Neutral Citation Number: [2023] EWHC 2995 (Comm)

Case No: CL-2023-000137

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 24 November 2023

CHARLES HOLLANDER KC
Sitting as a Judge of the High Court

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Between :

CETO SHIPPING CORPORATION	**Claimant/ Charterers**
- and -	
SAVORY SHIPPING INC	**Defendant/ Owners**

- -
- -

Oliver Caplin (instructed by **Waterson Hicks**) for the **Defendant**
Chris Smith KC and Celine Honey (instructed by **Stephenson Harwood Middle East LLP**) for the **Claimant**

Hearing date: 16 November 2023

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Approved Judgment

I direct that 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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CHARLES HOLLANDER KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 24 November 2023 at 10:00am.

Charles Hollander KC:

1. This is an application for security for costs brought by the Defendant shipowners Savory Shipping Inc ("Savory") against the Claimant charterers Ceto Shipping Corporation ("Ceto").

2. The case concerns the current ownership of the proceeds of sale of the mv VICTOR 1 (the "Vessel"), which Savory bareboat chartered to Ceto on 28 February 2019 ("the Charter").

3. Clause 39.1 of the Charter, provided, by an amendment in December 2019, for the transfer of the ownership of the Vessel from Savory to Ceto at the expiry of the Charter if Ceto had paid "*all hire and other sums due under this Charter and provided that the Charterers have also paid all management fees and any other sums due under the Management Agreement to Delfi*".

4. Savory contends that condition was not met and did not transfer ownership at the expiry of the Charter on 1 April 2022.

5. The Vessel was arrested in March 2022 by the crew in Singapore for unpaid wages. It was sold in January 2023 by judicial auction. The funds realised from the sale (approximately US$11.5m) are being held by the Singapore Court. The parties agreed that Ceto has the same rights in those funds as it would have had in the Vessel, had she not been sold.

6. On 21 October 2022, Andrew Baker J held that title in the vessel had not passed to Ceto. [2022] EWHC 2636 (Comm); [2023] 2 Lloyd's Rep 1 (the "Part 8 Claim").

7. Various proceedings in Singapore have been commenced in which the Vessel was first arrested and later sold, and various monetary claims have been made against the Vessel.

8. A London arbitration was brought by Ceto against Delfi S.A. (the "Ceto/Delfi Arbitration"). There Ceto claims various sums are due to it from Delfi under the management agreement contemplated in Clause 39.1 (the "Management Agreement"). Delfi counterclaims the sum of c.US$2m. The arbitration has since 23 February 2023 been stayed in light of Ceto's failure to put up security of £145,000 for Delfi's costs, ordered in December 2022. The issue as to whether sums are due to Delfi is an issue in the present proceedings (as to whether the condition in Clause 39.1 is satisfied) and Delfi have apparently agreed to be bound by the result of these proceedings.

9. In its present claim Ceto seeks declaratory relief in relation to Savory's Clause 39.1 transfer obligations both at the moment of expiry of the Charter on 1 April 2022, and thereafter. Ceto claim Savory has breached the Charter by failing to transfer title in the Vessel to Ceto. It argues that no sums are due from Ceto to Delfi under the Management Agreement, and that (by reference to the Singapore Proceedings) no sums were due to Savory from Ceto at the expiry of the Charter. Ceto also claims damages of nearly US$6m occasioned by, it says, Savory's transfer failure.

10. Savory counterclaims mirror declarations to those sought by Ceto, to the effect that it remains the owner of the Vessel, and is not, and never has been, under an obligation to transfer title to Ceto.

11. CPR r.25.13(1) provides that the Court may make an order for security under r.25.12 if: (i) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order (see r.25.13(1)(a)) and (ii) one or more of the conditions in r.25.13(2) is satisfied (see r.25.13(1)(b)).

12. Savory issued the Application under CPR r.25.12 for security in the amount of £613,770.50 on 9 August 2023. Two 'conditions' were relied upon: (i) r.25.13(2)(c) – Ceto's inability to pay an adverse costs order if required, and additionally (ii) r.25.13(2)(g), steps taken by Ceto in relation to its assets that will hinder enforcement. Ceto admit they would be unable to pay an adverse costs order so (g) does not now arise.

