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Claim No: 2014 Folio 862

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Date: 10 August 2015

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

EUROBANK ERGASIAS SA

Claimant

- and -

(1) KALLIROI NAVIGATION COMPANY LIMITED
(2) PILOT SHIPPING CO.
(3) GEORGIOS KASAPOGLOU
(4) ASTERIAS NAVIGATION COMPANY LIMITED
(5) STRIMON NAVIGATION LIMITED
(6) STARFISH K SHIPPING COMPANY LIMITED

Defendants

Steven Berry QC and John Snider (instructed by Holman Fenwick Willan LLP, Solicitors) for the Claimant
Richard Millett QC and Jeremy Brier (instructed by Enyo Law, Solicitors) for the Defendants

Hearing dates: 7 and 8 July 2015

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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.

INTRODUCTION

1. The Claimant, Eurobank Ergasias SA ("Eurobank") is a Greek company and the successor-in-title to another Greek bank, Proton Bank SA ("Proton"). It claims monies due pursuant to two separate written loan agreements (as amended).

2. By the first, made on 19 November 2009, Proton lent US$10m to the First Defendant, Kalliroi Navigation Company Limited, a company incorporated in Malta, ("Kalliroi") to finance its purchase of a bulk carrier vessel then called "Global Discovery" ("the Kalliroi Loan Agreement"). By written guarantees made on the same day, the Second Defendant, Pilot Shipping Co., a Greek company ("Pilot") and the Third Defendant, Captain Georgios Kasapoglou, a Greek national ("Capt. Kasapoglou") guaranteed the liabilities of Kalliroi thereunder. I refer to Kalliroi and those guarantors collectively as "the Kalliroi Defendants".

3. By the second, made on 31 March 2010 (as amended) with the Third Defendant, Asterias Navigation Company Limited, a company incorporated in Malta, ("Asterias") and the Fourth Defendant, Starfish K Shipping Company Limited, also incorporated in Malta ("Starfish"), Proton lent to both of them, under Tranche A, the sum of US$20m but where only US12m was ever repayable so in effect US$12m, and under Tranche B, US$38m, the latter to enable Asterias and Starfish to purchase, respectively, two bulk carriers ("the Starfish Loan Agreement"). By written guarantees made on the same day, Pilot, Capt. Kasapoglou and Strimon Navigation Limited guaranteed the liabilities of Asterias and Starfish thereunder. I refer to those borrowers and guarantors collectively as "the Starfish Defendants". The nature and purpose of the loan under Tranche A ("the Tranche A Loan") is the subject of substantial dispute between the parties.

4. I have the following applications before me:

   (1) Eurobank's application for summary judgment against Kalliroi for US$9.8m which is the total balance owing under the Kalliroi Loan Agreement, it having fallen due because of events of default on the part of Kalliroi. The events of default were (a) non-payment of instalments of interest and capital and (b) failure to pay the earnings from the vessel into a designated account with Proton. In the alternative, Eurobank claims the arrears (ie on a non-accelerated basis) of US$6.05m. Eurobank also seeks judgments in the same amount against the guarantors, Pilot and Capt. Kasapoglou;

   (2) Eurobank's application for summary judgment against Asterias and Starfish for US$13.4m under Tranche A and US$41.8 under Tranche B, being the total balance owing under the Starfish Loan Agreement, again having fallen due because of the same events of default as above. In the alternative, Eurobank claims the arrears (ie on a non-accelerated basis) of US$9.6m and US$30.7m respectively. Eurobank also seeks judgments in the same amount against the guarantors, Pilot Shipping, Capt. Kasapoglou and Strimon;

   (3) Eurobank's application for summary judgment against all Defendants so as to dismiss their Counterclaim against Eurobank, and, if the Counterclaim is not dismissed, for security for costs against all Defendants except Capt. Kasapoglou ("the Corporate Defendants");

   (4) The Defendants' application for the release of £1.13m from a total of £1.491m representing freight payments earned by Asterias, to the Defendants' solicitors to enable them to continue to act for the Defendants in these proceedings. Of the £1.491m, £466,000 is presently held by the solicitors acting for Indagro Contractors SA, the

charterers of the *Anastasia K* a vessel owned by Kalliroi. The balance of £1.025m is held in Court pursuant to an order made on 25 February 2015. It represents freight earned by Asterias pursuant to the charter of its vessel, the *Kalliroi K* to Everdere Logistics Limited. I refer to the total of the sums held as "the Freight Payments".

5. For present purposes it is sufficient to use round figures as I have done above. There is unlikely to be any dispute on the precise amounts owed.

THE KEY ISSUE

6. All the corporate Defendants are part of a group of companies ("the Pilot Group") whose principal owner (directly or otherwise) and prime mover is Capt. Kasapoglou. In 2004 Capt. Kasapoglou met Mr Dimitrios Panagiotopoulos, then head of shipping at Omega Bank, and later of Proton when the two banks merged. As a result, different companies within the Pilot Group took three loans from those banks, in 2005, 2006 and 2007. The next in sequence were the Kalliroi Loan Agreement and the Starfish Loan Agreement.

7. The background to the making of the Kalliroi Loan Agreement is not controversial and in essence followed the pattern of the earlier loans. The events leading up to making of the Starfish Loan Agreement, are, however, disputed.

