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To: Transport Industry Operators

Sale of ship by court (II)

In the last issue of Chans advice, we reported the case that the Hong Kong Court of Appeal rejected the mortgagee's appeal against the High Court's order of granting a stay until 24 April 2019 for the sale of the Vessel Brightoil Glory. On 17 May 2019, the Court of Appeal issued another judgment refusing the shipowners' appeal in respect of their application for a further stay of the sale of the Vessel until 22 May 2019. [CAMP81/2019] [2019 HKCA 561]

Background

The Brightoil Glory was valued at approximately US\$60 million. The mortgagee's claim was about US\$33.8 million. There was therefore substantial equity in the Vessel of over US\$20 million. The Vessel was arrested by the bailiff on 21 January 2019. The mortgagee issued a notice of motion dated 25 January 2019 for appraisal and sale *pendente lite* of the Vessel for hearing on 4 February 2019. The shipowners did not attend the hearing. The High Court made an order as sought. It was only on 26 March 2019 that the shipowners issued a summons for an order that the sale of the Vessel *pendente lite* be stayed for three months until 27 June 2019. The High Court did not accede to that application but on 27 March 2019 ordered to grant instead a stay until 24 April 2019. The mortgagee sought leave to appeal against the High Court's order. The Court of Appeal refused leave to appeal and dismissed the mortgagee's application.

On 24 April 2019, the shipowners issued a summons for a further stay of the Order for Sale until 22 May 2019. The High Court refused to grant a further stay as sought. The shipowners renewed their application for leave to appeal before the Court of Appeal.

Discussion

This was an appeal against the exercise of discretion by the High Court.

The High Court had taken into account the matters submitted by the shipowners, namely, that there was substantial equity in the Vessel after satisfaction of the mortgagee's claim, that the Vessel could be moved outside Hong Kong should any adverse weather conditions arise, and the stay was for a short period of just four weeks to enable the shipowners to proceed with re-financing proposals and complete a private sale of the Vessel.

However, the High Court agreed with the submissions of the mortgagee, that to delay the court-ordered sale any further was a process of which the mortgagee would be prejudiced in that the mortgagee would find themselves in a situation where the shipowners would or might continue to come back to court month after month to seek yet further stay. The High Court was taken by the mortgagee to the unsigned memorandum of agreement ("MOA") for the proposed private sale and found force in the submissions made of the uncertainties in the proposed transaction, and the complications that might arise if there should be disputes. The High Court also noted that the Court of Appeal in refusing leave to the mortgagee to appeal against the order of the High Court

endorsed the High Court's approach of allowing the court-ordered sale to be delayed for a very short period.

Having weighed up the various matters submitted by both sides, the High Court did not consider it appropriate to grant the application for a further stay.

The burden was on the shipowners to satisfy the Court of Appeal there were reasonable prospects of establishing valid grounds for the appeal court to interfere with the exercise of discretion of the High Court on the well-established principles in *Hadmor Productions v Hamilton* [1983] 1 AC 191 at 220B to E.

The High Court had refused to grant a further stay because the High Court was not satisfied it would be appropriate and justifiable to make the order.

The shipowners referred the Court of Appeal to *The "Myrto"* [1977] 1 Lloyd's Rep 243, the leading case on the power to order a sale *pendente lite*, and relied on these observations of Brandon J at 259 to 260:

- (1) The power of the court to order an appraisalment and sale of a ship *pendente lite* is derived from its inherent jurisdiction and supplemented by Order 29 rule 4, which provides that the court may make an order for sale where the subject matter is "of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith".
- (2) The court should not make an order for sale *pendente lite* except for good reason.
- (3) The question whether such an order should be made normally only arises where there has been default of appearance or defence. In such a case, the court will commonly make an order for sale on the ground that, unless such order is made, the plaintiffs' security for their claim will be diminished by the continuing costs of maintaining the arrest, to the disadvantage of all those interested in the ship.
- (4) Where the action is defended, and the defendants oppose the making of such an order, the court should examine more critically than it would normally do in a default action the question of whether good reason for making an order exists or not.

The shipowners pointed out that the case in question was not a case of default of appearance or defence. The shipowners acknowledged service of the writ *in rem* within time on 1 February 2019. The defence was also served within time on 25 March 2019. It was due to error that the shipowners' solicitors were not notified of the hearing before the High Court on 4 February 2019, when the Order for Sale was made.

The High Court had dismissed similar arguments based on *The "Myrto"* because the issue before the High Court was not an appeal from the Order for Sale. The shipowners submitted that if the Order for Sale was wrongly made or prematurely made, that represented a "powerful reason" why the order in question should not take immediate effect. The shipowners contended it was wrong in principle for the High Court not to take this into account in exercising the High Court's discretion.