13. Ceto say an order for security should not be made for two reasons:

    a. They are impecunious and an order for security would stifle a genuine claim

    b. It is inappropriate to order security because Savory's Counterclaim mirrors their own claim.

Stifling: the law

14. Where, as here, the evidence shows an inability on the part of a Claimant company to pay an adverse costs order, the unfairness to the Defendant in permitting the claim to proceed gives rise to a prima facie entitlement to security. As Peter Gibson LJ put it in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 at 536, the system of justice in this jurisdiction is founded on the premise that the interests of justice are normally best served if successful litigants recoup the costs of their litigation, and unsuccessful litigants pay them.

15. However, where the evidence shows that the Claimant would be unable to comply with an order for security because of its impecuniosity, the court has to consider whether the effect of an order for security would be to stifle a genuine claim and the exercise of discretion becomes a different one. Consideration of the merits will not normally be appropriate at this stage and neither party sought to rely on the merits of their case.

16. In *Keary* Peter Gibson LJ said at 540j:

> "*…the court should not only consider whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation…In M V Yorke Motors (a firm) v Edwards [1982] 1 All ER 1024 at 1028…Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal:*
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> > *"The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may business associates, he may have relatives, all of whom can help him in his hour of need"*
> >
> > *In Kloeckner & Co AG v Gatoil Overseas Inc [1990] CA Transcript 250 Bingham LJ cited with approval certain remarks of the Registrar of Civil Appeals…The registrar said:*

> *….it is not sufficient for the appellant to show that he does not have the assets in his own personal resources. As in the Yorke Motors case, the appellant must, in my view, show not only that he does not have the money himself, but that he is unable to raise the money from anywhere else*
>
> *Bingham LJ's comment was: 'I cannot fault the general approach of the registrar*'"

17. In relation to security for the costs of an appeal, in *Goldtrail Travel Limited (in Liquidation) v Onur Air Tasimacilik AS* [2017] UKSC 57, Lord Wilson identified the question at [23] as follows:

> "*Has the appellant company established on the balance of probabilities that no such funds would be available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?*"

18. As to how the Court should approach evidence by a company asserting 'stifling', Lord Wilson said at [24]:

> "*In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position, and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directed (and has directed) its affairs and is supported (and has supported) it in financial terms*"

19. Mr Caplin for Savory submitted it must be shown that the evidence establishes, on the balance of probabilities, it will be impossible for Ceto to put up the security, either now, or within a reasonable timeframe. I prefer to use the formulation of Lord Wilson in *Goldtrail*.

20. Mr Smith for Ceto submitted that it was important to focus on whether the Claimant company could comply with an order for security, and not to be sidetracked into considering whether a shareholder or some other person could comply with an order. It is right in principle to focus on the company (and if one frames the question wrongly one may get the wrong answer) but I do not accept where he submits this leads. Whether a one ship company could comply with an order for security depends on whether efforts could be successfully made, by its owner or anyone else, to raise the money, and there is no artificial limit to be placed on the enquiries to be made to that end.

21. It is also fair to note that the exercise must be approached realistically. Whatever evidence is led, it is always possible to identify some point that has not been considered, or some theoretical avenue that has not been explored. What is important is that the evidence is "*full, frank, clear and unequivocal*": Eady J in *Al-Koronky v Time-Life Entertainment Group Ltd* [2005] EWHC 1688 (QB) at [31].

Stifling: the evidence

22. Ceto is owned by Ms Mahdieh Sanchouli. Ms Sanchouli is a sanctioned individual, having been added to the OFAC Specially Designated Nationals and Blocked Persons ("SDN") list in July 2022. She was found to have facilitated the export of Iranian oil. She says in her evidence that has made business difficult for her.

23. In *Integral Petroleum SA v (1) Petrogat FZE, (2) Ms Mahdieh Sachouli* [2023] EWHC 44 (Comm) Ms Sanchouli was personally ordered to pay back to Petrogat some US$1.7m under a s423 IA 1986 application in relation to funds transferred out of Petrogat in fraud of its creditors: [124], [131]. David Edwards KC, sitting as a Judge of the High Court, noted that Ms Sanchouli had refused to comply with the asset disclosure aspects of a Worldwide Freezing Order (WFO) granted against her by Calver J, and continued by Sir Michael Burton [39]. The WFO had required her to provide evidence of her bank accounts and assets: [30]. This ultimately led to her being debarred from defending the s.423 claim pursuant to an "unless" order granted by Cockerill J: [38-39].

