IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ADMIRALTY COURT (QBD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

[2021] EWHC 310 (Admlty)

18 February 2021

Before:

MR ADMIRALTY REGISTRAR DAVISON

- -

AD-2020-000169

Between:

TAXIDIOTIKI-TOURISTIKI-NAUTILIAKI LIMITED (trading as ASPIDA TRAVEL) — **Claimant**

- and -

THE OWNERS AND/OR DEMISE CHARTERERS OF THE VESSEL 'COLUMBUS' — **Defendant**

And between-

AD-2020-000176

TAXIDIOTIKI-TOURISTIKI-NAUTILIAKI LIMITED (trading as ASPIDA TRAVEL) — **Claimant**

- and -

THE OWNERS AND/OR DEMISE CHARTERERS OF THE VESSEL 'VASCO DA GAMA' — **Defendant**

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Mr Benjamin Joseph (instructed by **Roose & Partners**) for the **Claimants**
Ms Celine Honey (instructed by **Watson Farley & Williams LLP**) for **Carnival Plc**
Mr Bibek Mukherjee (instructed by **Salvus Law Ltd**) for **the Salvus Claimants**

Hearing date: 9 February 2021 (by Microsoft Teams)

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30am on Thursday 18 February 2021

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1. By claim forms issued on 13 November and 20 November 2020, Aspida Travel have claimed against the proceeds of sale of the vessels "Vasco Da Gama" and "Columbus". The claims are respectively for €275,863.00 and €123,884 in respect of travel agency services for the transport of crew to and from the vessels. The period during which such services were provided was from 1 January 2020 to 31 July 2020. Some, though not all, of the costs were incurred in repatriating crew following the lay-up of the vessels in Tilbury due to the pandemic. By Forms ADM13 dated 11 December 2020, Aspida has claimed judgment in default. Those applications were served on the other persons claiming against the vessels. Objection has been taken to the claims by a group of claimants represented by Salvus Law, ("the Salvus Claimants"), and by the former owners of the vessels, Carnival Plc ("Carnival"). The objection to the claims is that they do not meet the requirements of section 21 of the Senior Courts Act. Section 21(4) is in the following terms:

> *"In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—*
>
> *(a) the claim arises in connection with a ship; and*
>
> *(b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—*
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> *(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or*
>
> *(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it."*

2. In the context of this case, in order for the court to have jurisdiction over the claims, the "relevant person", i.e. the person who would be liable *in personam* on the claims must have been the charterer at the time when the cause of action arose and the demise charterer at the time when the action was brought. The vessels were demise chartered to Lyric Cruise Ltd ("Columbus") and Mythic Cruise Ltd ("Vasco Da Gama") to whom the travel agency services were provided and the invoices from Aspida rendered. But on 7 October 2020 (Mythic) and 9 October 2020 (Lyric), the charters were terminated. The claims were brought more than a month later. It follows that, *prima facie*, the second requirement of the section was not made out. By the time that the claims were brought, Mythic and Lyric were no longer the demise charterers.

3. To this basic and fundamental objection, Aspida had a number of answers – none of which was, in my judgment, made out. In the interests of economy, I will set out compendiously both Aspida's attempts to meet the objection and the reasons why I have rejected those attempts.

4. First, Aspida submitted that it was not open to Carnival to terminate the demise charters when they did and that the steps they took to terminate were legally ineffective to do so.

5. Aspida said that it was not open to Carnival to terminate because that was contrary to representations that they (Carnival) had made to Andrew Baker J on 2 September 2020, which was the date of the order for sale of the vessels *pendente lite*. Aspida relied upon the wording of an email sent on 10 September 2020 by Mr Fidoe of Watson Farley Williams ("WFW") , who was acting for Carnival, to Mr Hailey, who was acting for various claimants against the vessels. The email stated as follows:

> "You refer to CPR 61.10(2) which allows the court to make a deadline for the time in which claims can be brought against the proceeds of sale. It was made clear during the hearing that the bareboat charters would remain in full force and effect for the benefit of all of the claimants and potential claimants to allow them to bring claims. That is clear from the witness statement and the underlying documents. The discretionary power you refer to was one that we did not to seek the Court to invoke given the underlying reasons for the application. Whilst this might prejudice your clients' claim, any other approach would prejudice the remaining creditors.
>
> Once the vessels are sold, the bareboat charters will be automatically terminated as the subject matter will neither be in the possession of the bareboat charterers or the registered owners. There is, therefore, an absolute cut-off date up to which claims can be brought; 'quasi' *in rem* claims require the bareboat charterer to be in possession of the vessel at the time the claim is issued."

