Neutral Citation Number: [2020] EWHC 661 (Admlty)

Case No: AD 2019 000022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

On appeal from the Admiralty Registrar

Admiralty action in rem against the vessel November

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2020

Before :

MR. JUSTICE TEARE

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Between :

TURKS SHIPYARD LIMITED	**Claimant in the action/ Respondent on appeal**
- and -	
THE OWNERS OF THE VESSEL NOVEMBER	**Defendants in the action/ Appellants**

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- -

Neil Henderson (instructed by **BDM Law LLP**) for the **Claimant/Respondent**
Stephen Du (instructed by **Sach Solicitors**) for one of the Owners, the **Defendants/Appellants**

Hearing date: 13 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TEARE

Mr. Justice Teare :

Introduction

1. This is an appeal from the decision of the Admiralty Registrar, Jervis Kay QC, dated 16 October 2019 in which he held that Clean Marine Limited had entered into an agreement with Turks Shipyard Limited, a family owned business operating at the Historic Dockyard at Chatham, for the drydocking, conversion and painting of the vessel NOVEMBER, and in so doing acting as agent for the Owners of the vessel NOVEMBER who were therefore liable to pay for the work as undisclosed principals of Clean Marine Limited. The Registrar concluded that the claim of Turks Shipyard Limited for the cost of the work could, in those circumstances and pursuant to section 21(4) of the Senior Courts Act 1981, be brought *in rem* against the vessel NOVEMBER.

2. One of the owners of the vessel NOVEMBER, Mr. Agamemnon Otero, brings this appeal, with the permission of this court. The other owner, a Mr. Fitzsimons, was not represented before me. I shall refer to them both as "the Owners". Mr. Otero contends that the only party liable who would have been liable on the claim *in personam* was Clean Marine Limited ("CML") and that accordingly Turks Shipyard Limited ("the Yard") was not able to bring an action *in rem* against the vessel NOVEMBER pursuant to section 21(4) of the Senior Courts Act 1981 (because CML was not, when the cause of action arose, the owner, charterer of or in possession or control of the vessel NOVEMBER).

3. The claim was proved in a sum in excess of £103,000 but the vessel, when sold by the Admiralty Marshal, realised only £30,000. Since one of the Owners, Mr. Otero, acknowledged service, the claim can be enforced against him in *personam*, assuming that CML entered into the agreement on behalf of the Owners; see *The Gemma* [1899] P. 285 at pp.291-2, *The August 8th* [1983] 1 Lloyd's Reports 351 at 355 and *The Maciej Rataj* [1992] 2 Lloyd's Reports 552 at 559.

The facts

4. Although several matters have been canvassed the principal dispute is whether the Registrar was correct to hold that CML entered into the agreement with the Claimant as agent for the Owners, as undisclosed principals of CML.

5. The circumstances in which this dispute arose were found by the Registrar.

6. NOVEMBER, a "swim end barge built during the 1940s", was initially acquired and owned by Mr. Fitzsimons. Mr. Otero acquired a half share in 2017 (see paragraph 2 of the judgment). It appears that the intention of the Owners in October 2017 was to transfer ownership to CML. But in the event no such transfer took place (see paragraph 47). Mr. Otero and Mr. Fitzsimons were supporters of projects which support environmental awareness and sustainability. They planned to moor NOVEMBER on the Thames near to Westminster to be used as an educational conference centre to promote environmental awareness "amongst those at Westminster". CML, of which Mr. Otero and Mr. Fitzsimons were directors and shareholders, was to be the vehicle through which funds would be channelled and which would manage the project. NOVEMBER required to be certified by the Classification Society, Bureau Veritas (see paragraph 4). A conversion specification was drawn up and the contract was given to

the Yard in December 2017 (see paragraphs 5 and 6). The contract was contained in an exchange of emails and a booking form. I was shown the "booking form" which was unsigned but which identified "the client" as CML. The unsigned form bore the date 20 December 2017 and contemplated that Mr. Fitzsimons would sign it on behalf of CML. NOVEMBER was delivered to the Yard in February 2018 and work was done between February and July 2018 (see paragraphs 7-14).

7. The Registrar recorded (at paragraph 49) that it was common ground that the written element of the agreement only mentions CML. That must be a reference to the naming of "the client" as CML on the booking form. He also noted that Mr. Otero's evidence was that he and Mr. Fitzsimons only ever acted as directors of CML and not as owners of the vessel. But he had earlier expressed his opinion of Mr. Otero as a witness. He was "evasive, disingenuous and argumentative……a most unsatisfactory witness whose primary purpose was to deflect liability away from the owners of the vessel, particularly himself as a part owner of the vessel …his evidence ….was not to be relied upon as being reliable or true" (see paragraph 24). There was no evidence from Mr. Fitzsimons.