8. The following terms of that agreement are material:

(1) "1.01. This Agreement sets out the terms and conditions upon and subject to which it is agreed that the Bank will make available to the Borrowers a term loan of up to the amount of ..US$ 58,000,000.00 for a period of seven ..years.. for the purpose of a) acquisition with US$ 20,000,000.00 the existing indebtedness with the Bank of companies NEW ERA SHIPPING INC… with assignment to the Borrowers of all the securities of the loan concerning those two companies ("Tranche A") and b) financing with US Dollars up to ..US$38,000,000,00.. the acquisition of two other Vessels with an average age of ..12 years ("Tranche B")";

(2) "**Draw downs** means the facility which will be available.. for the following draw downs which will mutually inclusive Tranche A $ 20,000,000.00 and Tranche B $ up to $38,000,000.00. All proceeds which may be collected by the Bank from the auctioning of the Vessels D and E at Hong Kong to reduce equally the Tranche A, Tranche A to be drawn on signing of this Loan Agreement and have Interest 1% per annum on the amount of $12,000,000 until 31st December 2010.."

(3) "**Tranche A** means the amount of $20,000,000.00 to be drawn for the acquisition of the existing indebtedness of the Vessels D and E pursuant to the Loan Agreement…between the "Bank" as Lender and the companies NEW ERA SHIPPING INC… with assignment to the "Borrowers" of all the securities of the loan concerning the vessels D and E;

(4) Vessels D and E meant respectively "Med Trust" and "Med Integrity";

(5) Clause 4.04 required the parties to sign an Addendum which is contained in Schedule 3. It provides as follows:

"We refer to the above Loan Agreement and hereby irrevocably and unconditionally agree to reduce the Outstanding Indebtedness of Tranche A to the amount of twelve million Dollars ($12,000,000.00). Such reduction will be effective as of 31.12,2010. ..In view of the above we hereby irrevocably and unconditionally confirm and declare that notwithstanding specific references to the Loan Agreement that Tranche A will have an interest of 1% per annum until 31/12/2010, we hereby irrevocably and unconditionally confirm and guarantee that such interest will not fall due and will not be demanded by the Bank and/or payable by the Borrowers. ..Given the above any and all relevant references made in the Loan Agreement in respect with the Interest Rate of Tranche A up to the Build up period, such build up period as in the Loan Agreement defined, will be considered and treated as null and void and have no force and legal effect whatsoever."

(6) Clause 13.06 provides that "In the event of any provision contained in any one or more of this Agreement…being invalid, illegal or unenforceable in any respect under any applicable law in any jurisdiction whatsoever, such provision shall be ineffective as to that jurisdiction only without affecting the remaining provisions hereof….In case that the

invalidity of a part results in the invalidity of the whole agreement, it is hereby agreed that there will exist a separate obligation of the Borrowers for the prompt payment to the Bank of all the Outstanding Indebtedness…"

9. By way of background, Capt. Kasapoglou says that at a meeting in January 2010 Mr Panagiotopoulos had asked for a favour. Proton had a loan agreement or agreements ("the New Era Loans") which had "gone bad" and he wanted them off the bank's books. He suggested that the Pilot Group bought them from Proton, together with the associated securities which would include the vessels Med Trust and Med Integrity and Proton would lend the purchase price of the loans. In return Proton would provide new 100% financing for the acquisition of four further vessels. Capt. Kasapoglou was interested in the proposal and on 28 February 2010 obtained desktop valuations of the vessels which came out at US$21.25m. A first term sheet from Proton gave the price of buying the loans as US$12m and provided for the giving to the Pilot Group of 50% of the proceeds of sale of the vessels at auction. Capt. Kasapoglou was not happy with this because on his figures, he would obtain only around US$10m from the sale of the vessels and yet have to pay US$12m for the loan. So he struck through the reference to 50% of the proceeds. A further sum, Tranche B (which became US$38m) was to finance the purchase of two further vessels. According to Capt. Kasapoglou, Mr Panagiotopoulos promised that a later loan agreement would finance another two.

10. A later term sheet, said to be ready for submission to Proton's Credit Committee, provided for all the proceeds to go to the Pilot Group. The price of the loans however had now gone up to US$20m, being Tranche A. But the amount of repayment required would be a total of only US$12m. Mr Panagiotopoulos's covering letter of 24 March 2010 said that there would be an "understanding" between the parties that Proton could only recover US$12m under Tranche A. When Capt. Kasapoglou questioned this he was told by Mr Panagiotopoulos that this was just the way Proton had to document things. He was content with this deal because on the face of it the sale proceeds of the vessels should cover or slightly exceed, the cost of the loan purchase on the footing it was US$20m. Although the Pilot Group had a lawyer who acted for it in the making of the Starfish Loan Agreement, there was no due diligence of the loans to be assigned nor of the documentation embodying the securities, nor, it seems any attempt to have a separate agreement to deal with those matters or the assignment to the Pilot Group of the securities.

11. Broadly speaking, those terms found their way into the Starfish Loan Agreement. See the term sheet dated 26 March as approved by Proton's Credit Committee and then the agreement itself as set out in paragraph 8 above.

12. However, according to Capt. Kasapoglou, things did not go to plan. The borrowers under the Starfish Loan Agreement made the required repayments at first but no proceeds of sale were forthcoming. Furthermore, Capt. Kasapoglou discovered through the Pilot Group's accountants, Deloitte, that on 9 April 2010 the designated bank account with Proton showed US$20m coming in and then going out almost immediately to an unknown account. Without an explanation for this, Capt. Kasapoglou said his accountants could not show a "clean audit" for the purpose of obtaining further finance then being sought. In January 2012 in response to Capt. Kasapoglou's query about this, Proton wrote that this money had come in as the loan to purchase the New Era Loans and then gone back to Proton to discharge them.