6. More recently, Mr Handley of WFW stated that the demise charter agreements had "remained in full force and effect during the period of arrest"; (see witness statement dated 20 November 2020). The period of arrest was from 21 August 2020 to 16/22 October 2020 – so this statement was in conflict with the fact that the demise charters had been terminated on 7 & 9 October 2020.

7. As a general proposition, the law frowns upon a person who both "approbates and reprobates". "A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance"; see *Express Newspapers Plc v News (UK) Ltd & Ors* [1990] 1 WLR 1320 at 1330. But no breach of that principle has been demonstrated, nor any sound legal basis to elevate it into some kind of estoppel in Aspida's favour. Following the hearing on 2 September 2020, Carnival held off from terminating the charters for 5 weeks, which was ample further time for claimants to bring claims. On the evidence that I have (which only consists of Mr Fidoe's email) they did not give a completely open-ended assurance and nothing to that effect appears in the orders. The reference to "an *absolute* cut-off date" is inconsistent with an open-ended assurance. Further, if they had, there is no evidence that Aspida relied on it. Finally, even if there was an assurance and Aspida had relied upon it, it is hard to see how that could confer jurisdiction under section 21(4) where the requirements of that section were not met. As Ms Honey, for Carnival, observed during the hearing, how that state of affairs came about is neither here nor there – a person either satisfies section 21(4) or they do not.

8. Similarly, I do not think that Mr Handley's (perhaps, without meaning any disrespect to him, slightly loose) statement in November 2020 can be taken to prevent Carnival from relying on the terminations of the charters if those terminations were otherwise valid. His words were after the event. There is no evidence of reliance and there could in fact be none. His words cannot change the facts or the law.

9. The second limb of this part of Aspida's argument was that the demise charters were not validly terminated. The letters dated 7 & 9 October 2020 from WFW acting on behalf of Carnival purported to terminate the charter agreements "under clause 22 and at common law" and with immediate effect. No hire payments had been made since June 2020 and the vessels had effectively been abandoned due to the insolvency of the CMV group. That situation had already forced Carnival reluctantly to retake possession of the vessels on 4 August 2020 by installing V.Ships as protective managers. By reference to the detailed provisions of clause 22, Mr Joseph, for Aspida, attempted to persuade me that Carnival's legal right to terminate was constrained by the need to serve a 30 day notice giving Mythic and Lyric the opportunity to remedy the breaches of the charter agreements. The difficulty with this is that Carnival terminated both under clause 22 and at common law. "One starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption": Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689 at 717; see also the discussion in Chitty on Contracts, 33rd Ed at 22-049. In

my view, such words are not found in clause 22 and nor can they be implied. It follows that Carnival were free to exercise their common law right to terminate. But if I am wrong about that, I would find that even if clause 22 qualified Carnival's common law rights, their unequivocal immediate termination (which drew no protest at the time) was still effective. I would so find for two reasons, which are related. The first is that the charterers had abandoned the vessels. That was a circumstance which (a) amounted to the clearest possible repudiation / renunciation and which (b) did not squarely fall into any of the categories contemplated by clause 22. It follows that the notice provisions of clause 22 did not apply. The second is that in such circumstances and where the owner had already resumed possession and control of the vessels the contracts cannot sensibly be said to have remained on foot. The common sense and commercial reality is that the contractual relationship was over and any failure on Carnival's part to give notice could only sound in damages.

10. Mr Joseph had a subsidiary point, which was that for the termination to take effect the vessels had to be re-possessed by Carnival *qua* owners. Carnival did precisely this when they installed V.Ships as managers on 4 August 2020. They had retaken possession before the termination of the charters. They had little choice in the matter. The evidence of Mr Handley demonstrates that Carnival's motivation in appointing V.Ships was to maintain safe and lawful operation of the vessels, with the particular interests of the crew in mind. If there is a requirement to retake possession as an owner in order validly to complete a termination, then that requirement was amply met in these cases.