The judgment of the Registrar

8. On the essential issue of agency the basis of the Registrar's decision is to be found in paragraphs 50 and 51 of his judgment. The Registrar noted that there was no evidence of any agreement between CML and the Owners which provided that CML could enter into an agreement with a third party for the repair of NOVEMBER without the authority of the Owners. That was to be contrasted with a demise charter of a vessel which effectively provides that the charterer might enter into an agreement with a third party for the repair of the vessel without the authority of the owner. The Registrar, having noted the background to the case, found it "incredible" that the Owners and CML, if they had given the matter thought, could have considered that they could contract with the Yard without the authority of the owners. He noted that his conclusion was consistent with the evidence of Mr. Otero to the court that CML "entered into contract with yard on behalf of barge owners whoever the barge owners were". The Registrar, in circumstances where he did not believe that anyone had considered this issue at the time, then considered what a reasonable person would have understood had he been asked. He concluded that a reasonable person would have responded that "of course such works could not be performed to the vessel without the authority of its owners". The Registrar observed that it was interesting to note that in his witness statement Mr. Beck of Houlder, the company which provided the specification of the necessary work, stated that "the Owners of the barge, Jay Fitzsimons and Agamemnon Otero, instructed Turks Shipyard to undertake the works detailed in the conversion specification that Houlder Limited has repaired." The Registrar further observed that "if that were not the case it would allow owners of vessels to escape the effects of s.21(4) of the Senior Courts Act which is clearly intended to give builders and repairers of vessels protection against the non-payment of invoices". He concluded that Mr. Otero's statement in evidence was a "belated recognition by him of the true situation, namely, that both the agreement made with the yard and the instructions given to the yard with respect to the work to be performed were made on behalf of the owners of the vessel."

The arguments on appeal

9. Counsel for Mr. Otero submitted that the Registrar's decision was wrong because there was no evidence of any communication, by words or conduct, between the Owners and CML which, objectively analysed, amounted to an intention to confer authority on CML to contract with the Yard on behalf of the Owners. Without such evidence there was nothing to displace the presumption that the person named in the contract as principal is contracting as principal. "Convincing proof" was needed to displace that presumption and that where conduct was relied upon it must be conduct which is only consistent with the conferring of such authority; see *Magellan Spirit ApS v Vitol SA* [2017] 1 AER Comm 241, [2016] EWHC 454 (Comm), at paragraphs 28 and 29 per Leggatt J. Counsel further submitted that there was no coherent explanation for the suggested "convoluted" transaction whereby CML, represented by Mr. Otero and Mr. Fitzsimons, entered into a contract in the name of CML but CML in fact acted on behalf of Mr. Otero and Mr. Fitzsimons as undisclosed principals. Had that been intended Mr. Otero and Mr. Fitzsimons could simply have been named in the contract. Further, it was said that there were sound reasons why, in all the circumstances, the appropriate contracting party should have been CML, namely, that CML was the corporate vehicle for the project and that CML was supposed to become the owner of the vessel and therefore it made sense for CML to contract for repairs.

10. Counsel for the Yard submitted that the Registrar's decision was correct. Counsel submitted that the suggested presumption in *Magellan Spirit* that the party named in the contract as the contracting party is the contracting party, which presumption could only be rebutted by convincing proof, was not the law. Neither the presumption nor the need for it to be rebutted by convincing proof were mentioned in *Bowstead & Reynolds on Agency* or in *Chitty on Contracts*. The orthodox position was stated by in *Siu Yin Kwan v Easter Insurance Co.Ltd.* [1994] 2 AC 199 at p.207, namely, that "the contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal." However, counsel accepted that it was necessary for the Court to determine on the basis of all of the available evidence whether CML and the Owners consented, either expressly or by implication from their words or conduct, to the relationship of agent and principal. The factors which showed that agency in the present case were, first, that there was no agreement between CML and the Owners for the use of the vessel and, second, that, although it had been intended that ownership of the vessel would be transferred to CML such a transfer never took place. In those circumstances it made no sense for CML, who had no right to use the vessel, to contract for the repair of the vessel as principal. Indeed it would be contrary to the Owners' duties as directors of CML to commit CML to a contract whereby it was obliged to pay for the repair of a vessel in which it had no interest.

Discussion

11. Given that it is accepted that the Court must determine whether the Owners by their conduct consented to the relationship of principal and agent between them and CML with regard to the repairing contract, I am not sure that it is necessary to determine the legal issues between the parties. But it must be right that there is a burden on the Yard to rebut the description of CML in the booking note as the client, which description amounts to evidence that CML was intended to be the principal. In another case (in a very different context) I described that burden as "a heavy burden"; see *Filatona v Navigator* [2019] EWHC 173 (Comm) at paragraph 156. In that case the undisclosed principal sought to enforce the contract in question. In the present case it is the other

party to the contract who is seeking to enforce it against the undisclosed principal. In the former situation the undisclosed principal can be expected to have access to considerable evidence on the subject of the agency relationship. In the latter situation the other party will not have such access (save by the process of disclosure and cross-examination). When considering whether the other party has rebutted the words of the contract this lack of access may have to be borne in mind.