24. Ms Sanchouli had transferred assets to Company A in circumstances that gave rise to a breach of s423. Ms Sanchouli was required by the court to identify Company A with a view to the funds being recovered. She declined to do so: [32][36][38-39]. The Judge drew adverse inferences against Ms Sanchouli's written evidence because of her "*defiance of court orders – withholding information as to the identity and assets of Company A and about [her] own assets*"[82].

25. Ms Sanchouli was also in contempt of this Court for the deliberate breach of a court order prohibiting her from directing delivery of cargo to Iran, and was given a 3 month suspended prison sentence by Foxton J as a result: [8].

26. These matters require me to exercise caution in assessing the evidence led by Ms Sanchouli.

27. Ms Sanchouli says in her evidence Ceto is an SPV and the only asset Ceto had was the Vessel. In circumstances where the registered ownership of the Vessel was not transferred, the Claimant remains assetless. Ceto's income was solely derived from operating the Vessel but since the Vessel's arrest in April 2022, the Claimant has not had source of income. She produced a spreadsheet of assets and liabilities showing liabilities to exceed any income earned during the Charterparty.

28. She says that her SDN designation has had a devastating effect on her personal finances as well as on her ability to raise finances for Ceto's benefit. She says in her witness statement her designation by OFAC has been the "kiss of death" and resulted in her ability to conduct business being curtailed and all of her personal bank accounts being closed. She says she has a job in marketing for which she is paid $2700 per month and has undertaken an unpaid internship at a dentist's clinic in Dubai so as to ensure that she has an alternative career avenue (she has a dentistry degree) if the difficulties caused by her being included on the SDN list cannot be overcome.

29. In her evidence, Ms Sanchouli addresses the possibility of obtaining funding for Ceto from four outside sources: (i) banks, (ii) other financial institutions, (iii) litigation funders and (iv) creditors. She states that it would be impossible for her or Ceto to obtain such funding.

30. Savory say that her evidence does not suggest she has explored raising money from funders. But it seems unlikely that funders would be interested in funding an individual on the SDN list or a company owned by her.

31. However, what is striking is the amount of litigation being conducted with what is said to be no funds:

    a. Ceto fought the Part 8 proceedings before Andrew Baker J to a conclusion (albeit they have not complied with the costs order against them)

    b. In the Ceto/Delfi Arbitration, they said their costs were £53,000 up to service of the LMAA Questionnaire, with a further £363,500 budgeted to trial (the arbitration was stayed as a result of their failure to comply with an order for security)

    c. Stephenson Harwood have acted for Ceto in relation to the Vessel since 2019. They act in this case, they acted in the Part 8 Claim, they acted in the Ceto/Delfi Arbitration. Mr Smith and Ms Honey have acted for Ceto in all three sets of proceedings.

    d. Gurbani & Co LLC act for Ceto in Singapore in several actions

    e. Ms Sanchouli has instructed US lawyers in order to try to discharge the order putting her on the SDN list.

32. In his first witness statement dated 13 September 2023 Mr Mark Lakin of Stephenson Harwood said that his firm had agreed with Ms Sanchouli that his firm and counsel would be paid when funds became available:

> "*Whilst it may take some time for the invoices to be cleared, I do believe that our fees will be paid in full eventually.*"

33. In her witness statement on the same date Ms Sanchouli said:

> "*I am endeavouring to arrange payments of the Claimant's lawyers and Counsel's invoices and when possible, I have been able to make some limited payments through chasing the debts owed to me for some old cargoes that had been delivered in previous years… I am also endeavouring to obtain support from friends and connections in Iran to provide funding so that at least some payment can be made to the Claimant's lawyers and Counsel going forward so that they can continue to act.*"

34. On 13 November 2023 Mr Lakin made a further witness statement merely to exhibit a document relating to Ms Sanchouli's salary. He did not otherwise respond to the reply evidence from Savory.