13. Meanwhile the parties to the Starfish Loan Agreement executed 3 supplemental agreements on 30 June and 13 December 2011 and 27 June 2012, which amended the repayment terms so as to be more favourable to the borrowers who were experiencing some problems with the payments due to difficult trading conditions ("the Supplemental Agreements"). All of them expressly recognised that the sums due were just under US$50m which included US$12m for Tranche A.

14. However, in an “extra-judicial statement of protest” letter dated 25 July 2012, the borrowers and guarantors under the Starfish Loan Agreement protested about the US$20m coming in and out and sought information and documents regarding the proceeds of sale of the vessels and the assignment thereof to Starfish and Asterias. It also said that the latest Supplemental Agreement and in particular the declaration of the existing debt therein was made to provide for restructuring of the debt to Proton, to avoid a financial “disaster”. Accordingly it could not be relied upon as any recognition of the Tranche A debt.

15. Proton replied on 7 and 13 August 2012, saying that the drawdown and payment out of the US$20m had been authorised by the borrowers. (There is in fact a written drawdown request from their lawyer but no evidence of any instruction to pay the sum out again.) As to the US$12m it said that it had been agreed that the original loan of US$20m would be reduced in any event by US$8m down to US$12m in order to give a pre-determined credit for the sale proceeds of the vessels, whatever they happened to be. In other words, Proton was not now obliged to remit any proceeds of sale. Proton also said, however, that it was willing to transfer the security documentation for the New Era Loans to the borrowers.

16. Capt. Kasapoglou also said that he discovered in April 2012 that Proton was not the sole lender on the New Era Loans but only jointly with First Business Bank (“FBB”) with each one (as he discovered in September 2012) providing 50%. So at best Proton could only obtain 50% of the proceeds of sale of the ships being the security for those loans. The vessels were in fact sold for about US$17.1m and if Proton was entitled to 50% it would have received around US$8.5m.

17. When Eurobank issued its claim on 17 July 2014 it claimed the monies owed as simple debts and on the basis that events of default had occurred entitling it to the whole amounts due. In the Defendants’ Defence and Counterclaim they alleged, among other things that:

    (1) Proton (through Mr Panagiotopoulos) had been guilty of fraudulent misrepresentation towards all or any of the Defendants because he had represented that Proton intended to assign all of the New Era Securities to the borrowers, which was false because it only owned 50% thereof and could not have made any assignment without the consent of FBB and in fact it had no such intention;

    (2) There was a breach of the Starfish Loan Agreement because (a) it wrongly debited the earnings account of Asterias and Starfish by US$20m (see paragraph 12 above), since any such debit should only have been effected in return for an assignment of the relevant securities and/or payment of the proceeds of sale of the relevant ships which did not happen and/or (b) there was in any event no such assignment or payment of the proceeds.

18. In its Reply and Defence to Counterclaim dated 25 November 2014, Eurobank responded to these points as follows: the true agreement was that the borrowers had agreed to pay to Proton US$12m as a “fee” for the Tranche B loan, in other words for the provision of finance for the two vessels to be acquired by them. The references to any assignment to them of the proceeds of sale in the Starfish Loan Agreement was “erroneous” and there was no agreement to transfer them. The loan fee had been viewed by Mr Panagiotopoulos and Capt. Kasapoglou as a way of mitigating Proton’s loss on the New Era loans but no more than that. Unsurprisingly, Proton later amended the Particulars of Claim to claim that, properly construed, the Starfish Loan Agreement provided for the loan fee, alternatively it sought rectification to this effect by reason of mistake ("the Rectification Claim"). Accordingly there was in truth no obligation to assign or pay over the proceeds of sale, of any of the securities.

19. Eurobank's evidence on all of this came from Mr Vassos of its solicitors, though clearly after taking copious instructions from Mr Panagiotopoulos. Belatedly, Eurobank served a witness statement from Mr Panagiotopoulos on the second day of the hearing (8 July) confirming what Mr Vassos had said. Put briefly, it is to the effect that originally Capt. Kasapoglou suggested that the Pilot Group would acquire Proton's part of the New Era debt and securities. In response, Proton first offered to the Pilot Group 50% of its exposure/rights under the debt (then thought to be US$24m) ie US$12m which the Pilot Group would purchase. In return the Pilot Group would get 50% of the proceeds of sale of the vessels due to Proton, ie around US$4m and the further financing it wanted. After some amendments from Capt. Kasapoglou the deal ended up as being one for the purchase of all of Proton's interest in the New Era debt at a discounted price of US$20m which would be reduced by US$8m to reflect Proton's interest in the sale proceeds but as a fixed reduction so that the borrowers debt to Proton was fixed at the outset as US$12m. But this had not been property translated into the terms of the Starfish Loan Agreement. The US$20m which went into and out of the designated accounts was applied in reduction of the amounts owed to Proton under the New Era Loans.

20. The stark difference between the parties on what was truly agreed is therefore, this:

    (1) Proton says that the US$12m is a straight fee for the loan of US$38m to enable the borrowers to buy two further vessels; on any view that is very sizeable, amounting to some 32% of the loan being provided; there was in any event no obligation on Proton to remit the proceeds of sale of the securities under the New Era Loans;

    (2) The Defendants say that the Starfish Loan Agreement, as read, is correct and while they would never owe more than US$12m the borrowers were <u>also</u> entitled to <u>all</u> of the proceeds of sale of the vessels. Assuming they sold for US$20m, as Capt. Kasapoglou thought, that would give the borrowers a net profit of US$8m. Since they actually sold for US$17.1m there would be around US$5m profit. That outcome might be thought to be as odd as the size of the fee referred to above.