12. Counsel for Mr. Otero submitted that that there was no coherent explanation for the suggested "convoluted" transaction whereby CML, represented by Mr. Otero and Mr. Fitzsimons, entered into a contract in the name of CML but CML in fact acted on behalf of Mr. Otero and Mr. Fitzsimons as undisclosed principals. Had that been intended Mr. Otero and Mr. Fitzsimons could simply have been named in the contract.

13. It seems to me that in considering this submission it is necessary to bear in mind that although it had been intended in October 2017 that ownership would be transferred to CML that never in fact occurred and there was no evidence explaining why that was so. Had the transfer taken place before the repair contract was made in December 2017 there would in all probability have been no issue as to whether Mr. Otero and Mr. Fitzsimons were bound by the contract. But in circumstances where Mr. Otero and Mr. Fitzsimons remained the owners as at the date of the contract there is a coherent explanation for CML entering into the contract on their behalf, namely, that Mr. Otero and Mr. Fitzsimons had a clear interest in the vessel being properly repaired. Of course, they could have been named as parties to the contract but in circumstances where it had previously been intended that ownership would be transferred to CML and where CML was to manage the project Mr. Fitzsimons (who was the person said to be negotiating with the Yard) may have not thought this necessary.

14. Counsel for Mr. Otero also submitted that there were sound reasons why, in all the circumstances, the appropriate contracting party should have been CML and not the Owners, namely, that CML was the corporate vehicle for the project (through which funds were to be channelled) and CML was supposed to become the owner of the vessel.

15. I accept that these matters make it plausible to suggest that CML was intended to be the contracting party. But they have to be weighed along with the matters relied upon by counsel for the Yard. CML had no contract with the Owners of the vessel for the use of the vessel. Thus CML had no liability to repair the vessel. That suggests that there was no sound reason for it accepting sole liability under the repairing contract. Counsel for Mr. Otero suggested that there was at least an expectation that ownership would be transferred to CML and therefore it made sense for CML to be party to the repairing contract. But there is no evidence that there remained in December 2017 an intention to transfer ownership. Mr. Otero's evidence was that he had learnt that Mr. Fitzsimons had failed to carry out the transfer and there was no evidence from Mr. Fitzsimons explaining why he had failed to carry out the transfer. Furthermore, as emphasised by counsel for the Yard, Mr. Fitzsimons would be likely to have breached his fiduciary duty as director if he had made CML liable for the repairs as principal in circumstances where CML, not having any proprietary interest in the vessel or any contract for the use of the vessel or any liability for the repairs to the vessel, would not benefit from the repairs. Counsel for Mr. Otero suggested that the directors could in due course have arranged for CML to enter into a charterparty on appropriate terms or for CML to be reimbursed the costs of the work. But I was referred to no evidence that this was their intention.

16. The facts are that when Mr. Fitzsimons made the contract with the Yard in December 2017 he and Mr. Otero were the owners of the vessel. It was they who had every interest in the vessel being repaired or converted in accordance with Houlder's specification so that the vessel could be certified by Class. By contrast CML had no proprietary or possessory interest in the vessel and had no obligation to repair or renovate the vessel. Although there had been an intention in October 2017 for CML to become the owner of the vessel that transfer had not taken place and there was no evidence why that had not occurred. The transfer never took place. In those circumstances the making of the contract with CML is, in my judgment, only consistent with CML acting as agent for the Owners. That appears to have been the opinion of Mr. Beck of Houlder and, ultimately, of Mr. Otero. In circumstances where CML had no contract for the use of the vessel and no liability to repair or convert it there is no legal or commercial sense in CML entering into the contract with the Yard other than as agent for the Owners.

17. The Registrar did not refer to these considerations when reaching his decision. However, having considered the circumstances of the case, he expressed a clear view, (i) that he found it "incredible" that Mr. Otero, Mr. Fitzsimons and CML could have considered it proper for them to contract with the Yard without the actual authority of the actual owners of the vessel and (ii) that a reasonable person would have concluded that the works could not be performed without the authority of the Owners. These views are entirely consistent with the considerations relied upon before this court by counsel for the Yard.

18. Counsel for Mr. Otero said that the Registrar had conflated (i) authority from the Owners, or more accurately, permission to make physical alterations to the vessel (which had been given) and (ii) authority from the Owners to incur legal liabilities on their behalf (which had not been given). This distinction would make sense and would have to be drawn in a case where CML had a contract for the use of the vessel on terms which permitted or obliged it to carry out works of repair or conversion. But I am not persuaded that the distinction is realistic where CML had no such, or indeed any, contract for the use of the vessel.

