court. First of all an Opinion has been furnished from Counsel involved in the arbitration in Dublin setting out the limited circumstances in which a challenge can be made to an arbitration award. Paul Fogarty of the Law Library, Dublin, attached a judgment of Laffoy J in the High Court dated 19 June 2013 addressing the limits on an appeal from an arbitration award. Nevertheless I am not satisfied that the arbitration proceedings in Dublin will be concluded in September 2015 and if there is any delay in the hearing or further time required before a decision is issued or if there is an appeal against the decision it is possible that the proceedings may not be concluded by May 2016.

[20] Secondly, since the hearing, an e-mail has been furnished from Conor Corry, manager of the North East Business Centre, on behalf of Allied Irish Bank, which states that in the event that the arbitration proceedings are unresolved in May 2016, AIB “would certainly seek to extend the Guarantee for a further period of up to 12 months subject to the Bank’s normal credit approval and policies”. That further undertaking is qualified and I assume not acceptable to the plaintiff or I would have heard otherwise. It is expressed in terms that AIB would certainly seek to extend the guarantee without stating that it actually has been extended and it is also subject to AIB’s normal credit approval and policies, and it is not known what either matter might require.

[21] Thirdly, a communication has been received in relation to the expenses that are being incurred by the arrest of the vessel. All the expenses are not being paid, according to a statement from Mark Ewings of Clarkson Port Services, who states his role as that of agent on behalf of the owners. Mr Ewings gathers the invoices and passes them on and distributes the funds that are recovered. The list of costs involve port dues, pilot fees, mooring charges, berth occupancy fees, ISPS, waste disposal, port welfare, crew change costs, sludge removal, shifting costs within the harbour and chandlery costs. To date the costs amount to some £34,000. The costs stated to have been paid to date, I assume by the owners, are some £7,000 to cover agency fees. None of the other costs has been paid and there is an outstanding balance of £26,845.

[22] The plaintiff’s grounds for appraisalment and sale of the vessel are first of all that the vessel has now been under arrest for some six months and the arbitration will not commence until September. Secondly, the plaintiff has given and continues to be bound by an undertaking to pay the Admiralty Marshal’s costs and expenses, although the plaintiff has not been asked to do so. The invoices have been sent to the owners who have stated through their Counsel that they are paying the fees, but according to Mark Ewings they are only paying the agency fees. Thirdly, the costs are likely to be considerable and to continue for many months and there is no apparent prospect of the security ordered by the Court of Appeal in the sum of €1m

being provided, given the lapse of time. The costs over the last five months have amounted to some £35,000 and are increasing at the rate of £7,000 a month. In addition there will be the ongoing maintenance of the vessel.

[23] Further, the plaintiff disputes the description of the state of the vessel. Hugh Noel Hanley has described the sound condition of the vessel. He is said by the plaintiff to be a retired veterinary surgeon and not a marine engineer and therefore not to be in a position to declare authoritatively on the state of the vessel. I have no evidence that the vessel is other than in a sound condition.

[24] In addition the plaintiffs rely on what they describe as the machinations of the Hanley companies. Changes of ownership have involved Rossmarine Ltd and Zinnia Holdings Ltd and now Nova. The transfer to Nova has taken place without notice to the plaintiff or the Court. The plaintiff says in any event that whatever dispute there may be about title to the vessel a sale by the Admiralty Marshal will pass good title to the purchaser.

[25] On the other hand the defendant says there is no good reason for the sale of the vessel. It is said that the expenses of the ship and the crew are being met, although, according to Mark Ewings, the shipping costs stated above are not being discharged. The arbitration will be completed in September say the defendants and therefore a sale at this stage is unnecessary.

[26] Is there good reason to sell the Star Viking? First of all I am satisfied that there is no evidence of deterioration of the vessel and she is I believe currently in a sound state. Obviously she will require maintenance while in port under arrest and the cost of that maintenance will be incurred when the vessel is not earning. There are expenses being incurred by the vessel in port and those costs are not being met, save for the agency fees. Ultimately if those expenses are not discharged by the owners they will fall on the plaintiff to be met out of the proceeds of sale of the vessel and the value of the asset will be diminished to that extent.

[27] Secondly, after four months the defendant has been unable to obtain adequate security. The defendants sold the ship for €2.5m, returned €500,000 to the buyer, discharged the expense of refurbishment in Turkey and met unspecified fees of €200,000. There remained available to the owners €1m, as required by the Court of Appeal for security, and that €1m was not used to provide the security but instead was used to buy cattle worth €800,000. Why, with the ship under arrest in Belfast and no security available for the release of the ship, did they buy €800,000 worth of cattle with the proceeds? The inference is that the defendants wish to divert assets away from the plaintiff.

[28] Thirdly, the defendants completed a sale of the vessel to Nova and did not disclose that sale in these proceedings, nor did they disclose the arrest of the vessel to Nova. These actions add to what have previously been described as the

machinations of the defendants. The inference is that the defendants are seeking to thwart the plaintiff's claim.

[29] Fourthly, the arbitration hearing in Dublin is fixed for September. There will be further delay if there is any challenge to the arbitration decision. I note the Opinion of Mr Fogarty and the judgment of Laffoy J as to the limited circumstances in which a challenge can be made to arbitration decisions. I consider there to be a prospect that this dispute may not be resolved this year and that the vessel will remain under arrest.

[30] Fifthly, the purpose of this exercise is to provide security for the prospect of the plaintiff's success. If the plaintiff succeeds, then as matters stand the vessel will probably have to be sold to meet an award made to the plaintiff as the defendants do not have other assets or are unwilling to produce other assets to meet an award.

[31] As a result I am satisfied that there is good reason to sell the vessel now rather than to wait. It would be preferable to avoid the vessel lying under arrest in port for a year. The sale of the vessel will be the ultimate outcome in any event in the absence of security being provided. I have drawn the inference that the defendant is diverting or seeking to divert assets and is seeking to avoid the plaintiff's claim. The expenses of keeping the vessel under arrest are increasing. While I am satisfied that the vessel is currently in sound condition the ongoing maintenance of the vessel will also be a necessity.

[32] Accordingly there will be an Order for the Appraisal and Sale of the mv Star Viking.