21. It is not for me to decide where the truth lies on all of this. But there is clearly more to this than meets the eye, from both sides. There are many other issues of fact surrounding these events but it is not necessary to recite them here.

22. Against that background I consider the applications.

SUMMARY JUDGMENT ON THE STARFISH LOAN AGREEMENT

Introduction

23. Eurobank does not seek summary judgment on its claim that the relevant parts of the Starfish Loan Agreement must be construed so as to provide simply for the Loan Fee and not for the assignment of the proceeds of sale by Proton to the borrowers. Nor does it seek judgment on the alternative Rectification Claim, nor could it, given the extent of the disputed facts. Instead it says that even if the borrowers are right on those matters and there is a triable counterclaim for damages for fraud and/or breach of contract (as summarised above), this cannot constitute a defence by way of set-off because Clause 5.03 provides that:

> "All payments to be made by the Borrowers under any of the Security Documents shall be made without set-off or counterclaim whatsoever.."

24. Mr Millett QC for the Defendants rightly concedes that at least before me, such clause is binding and operates to exclude from set-off even a claim in fraud. That being so it is not necessary for me to consider Eurobank's alternative argument that in any event, the borrower's declarations of

indebtedness contained in the three Supplemental Agreements operate as a contractual waiver or estoppel against the use of the Counterclaim as a defence to the monies owed.

25. However, the Defendants advance two reasons why the Court cannot give summary judgment:

(1) There is a real prospect that the Starfish Loan Agreement, as now alleged by Eurobank, is tainted by illegality and is thus unenforceable ("the Illegality Point"); and/or

(2) There is some other compelling reason for a trial ("the Compelling Reason Point").

The Illegality Point

26. Eurobank's case, as amended, is that the sum of US$12m due under Tranche A was a fee payable in consideration for the making of the US$38m loan under Tranche B.

27. There is evidence that under Greek law, such a fee amounts to an illegal commission. In this regard there are competing expert reports from (a) Dr Kornilakis, Emeritus Professor at the School of Law of the Aristotle University of Thessaloniki, dated 21 April and 26 June 2015, submitted by the Defendants and (b) Michael Stathopoulos, Emeritus professor of Civil Law at the University of Athens, submitted by Eurobank.

28. The relevant provisions are as follows:

(1) Chapter F of Act No. 2501 of the Governor of the Bank of Greece, 31 October 2002 reads as follows:

> "F. COMMISSION FEES ON LENDING
> Commission fees on any kind of lending by credit institutions are prohibited, with the exception of;
> a) management fees on syndicated loans
> b) commission fees on inert capital (irrespective of the type of credit)."

It is not disputed for present purposes that Chapter F has the force of law on Greece;

(2) Article 174 of the Greek Civil Code ("the Code") then provides that a juridical act (which includes a contract) "which is inconsistent with a prohibitive provision of the law shall, unless a different conclusion can be drawn, be null and void";

(3) Finally, Article 181 of the Code provides that "the nullity of a part entails the nullity of the transaction as a whole if it can be deduced that the transaction would not have been concluded without the void part".

29. The Pilot Defendants contend that the loan fee was an illegal commission fee which rendered Tranche A null and void by reason of Article 174 and which in turn rendered the entire Starfish Loan Agreement void because of Article 181.

30. In a detailed analysis set out in paragraphs 16 to 26 of his report Professor Stathopoulos states that the fee is really consideration paid to Proton in exchange for its willingness to provide the finance under Tranche B, by way of a genuine *quid pro* quo, as opposed to a simple commission then is it not an illegal commission at all. Professor Kornilakis in his second report in particular rejects that distinction and says that the fee here amounts to a commission within Chapter F. Although I consider that the views of Professor Stathopoulos are the more persuasive, I am not able at this summary stage to determine this issue between the experts finally on paper. Accordingly for present purposes it is at least realistically arguable that the payment to be made under Tranche A is an illegal commission under Greek law.

31. The next stage is to see what the consequences are for the claim under the Starfish Loan Agreement which is governed by English Law.

32. The Starfish Defendants contend that:

(1) By reason of the decision of the Court of Appeal in *Ralli Brothers v Compania Naviera Sota Aznar* [1920] 2 KB 287, Tranche A is unenforceable under English Law, and that this decision has not been superseded by Article 9 (3) of the Rome 1 Regulation no. 593 of 2008 ("Rome 1"). Article 9 provides as follows:

> *"Overriding mandatory provisions*
>
> 1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
>
> 2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
>
> 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

(2) Even if *Ralli* has been superseded, Chapter F is a "mandatory overriding provision" and should be given effect;

(3) Moreover, the combination of Articles 174 and 181 mean that this Court should not enforce any part of the Starfish Loan Agreement, since all of it is void.

33. For its part, Eurobank contends as follows:

(1) *Ralli* is no longer good law and has indeed been superseded by Article 9 of Rome 1;

(2) Chapter F is not a "mandatory overriding provision" but even if it were, I should not exercise my discretion under Article 9 (3) to give effect to it;

(3) Articles 174 and 181, being provisions of Greek Law, are irrelevant when it comes to the question not merely whether the fee in issue is itself payable but whether that illegality renders the Starfish Loan Agreement as a whole unenforceable.

