



Campbell Johnston Clark

Beware of time bars: *The Bank of Tokyo-Mitsubishi UFJ Ltd v The Owners of the MV "Sanko Mineral" [2014] EWHC 3927 (Admlty)*

In the recent Admiralty Court decision the Court reiterated the long established principle of admiralty law that claims in rem may be enforced against the proceeds of sale of a vessel, where the person liable in personam is the beneficial owner of the proceeds of sale.

The judgment is noteworthy as it illustrates the unpredictability surrounding priorities enjoyed by statutory liens when proceedings are in place in more than one jurisdiction. Further, the judgment is a reminder of the importance of protecting time bars.

BACKGROUND

Glencore was the owner of a cargo carried from Bulgaria to New Orleans. The bill of lading incorporated the terms of a charterparty which stipulated that London arbitration was the preferred jurisdiction and that:

"Any claim must be made in writing and Claimant's Arbitrator appointed within twelve months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred."

The vessel was arrested on 7 May 2012 by various creditors in the USA. Subsequently, Glencore issued a claim against the vessel in respect of damages arising from breach of the bill of lading terms due to delay of discharge of the cargo in the US District Court of Maryland under Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Glencore asserted that it obtained a statutory maritime lien over the vessel by virtue of the Rule C claim.

On 23 July 2012, Owners issued insolvency proceedings in Japan entering into Reorganisation proceedings pursuant to the Japanese Corporate Reorganisation Act. On 30 July 2012, the Chancery Division of the High Court recognised the Reorganisation as the main foreign proceeding pursuant to the Cross-Border Insolvency Regulations 2006. The terms of the High Court order provided that no steps shall be taken to enforce any mortgage, charge, lien or other security and no legal process may be instituted or continued except with the consent of the Foreign Representative or the permission of the High Court.

On 2 August 2012, some 4 months after the vessel was arrested, she was released and the cargo was subsequently delivered on 4 August. Glencore claimed losses against the Owners for breach of the bill of lading terms in the sum of USD3,850,000 and in September 2012, Glencore issued two claims before the court in Tokyo: a) a secured Reorganisation claim for USD3,046,959.90 plus interest in respect of its maritime lien; or, in the alternative b) an unsecured claim for the same amount. Glencore's claims are pending before the Tokyo court to date. The 12 month time bar commencing from the date of delivery of the cargo expired on 5 September 2013 without Glencore commencing arbitration proceedings in London.

On 17 April 2014 the Owners' Foreign Representative authorised the Bank of Tokyo (the "Bank") as a mortgagee to commence proceedings against the vessel. The Bank issued in rem proceedings in the Admiralty Court and obtained judgment for its claim. The Court ordered that the vessel be sold and the proceeds be paid into court pending determination of priorities of liens and the vessel was eventually sold on 7 August 2014.

On 22 August, Glencore issued an application before the Companies Court requesting permission to commence in rem proceedings against the vessel and also requested the issue of a caution against the release of the proceeds of sale. Glencore asserted that as a matter of US law it had obtained a statutory lien on the vessel which, as a matter of Japanese law, enjoyed priority over a mortgage. The Owners then issued an application requesting the strike out or withdrawal of the caution against release of the proceeds of sale issued by Glencore and payment out of the sale proceeds.

DECISION

The Court, in finding for the Owners, examined whether Glencore was entitled to issue in rem proceedings and whether the caution against release of the proceeds of sale should be upheld.

The Court first considered whether Glencore was entitled to issue in rem proceedings and found that Glencore's claim was a contractual claim which was absolutely barred pursuant to the terms of the bill of lading because arbitration was not commenced within 12 months of discharge of the cargo. Mr Justice Teare held that *"so far as the position in English law is concerned I consider that where a contractual time bar provi-*

sion requires arbitration to be commenced in order to preserve a claim, failing which the claim is absolutely barred, that provision must be complied with”.

The fact that insolvency proceedings were ongoing in another jurisdiction was not a factor which would be taken into account in the consideration of whether the claim was time barred or not. Article 20 (4) of the Cross – Border Insolvency Regulations 2006 permits proceedings to be commenced to the extent necessary to preserve a claim. Glencore could have, therefore, commenced arbitration in London to preserve its claim at any time up to 5 September 2013.

The Court then considered whether Glencore would have been entitled to enforce an in rem claim against the vessel following judicial sale of the vessel even if Glencore’s substantive claim had not become time barred. Section 21 of the Senior Courts Act 1981 stipulates that in rem claims may be brought against a vessel provided that the person who was liable in personam was the Owner of the vessel when the cause of action arose and was the beneficial Owner of the vessel at the time when the action in rem was issued.

The caution was requested by Glencore pursuant to CPR 61.8 (2) which provides that any person who “claims to have an in rem right against any property under arrest” may file a request for a caution. The Court held that “when a vessel is sold by the Admiralty Court rights in rem are transferred to the proceeds of sale. Thus the operation of section 21 of the SCA 1981 must be understood in the context of the long established principle that, where the vessel has been sold by the Admiralty Court, claims in rem may be enforced against the proceeds of sale”.

As Glencore’s claim was found to be time barred, the Court ordered payment out of the sale proceedings to the Trustee on the condition that the proceeds are held in a separate US Dollar account and held to the order of the Tokyo court.

Comment

This decision serves as a timely reminder that lawyers should always have their eye on all the time-bars involved and be very careful not to have their attention in one jurisdiction diverted by proceedings in another jurisdiction. “Caution” is the ultimate by-word where time-bars are concerned.

Campbell Johnston Clark is currently involved in another Admiralty Court matter involving a time-bar issue along similar lines to the “Niyazi S” [EWHC] 1731 (Admiralty). That matter is due to be heard before Master Kay in the Admiralty Registry in early February: so watch this site for an update.



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