11. Aspida's second broad point was that they had valid *in rem* claims against the vessels at the time of the judicial sales and could thus bring those claims against the proceeds. This point invoked a principle which is summarised in the notes to CPR rule 61.10 in the White Book:

> "Where there is a sale of a vessel by the Admiralty Court the holder of a statutory right of action *in rem* may, providing that the claimant satisfies the conditions set out in s.21(4) of the Senior Courts Act 1981 for enforcing admiralty claims *in rem*, enforce the claim against the proceeds of a court sale by commencing his action *in rem* within the time provided by the court's order of sale: *The Sanko Mineral* [2014] EWHC 3927 (Admlty) - per Teare J."

12. The principle is not in doubt. But it is dependent on the proposition that Aspida had *in rem* claims which satisfied the requirements of section 21(4) immediately before the sale, otherwise there could be no claim which could transfer and attach to the proceeds. They did not. It is therefore unnecessary to consider whether the principle could be extended to the case of a demise charterer (whose charter, if still on foot, would be terminated by the sale) or whether the demise charterer could then be regarded as the beneficial owner of the proceeds of sale.

13. It is true that on 2 October 2020, Andrew Baker J made orders stipulating that notice of claims against the vessels were to be filed within 28 days of advertisement that sales had been effected. Mr Joseph submitted that those orders had to be interpreted in a way that was not misleading and that "if judicial sale extinguished the possibility of further claims" then that principle was transgressed. It is debateable whether a standard form court direction could suspend or negate what would otherwise be the effect of section 21(4). But it does not assist Aspida in this case. It was not the judicial sales that extinguished the possibility of their claims. It was the earlier termination of the demise charters.

14. Aspida's third broad point was that the demise charterers had equitable interests in the vessels and their proceeds of sales "and thus were also the beneficial owners of the vessels and the proceeds thereof for the purpose of the 1981 Act". This was because the demise charters to Mythic and Lyric were hire purchase agreements which contained options to purchase. It is hard to see how an unexercised option to purchase could give Mythic or Lyric a beneficial interest in the proceeds of a judicial sale. But the options could not have survived the termination of the demise charters and the point is academic.

15. Aspida's final broad point was that, in any event, they had valid claims against Carnival (who were beneficial owners of the vessels). I read the evidence and heard Mr Joseph's arguments on this point notwithstanding the objections of Ms Honey and Mr Mukherjee that the point had been sprung upon them. I said that I was reluctant to bifurcate the hearing and that I would deal with the point, if I was able to and could do so without unfairness to the other parties. For the reasons that follow, I cannot do that and this part of the claim must be adjourned. The claims against Carnival are based upon evidence (filed the day before the hearing) from Mr Matthaios of Aspida that he was told by Mr Ioannides of Global Cruise Lines Ltd ("Global"), the managing agents of the vessels, that Global were acting on behalf of both the charterers and the owners in contracting for air tickets for repatriation. Mr Joseph argued that Global also had ostensible or usual authority to act for the owners. This evidence was highly contentious. Ms Honey and Mr Mukherjee were correct to point out that there was no evidence (other than Mr Ioannides' implied assertion) that Global were expressly authorised by Carnival, or that Carnival had clothed Global with authority so as to support the plea of apparent authority. They were similarly correct to observe that it was difficult, if not impossible, to assert that an agent appointed by the demise charterers had usual authority to act for the owner. For these reasons, I have come close to rejecting these claims *in limine*. I have not done that. But, plainly, I must give Carnival a proper opportunity to respond, (which would include the opportunity to seek an order that they be permitted to cross-examine Mr Matthaios).

16. Claims were also advanced on the basis that Carnival had a legal duty to repatriate the crew and in partially discharging that duty Aspida had restitutionary or equitable rights against Carnival. Such claims would require a careful examination of Carnival's obligations arising under English and Bahamian law and under the Maritime Labour Convention. Plainly, that could not take place in the context of a short default judgment hearing and at no notice to Carnival.

17. There is a further dimension to this aspect of Aspida's application, which is that Carnival is a solvent, trading company and Aspida may, on reflection, prefer to pursue these claims *in personam*.