34. In *Ralli* the Spanish owners of a ship delivering cargo in Barcelona claimed the balance of the freight due from the charterers. Under Spanish law that balance was not recoverable because it exceeded a limit of 875 *pesetas* per ton. The Court held that the charterers were not bound to perform "that part of the contract, that is, the payment of freight above the maximum allowed by Spanish law which has become illegal by the law of the place of performance." per Lord Sterndale MR at p292. See also the concurring judgments of Warrington and Scrutton LJJ at pp 297 and 304 respectively. It is also clear from those judgments that it is only the performance of that part of the contract which is illegal under foreign law which is unenforceable under English law. Indeed there would be no reason in logic why this rule, which exceptionally gives effect to foreign law when the governing law of the contract is English, should go wider than necessary in order to apply the foreign law rule in question.

35. It follows that if *Ralli* remains good law, the Court here will not enforce Tranche A, or at least, there is a real prospect of that being the case. But the claim for Tranche B is unaffected.

36. For present purposes at least I consider that *Ralli* remains good law. There is material to suggest that in the negotiation of Article 9 the problem with which *Ralli* is concerned was part of the discussions and if so, it would make sense that it has now been subsumed into the slightly different approach taken by that Article. On the other hand, and as is suggested in *Dicey &*

Morris (15th edition) at 32-97 to 32-101, the prevailing view is that the *Ralli* principle is and should be regarded as a rule of English law, thereby applying only to contracts governed by English law; but as such it is not a conflicts of law rule but simply an aspect of domestic law. If so, it remains good law, notwithstanding Article 9. See also *Chitty on Contracts* (31st Edition) at paragraphs 30-360 to 30-362 to much the same effect. I note that in *Ispahani v Bank Melli Iran* [1998] Lloyd's Rep. Banking 133, Walker LJ, in giving the lead judgment took the same view (see p136) but felt it unnecessary to decide the point finally, as do I.

37. On that basis, there is a triable defence to the claim under Tranche A by reason of illegality as outlined above.

38. If (contrary to my conclusion above) the effect of *Ralli* here was somehow to render *prima facie* the whole of the Starfish Loan Agreement illegal and unenforceable, I would hold that the "blue pencil" rule is available to preserve the Tranche B claim and should be applied here. The fact that Eurobank would not then be entitled to the fee due for the grant of Tranche B is no bar to applying the rule. Tranche B is a separate loan with its own interest provisions. Alternatively, the second limb of Clause 13.06 (see paragraph 8(6) above) would apply to preserve the Tranche B claim. In that context I consider that the separate obligation to pay the Outstanding Indebtedness which is deemed to arise would do so with all the previous relevant contractual "baggage" which is not itself illegal and this would include the no set-off clause.

39. It is therefore unnecessary to decide the outcome under Article 9. However, as there has been argument on the point I will state my views briefly. First I do not consider that Chapter F is a "mandatory overriding provision". This is a European, not Greek Law concept and so the competing views of Professors Kornilakis and Stathopoulos are strictly irrelevant. As I see it, it cannot be said that Chapter F is exclusively or even mainly concerned to advance consumer protection or some other interest serving what might be referred to as weaker contractual parties or the types of interest set out in Article 9 (1). It cannot be said to be concerned only with what might be termed "exorbitant bargains". See also *Chitty* at 30-363 and the examples cited therein. However, even if I were wrong about that, it is plain from Article 9 that it only applies to that part of the foreign law which renders performance illegal, and so only Tranche A is affected. Even here I would have exercised my discretion in favour of permitting enforcement of Tranche A. Leaving aside the separate considerations of alleged breach of contract and fraud, and based upon the limited materials before me, both parties here are commercial entities and both have competing versions of events, neither of which is straightforward. But it is clear that Pilot was very keen to have the finance in place for the purchase of the further ships. And Tranche A was the price to be paid for it. Moreover there was no deliberate infringement and if this fee is outlawed by Article 9 it must be at the limits of its scope. If I was wrong about discretion here, then the outcome is as I have found anyway which is that there cannot be summary judgment on Tranche A because of the application of *Ralli*.

40. If Article 9 was engaged and somehow applied so as to render unenforceable the claims for both tranches, then on any view the discretion must be applied to permit the Tranche B claim which is a self-contained loan repayment which would not itself be penalised under Greek law and would give the Starfish Defendants an entirely undeserved windfall. Moreover the parties clearly intended to preserve such a claim where another claim might be rendered unenforceable – see Clause 13.06, discussed above.

41. Does the fact that Articles 174 and 181 of the Code render the whole of the contract thereby unenforceable? In my view, clearly not. They are provisions of Greek Law which do not apply here.

The Compelling Reason Point

42. The Pilot Defendants' alternative submission is that there is some "other compelling reason why the case should be disposed of at a trial". See CPR 24.2 (b). This is still relevant insofar as I have found no real prospect of a successful defence to the claim under Tranche B. There was some discussion before me as to whether the word "compelling", introduced as part of the 2000 reforms, makes any difference. The editors of the White Book suggest not (see the notes at 24.2.4). Under the previous law, in the oft-cited case of *Miles v Bull* [1969] 1 QB 258, Megarry J said that the previous words were very wide and would cover a case where although no specific issue to be tried could be identified, there were nonetheless circumstances which should be investigated by a trial. In that case, Megarry J said that the Plaintiff should be required to prove his case for possession against the wife of the former matrimonial home in circumstances where the husband would not have been able to evict her. As he put it "Order 14 is for the plain and straightforward, not for the devious and crafty." In *Global Marine Drillships v Landmark Solicitors and others* [2011] EWHC 2685, Henderson J considered that the transaction at issue assumed such a strange complexion and there were so many obvious suspicions raised, that the ability of the Claimant simply to rely on the "unvarnished" terms of the solicitor's undertaking sued upon was called into question and the full facts needed to be scrutinised at trial. He thought there may be a good deal more to the case than met the eye and the claim on the undertaking could not safely be viewed in isolation from other claims. He did not suggest that there was any material difference between the test as it now is, and as it was.