19. Counsel for Mr. Otero submitted that the Registrar's conclusion would have alarming consequences. It was suggested that landlords could find themselves liable for repair works entered into by their tenants with builders. But a tenant has a proprietary or possessory interest in the property and has a repairing obligation. The fact that the landlord consented to the work being done and might benefit from it would not lead to the conclusion that the landlord was the undisclosed principal of the tenant. It was further suggested that directors, who were also shareholders, might find themselves liable for contracts entered into by their companies. But Mr. Otero and Mr. Fitzsimons were not merely directors of and shareholders in CML but were the vessel's owners. Thus the "alarming" consequences suggested would not, in my judgment, flow from the Registrar's decision.

20. I accept that the Registrar's comment about section 21(4) of the Senior Courts Act was mistaken, or at least overstated the position. Section 21(4) does not provide for builders and repairers always to be able to proceed against a vessel *in rem* for the cost of the work done. It only does so in the event that the person who would be liable on the claim *in personam* was the owner, charterer or in possession or control of the vessel when the cause of action arose. However, this error or overstating of the position was not such as to invalidate the conclusion reached by the Registrar.

21. Counsel for Mr. Otero submitted that the opinion stated in evidence by Mr. Otero was just that, an opinion formed after the event. I was not persuaded that it could be brushed aside on that account. The fact that Mr. Otero, one of the Owners, belatedly recognised that CML entered into the contract on behalf of the Owners, is, like Mr. Beck's understanding, some confirmation that the conclusion reached by the Registrar, and this court, is correct. Their understanding cannot found the basis of the court's conclusion but gives reassurance that the court's conclusion is correct.

22. For these reasons the appeal must be dismissed. If the test is, as stated by Leggatt J. in *Magellan Spirit*, that there must be convincing proof that the presumption that the principal was CML, I consider that there is such proof. In my judgment the circumstances in which CML entered the contract with the Yard are such from which (i) a reasonable person in the position of CML would have understood that CML was authorised to enter into the contract with Yard as agent of the Owners and (ii) a reasonable person in the position of the Owners would have understood that CML was agreeing to do so. The circumstances are only consistent with such an agreement or mutual intention.

Other matters

23. The appeal having been dismissed there is no need to consider the alternative submission advanced by counsel for the Yard, namely, that the Yard is entitled to recover a *quantum meruit* from the Owners on the basis that they had been unjustly enriched at the expense of the Yard. This gave rise to interesting questions as to the scope of the principle established by *MacDonald Dickens & Macklin v Costello* [2012] QB 244 at paragraphs 21-32 which counsel for Mr. Otero submitted showed that this claim must fail. Those arguments must await a case when they require to be decided.

24. The Registrar found other reasons for finding in favour of the Yard. First, at paragraphs 38-46 he held that Mr. Otero, having failed to apply for an order setting aside the warrant of arrest, is not now entitled to argue that the court cannot exercise its jurisdiction *in rem*. This conclusion was challenged by counsel for Mr. Otero. It is unnecessary to reach a decision on this matter which was not argued before the Registrar. But I should not be taken as agreeing with the Registrar's decision. Whilst Mr. Otero could have applied to set aside the warrant of arrest it seems to me strongly arguable that he was entitled at trial to defend the claim *in rem* on the basis that the conditions required by section 21(4) of the Supreme Court Act 1981 had not been established. Second, at paragraph 51 the Registrar held, in the alternative, that it was an implied term of the agreement with CML that CML had authority from the Owners to enter into the agreement on their behalf. Again, it is unnecessary to reach a decision on this matter but there is a real difficulty with the argument, namely, that the Owners, if they were not party to the contract between the Yard and CML, cannot be bound by its terms. Third, at paragraph 52 the Registrar held that even if CML had entered into the contract as principal CML was the beneficial owner of the vessel (because the Owners held it on trust for CML) and so a claim *in rem* could be advanced on that basis. This was also not argued and it is not necessary for me to reach a decision about it. The difficulty with the argument is that in circumstances where there was no evidence as to why the October 2017 intention to transfer ownership was not acted upon it is not possible to infer that the Owners were holding the vessel as trustee for CML. Fourth, at paragraph 53 the Registrar held that CML had a possessory lien for the costs of their work on the vessel and that in such circumstances the court may make an order for the

sale of the vessel. The difficulty with this is that a possessory lien is a remedy of self-help and does not confer a right of sale. However, in circumstances where the vessel has in fact been sold Counsel for Mr. Otero accepted that this question was only of academic interest.

Conclusion

25. The appeal must be dismissed on the grounds that the Registrar was correct to find that CML entered into the contract with the Yard as agent for the Owners. It must follow that pursuant to section 21(4) of the Senior Courts Act 1981 the Yard was entitled to enforce its claim *in rem*.