The Court of Appeal did not think the High Court was in error in rejecting the above arguments for these reasons.

The application for an order for sale *pendente lite* before the High Court was not made on the basis that it was a case of default of appearance or defence. The fact that this was not a default situation was immaterial. According to the supporting affirmation for that application, it was made on the grounds that 11 of the 15 owned vessels within the shipowners' group of companies had been arrested, that the ship-owning business of the group had "irretrievably collapsed", and that given the level of outgoings and expenditure of the Vessel, the interests of the parties would be served if

the Vessel was sold without further delay. And given the very large size of the Vessel, it was important for safety reasons that a court sale was completed before the onset of the typhoon season. As there was no appeal against the Order for Sale, it would not be right to act on the hypothesis that the order was wrongly made or prematurely made.

The High Court was apparently concerned that the Vessel might be at risk in the imminent typhoon season, such concern was heightened by the fact that the Vessel had dragged anchor during the flash storm on 20 April 2019. This consideration was now of more limited relevance, as an agreement was reached on 6 May 2019 among all relevant parties at the Marine Department that the Master of the Vessel was to receive weather routing reports, and if he considered anticipated weather to pose a danger, he was to be at liberty to sail the Vessel out of Hong Kong to ride out the storm, and to return to Hong Kong when such danger had passed.

The Court of Appeal noted the point made by the mortgagee that the very act of allowing the Vessel to leave Hong Kong could itself cause delay and disruption to any adjourned sale process.

Leaving aside the safety concerns, there were still other matters to be considered in the balancing exercise whether it would be appropriate to grant a further stay. The burden was on the shipowners to satisfy the court that a further stay was warranted.

The High Court granted a stay short of four weeks on the last occasion in March mainly because the High Court was given to understand that the shipowners' group had reached an "advance stage" in a proposed re-financing, which was based on a defined list of assets including the Vessel, and if the assets of the group should change due to the court-ordered sale of the Vessel, there were fears that might prejudice the proposed re-financing. The High Court decided to suspend the sale process for a short period to allow the shipowners a limited opportunity to pursue the proposed re-financing, having satisfied itself that the substantial equity in the Vessel ought to be sufficient to pay for the costs of maintaining the Vessel in the interim without impairing the mortgagee's security for its claim.

Since then, the proposed re-financing had made some progress. There was now before the Court of Appeal a draft umbrella agreement and a draft bareboat charterparty. The umbrella agreement related to all 15 vessels owned by the shipowners' group. There would be a separate MOA and bareboat charterparty for each vessel. At the moment, there was still nothing binding on any party.

The latest development was a proposal to carve out the private sale of the Vessel and to complete financing on the Vessel prior to the rest of the fleet. On a best-case scenario, it was suggested by the shipowners that the accelerated private sale could progress within nine days. However, completion was still contingent upon a host of conditions precedent, as emphasised by the mortgagee. It was not entirely clear if the proposed sale of the Vessel could be carved out of the wider arrangement regarding the other vessels which involved other creditors. And there was no guarantee that the payment of the purchase price for the Vessel would be forthcoming within the nine-day period as suggested, if the other creditors should take issue with the wider re-financing.

Moreover, the MOA was subject to English choice of law and jurisdiction clauses. If the private sale fell through or was postponed, the parties to that agreement would go to England to resolve any disputes, leaving the effect of the Order for Sale in limbo, and the mortgagee's rights under that order might be prejudiced. This would further complicate the situation.

In the event the private sale fell through, the court would be re-advertising the court-ordered sale for a third time. Prospective buyers who had wasted time and money acting on the earlier invitations to tender might not wish to participate in a third round of tendering. There was also the consideration of the volatility in the shipping markets.

The mortgagee had addressed the High Court on the uncertain and unsatisfactory nature of the proposed re-financing, which could go awry at any juncture at the mercy of various third parties. There was no material change in that regard.

Ultimately, the court was faced with a choice between a certain, orderly court-ordered sale process and a private sale riddled with uncertainties and potential mishaps.

Conclusion

The Court of Appeal was not persuaded that the High Court's rejection of a further stay to give yet another opportunity to the shipowners to pursue a private sale was plainly in error. There was no reasonable prospect to interfere with the exercise of the High Court's discretion in refusing a further stay.

The Court of Appeal therefore refused leave to appeal and ordered the shipowners to pay the mortgagee's costs.

Please feel free to contact us if you have any questions or you would like to have a copy of the judgement.

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