43. While nothing turns on this for present purposes (see below), for my own part I would respectfully suggest that the introduction of the word "compelling" must have been intended by the framers of the CPR to have some meaning, otherwise it is quite unclear why the "some other reason" limb was altered at all. In my view the word "compelling" highlights that this basis for refusing summary judgment, although one which cannot be defined exhaustively, is intended only to be applied sparingly. Otherwise, it would be a residual category appealed to frequently and as a simple fallback for a defendant with no viable defence. Given that, by definition, the case is one where the Court has held that there is no such defence, at least at that stage, and given the Court's refusal to allow a defendant to resist a claim in the Micawberist hope that "something may turn up at trial", I would for myself take the following view: only those cases which, because of their very particular circumstances "cry out" for a trial so that justice can be done and be seen to be done, are likely to fall within the "compelling reason" limb. The facts of both *Miles v Bull* and *Global Marine* fit that description in my view.

44. I can see no basis for allowing the Tranche B claim to go to trial on this basis here, and whether CPR 24.2 (b) is to be interpreted as I have suggested or effectively as it was originally without the word "compelling". It is true that there are some oddities in this case but they are on both sides and fundamentally affect only Tranche A. Some aspects of this dispute are also being ventilated in the Greek Courts already. I also consider that it would be quite wrong to deprive Eurobank of a judgment now on Tranche B where there is no real defence and the indebtedness arises from a loan which Pilot was on any view keen to secure to expand its business.

Conclusion

45. Accordingly, Eurobank is entitled to judgment on the claim for Tranche B of the Starfish Loan Agreement but not Tranche A which must go to trial. Eurobank also argued that if the "no set-off" clause had been found to be inoperative as against the Pilot Defendants (in the event that was not argued) then there was a counter-argument to the effect that the Pilot Defendants had waived their right to rely on their counterclaim by way of defence, by reason of their agreement

to the various Supplemental Agreements which recited the monies owed. However since the no set-off clause was admitted to operate, this point does not arise.

SUMMARY JUDGMENT ON THE KALLIROI AGREEMENT

Introduction

46. On the face of it, there is no defence to the claim under this agreement which was prior and separate to the Starfish Loan Agreement. No direct claim in breach of contract or fraud arises under it. However, the Starfish Defendants contend as follows:

    (1) There is a real prospect of showing that there was an implied term of the Kalliroi Loan Agreement to the effect that because of Proton's (alleged) wrongdoing under or in relation to the Starfish Loan Agreement, it cannot now make its claims against the Kalliroi Defendants ("the Implied Term Point); and/or

    (2) Again, there is some other compelling reason for a trial ("the Compelling Reason Point").

The Compelling Reason Point

47. I deal with this first because it can be disposed of briefly. If, for the reasons given in paragraph 44 above, there is no compelling reason for a trial of the claim under Tranche B of the Starfish Loan Agreement, there is even less justification for a trial on this basis when the claim is made under an entirely separate and prior agreement. Accordingly I reject the Compelling Reason Point here also.

The Implied Term Point

48. The argument here is that Eurobank has claimed against the Kalliroi Defendants, the entire sums lent under the Kalliroi Loan Agreement (plus accrued interest) because of the events of default of non-payment of the instalments and the earnings into the designated accounts. But this amounts to taking advantage of the wrongs Proton committed under or in relation to the Starfish Agreement ie its alleged fraud and/or breach of contract thereunder. It is not argued that the Kalliroi Defendants would not at least be liable for the arrears which have accrued, themselves substantial.

49. As to the law, in *Cheall v A.P.E.X* [1983] 2 AC 180, Lord Diplock stated that to attract the principle that a party to a contract cannot be permitted to take advantage of his own breach of duty, that duty must be owed to the other party to the contract. "..breach of a duty whether contractual or non-contractual owed to a stranger under the contract does not suffice." See p189F-G. It has been suggested (see *Chitty* at para. 12-82) that the duty broken by the party seeking to enforce might "possibly" include a non-contractual duty. In *Petroplus v Shell Trading* [2009] 2 Lloyd's Rep. 611, Andrew Smith J added that this principle was not inflexible or absolute and could be displaced by the parties intentions as understood from the express terms. An example of where the Court rejected an alleged implied term to give effect to this principle is *BDW Trading v JM Rowe Trading* [2011] EWCA Civ. 548.

50. In circumstances where there is an admittedly enforceable no set-off clause (even where there is alleged fraud), the scope for any implied term of the kind alleged must be very small. In my view there is no such implied term here. If I was wrong about that, then I consider that any implied term is limited to where the party seeking to enforce is relying on his own breach of contractual duty under the agreement in question, as opposed to some wider wrong.

51. But even if any implied term went wider, any breach of duty committed by Proton was not as against Kalliroi but rather, the Starfish Defendants. The fact that there were common guarantors,

namely Pilot and Captain Kasapoglou can make no difference. Their defence to the guarantee claims is here dependent on the defence (if any) open to Kalliroi under the Kalliroi Loan Agreement. It is not alleged that there was any implied term in the guarantees.

52. That is sufficient to dispose of the argument but there are other reasons why it must fail. First, Eurobank is not relying on or taking advantage of Proton's alleged breaches. It relies simply upon the fact of Kalliroi's non-payment. Moreover, such non-payment was not in fact caused by any wrong on the part of Proton. The clear evidence of Mr Efstratios Mallis, the CEO of all the Defendant companies, was that they took a deliberate decision not to pay any further instalments under either agreement, and not to remit their earnings into the designated accounts, because, having discovered Proton's alleged wrongs it was "no longer appropriate" to do so. See paragraphs 102-103 of his first witness statement dated 23 April 2015. There is thus no causal link in any event.

53. For all those reasons, there is nothing in the Implied Term Point.

54. For the sake of completeness I should add that an alternative argument based on circuity of action was made here. In my judgment it adds nothing and if the Implied Term Point fails, so does any argument based on circuity of action.

Conclusion

55. Accordingly, there must be judgment for Eurobank for the amounts claimed under the Kalliroi Agreement.

STRIKE-OUT OR SUMMARY DISMISSAL OF THE COUNTERCLAIM

56. Here Eurobank seeks to go further by saying that there is nothing in the Counterclaim based on Proton's fraud and/or breach of the Starfish Loan Agreement (see above) in any event and I should dismiss it. It is true that Capt. Kasapoglou's account is very odd because it entails the conclusion that he would pay US$12m in return for proceeds of sale of up to US$20m. Further, there seems to have been no due diligence as to the New Era Loans whatsoever, nor any demand for a written assignment thereof at the time of making the Starfish Loan Agreement. However, Eurobank's account is odd, too. After all, although it now contends that it was "mistaken" in agreeing to terms referring to the purchase of the New Era Loans and securities thereunder (instead of a US$12m fee), in January 2012 Proton was still saying in correspondence that Asterias and Starfish were making that purchase and in August, while it said that there was no obligation to remit the proceeds of sale of the ships (because the reduction of Tranche A from US$20m to US$12m represented a fixed credit in respect of the proceeds of sale) it still offered to provide the New Era Loan documentation to Asterias and Starfish though it never did so. It is very difficult at this point to disentangle Eurobank's Rectification Claim (to which it accepts there is an arguable defence) from its claim that there is no arguable claim against it in fraud and/or breach of contract.

57. It is said that from an evidential point of view the making by the Defendants of the three successive supplemental agreements which all confirmed the amounts owing militates strongly against the existence of the Counterclaim. However, there was also the "extra-judicial statement of protest" letter dated 25 July 2012 and when the Supplemental Agreements were entered into the loan fee argument had not yet been advanced by Eurobank.

58. On liability, therefore, I cannot say that the Counterclaim is fanciful so as to be dismissed summarily.

59. However, points are taken as to quantum as well. In particular it is said that the claim made in paragraph 80 (3) of the Amended Defence and Counterclaim, that but for Proton's wrongdoing, the Defendants, or some of them lost the opportunity to obtain US$300m to enable them to refinance the Kalliroi and/or Starfish Loan Agreements and/or expand the business, is fanciful.

60. According to Mr Mallis, there were negotiations with a company called Southridge Advisors LLC which led to the production of a draft Public Listing and Equity Financing Agreement under which Southridge was to act as a financial advisor and manager for Pilot so as to assist it to obtain capital finance, in exchange for significant monthly fees ("the Southridge Agreement"). Exhibited to the Southridge Agreement is an Equity Purchase Agreement Term Sheet ("the EPA") between Pilot as issuer, Southridge as advisor and Southridge Partners LLP ("Southridge partners") as purchaser. It contemplates the provision of US$300m to Pilot by Southridge Partners by way of a purchase of Pilot's stock. Some of the definitions are not filled in and while apparently signed by Mr Hicks on behalf of Southridge Partners it is expressed in any event to be subject to a formal agreement. Mr Mallis's evidence is to the effect that Pilot was told not to sign the EPA until it was able to show a "clean audit" of its accounts. But it could not do so because Deloitte, its accountants said there was a problem with the bank accounts of Asterias and Starfish showing the sum of US$20m leaving without authorisation. So the EPA could not proceed and thus Asterias and Starfish lost the opportunity to gain US$300m by way of financing.

61. I regard all of this as completely speculative. First the underlying Southridge Agreement itself is not signed and even though Mr Hicks apparently signed for Southridge Partners on the EPA, this was in effect nothing more than a draft. Indeed it is very unclear to me why Mr Hicks signed the EPA at all if Pilot was not able to do so at that point. Further, and for the cogent reasons given by Mr Daniel, Eurobank's expert accountant, I consider that the "clean audit" problem was more apparent than real. A greater problem would have been the very difficult trading conditions in which the Pilot group found itself and which had already caused it to refinance the loans pursuant to the Supplemental Agreements.

62. In truth, the notion that Pilot would ever have been able to secure funding of US$300m from Southridge so as to refinance itself and expand the business is indeed fanciful. Accordingly, I dismiss this part of the Counterclaim as pleaded in paragraph 80 (3) of the Amended Defence and Counterclaim.

63. Otherwise, the Counterclaim may proceed.

CONCLUSIONS ON EUROBANK'S APPLICATIONS ABOVE

64. Subject to checking the calculations and the addition of further accrued interest,

    (1) There will be judgment for Eurobank against Kalliroi, Pilot and Capt. Kasapoglou for US$9.8m pursuant to the Kalliroi Loan Agreement and guarantees;

    (2) There will be judgment for Eurobank against Asterias, Starfish, Pilot, Capt. Kasapoglou and Strimon for US$41.8m pursuant to the Starfish Loan Agreement and guarantees;

    (3) The Counterclaim is dismissed to the extent of its claim for damages set out in paragraph 80 (3) of the Amended Defence and Counterclaim.

THE DEFENDANTS' APPLICATION FOR THE RELEASE OF THE US$1.13M

65. Given that Eurobank now has the judgments against (inter alia) Kalliroi and Asterias (see above) I can see no basis for the release of any of the Freight Payments to any of the Defendants. Indeed

(subject to any further argument on the point) Eurobank should be entitled to payment out of all such funds in partial satisfaction of the judgment.

EUROBANK'S APPLICATION FOR SECURITY FOR COSTS

66. At the hearing on 8 July, I indicated that unless I directed otherwise I would deal with the question of security for costs on paper. I see no reason to change my view. I have been assisted by detailed evidence on the point together with the parties' written submissions dated 1 and 2 July, and the further written submissions made by letter after the hearing, and dated 23 and 28 July.

67. The context now is as follows: I have ruled that the Counterclaim alleging fraud and breach of the Starfish Loan Agreement cannot be invoked by way of defence to the claim. Accordingly, it is (now) not "defensive" in nature at all. I have also ruled that the Counterclaim should proceed to trial save for the damages claim made in paragraph 80 (3) which will reduce the evidence required somewhat. The Rectification Claim was of course made following the Defendants' allegations of fraud and breach of the Starfish Loan Agreement and to that extent might be viewed as being part of the defence to the counterclaim, from a costs point of view. On the other hand, and as recognised at the hearing the claim for rectification now represents Eurobank's case on its claim for the monies due under Tranche A which is why the Illegality Point was pertinent on its application for summary judgement. For all of those reasons, the scope of the trial of the Counterclaim is relatively narrow, though much in dispute. At the end of the day, it is going to involve an evidentiary contest largely between Mr Panagiotopoulos on the one hand and Capt. Kasapoglou on the other. Thus, for example, there is no basis now for saying that there will be a trial taking 10 days, even with the determination of the Illegality Point.

68. It is not in dispute that the Court has jurisdiction to make an order for security against the Corporate Defendants on the grounds that there is reason to believe that they will be unable to pay Eurobank's costs if it wins on the Counterclaim. The amount of security sought is £1,529,832.91 being the entirety of Eurobank's budgeted costs less the costs of the summary judgment applications and any costs of enforcement. However, the amount claimed is in respect of all the costs of the action. It is not restricted to the costs of defending the Counterclaim in the circumstances which now pertain as a result of my rulings above.

69. The sole argument raised by the Corporate Defendants as to why I should not exercise my discretion to order any security is because to do so would stifle the Counterclaim. The burden is on the Corporate Defendants to show this and in particular to show that funding is not available from friends or family. See *Keary Developments v Tarmac Construction* [1995] 3 All ER 534.

70. Capt. Kasapoglou has given evidence that those friends of family who have provided limited assistance thus far are now unable or unwilling to provide any more save in relatively small amounts. See paragraph 17-22 of his second witness statement dated 28 June 2015. Despite criticisms of this evidence I see no reason to doubt it for present purposes, as far as it goes.

71. However it does not deal with the fact that Mr Mallis, the CEO of the Pilot Group and who has provided two witness statements in its support here, including on the question of its financial position, is also the "ultimate" owner of 35% of the group's shares. He thus has a very clear and substantial financial interest in the outcome of these proceedings. Yet it appears that he has not been approached by Capt. Kasapoglou, or anyone else from the Pilot Group to provide assistance, nor has he seen fit to volunteer it. This is a glaring omission in the Corporate Defendants' case on stifling. Nor is there any evidence about his assets. The point was expressly highlighted in paragraph 5 (d) (i) of Eurobank's further submissions dated 23 July. The

Corporate Defendants' response does not deal with this point at all although it does deal with paragraph 5 (d) (iv).

72. Moreover there are at least some question marks over the Pilot Group's true financial position. First, while Capt. Kasapoglou pointed to a cash-flow forecast showing the making of losses for the year 2014 and beyond (see the schedule at C4/1099-1102) Mr Mallis produced a much more optimistic forecast in his Financial Overview document (C4/935) produced to assist the Pilot Group to obtain a refinancing from Eurobank in January 2014. In paragraphs 7-9 of his second statement, he explains that the figures cannot be compared because his forecast was done on the basis that the Pilot Group would be engaging in time rather than voyage charters, the former being significantly more profitable. I follow that, but since he goes on to say that the Pilot Group charters tended to be on a spot-rate voyage basis, it raises the question of why he produced a forecast based on time charters at all. There are also significant discrepancies in the expenses figures relied upon by the Corporate Defendants, as noted in paragraphs 71 and 72 of Eurobank's submissions. These also are highlighted in its submissions dated 23 July (see paragraph 5 (d) (ii) and (iii)) but again not answered.

73. In my judgment, in the light of those matters it would be wrong to deny Eurobank any security at all. However I am also conscious of the more limited trial that lies ahead and the narrow compass of the Counterclaim. I must also take account of the Pilot Group's general position and the fact that apart from Mr Mallis there seem to be no obvious candidates who can or will now give assistance. In my judgment the right figure to award by way of security is £200,000.

CONCLUSIONS

74. Following the hand-down of this judgment the parties will be invited to deal with all post-judgment matters on paper or on a date to be fixed. I am most grateful to Counsel for all their helpful oral and written submissions.