35. Also on 13 November Mr John Hicks on behalf of Savory put in a further witness statement in which he referred to proceedings commenced in Singapore about three weeks ago by Gurbani & Co on behalf of Ceto which he said he was not aware of when he served his prior evidence. On 24 October 2023 Ceto commenced proceedings before the High Court in Singapore (HCA/ADM 103/2023) against the "Owner and/or Demise Charterers of the vessel "VICTOR 1".

36. These appear to be proceedings in rem and the claim states:

> "*The Claimant's claim is for a declaration that, as of 1 April 2022, the Claimant is the beneficial owner of 100% of the shares in the vessel, Victor I and/or the proceeds of sale lying in the Court pursuant to the sale of the Vessel.*"

37. This evidence and the points taken in Savory's skeleton argument led to a further witness statement from Mr Lakin on 15 November (the day before the oral hearing). In this he said:

    a. The spreadsheet exhibited by Ms Sanchouli to her witness statement on 13 September was correct then showing outstanding legal fees of about £800,000

    b. He exhibited up to date spreadsheets showing US$550,000 owed to his firm , US$200,000 to Virtus law, US$35,000 owed to London counsel and US$63,000 owed in tax and other disbursements

    c. Payments of US$191,500 had been made in relation to Victor I matters in September 2023

    d. Payments of US$60,000 had been made to Gurbani & Co by Ceto directly but those sums have not been fully utilised to date.

38. So the day before the hearing Ceto for the first time refer to the new Singapore proceedings it has brought, and to the payment of lawyers therefor, and to the sums paid since the 13 September spreadsheet.

39. Savory's submission is that whenever Ceto need to find money, it is able to do so. Notwithstanding being allegedly impecunious, it has have brought a series of proceedings and appears to have been paying lawyers in Singapore, England, and in arbitration proceedings. There is not much point in starting proceedings in the knowledge that funds cannot be made available to bring them to trial. Ms Sanchouli herself has been involved in proceedings in addition in the US and England. Far from the evidence being full and frank, there was no mention of the (apparently duplicative) Singapore proceedings or the payments made since 13 September in relation to legal fees until the day before the hearing after receipt of Savory's skeleton argument. How is it that Ceto has no money but decides to start yet more proceedings in Singapore claiming what appears, on the limited information available, to be the same relief as in the present proceedings? Although it is said that Gurbani & Co were paid directly by Ceto, exactly how that was done is unclear. Exactly where did the money come from to make these not insignificant payments and why were they not disclosed earlier?

40. For a claimant who claims to be entirely impecunious to have commenced as many actions as have Ceto is surely unprecedented.

41. Savory point out that there is no evidence that Dr Rajabieslami, a longstanding business partner of Ms Sanchouli who has signed many of the key documents in the case, has been asked whether he could pay security and the evidence on behalf of Ceto that he has not been involved since 2019 is contradicted by the documents.

42. I would decide this issue on the broader ground that in the light of the evidence before me, I accept Savory's submission that whenever Ceto needs to find money in their own

interests, it is able to do so. The commencement and continuation of multiple litigations is not consistent with the alleged impecuniosity. I do not regard the presentation of evidence by Ceto as full and frank and I am not satisfied that an order for security would stifle this claim.

Savory's Counterclaim: the law

43. In *Explosive Learning Solutions Limited v Landmarc Support Services Limited* [2023] EWHC 1263 (Comm), Peter MacDonald Eggers KC sitting as a Judge of the High Court summarised the relevant principle at [21]:

> *"Where, as in the present case, the Defendant applying for an order for security for costs in respect of its defence of which the Claimant's claim is advancing a counterclaim and that counterclaim is based wholly or in a very substantial part on the same facts or substantially the same facts as the Claimant's own claim, additional considerations arise in respect of the application for security for costs. In such cases, what may be described as the default principle is that the Court will not order security for costs against the Claimant. The principle was summarised by Moore-Bick, LJ in Anglo Irish Asset Finance Plc v Flood [2011] EWCA Civ 799, at par. 20.:*
>
> > *"If the claim and counterclaim raise the same issues it may well be a matter of chance which party is the claimant and which a counterclaim defendant and in such a case it will not usually be just to make an order for security for costs in favour of the defendant, although the court must always have regard to the particular circumstances of the case"."*

44. The rationale behind the ordinary approach is that if the claim is struck out for want of provision of security, the same underlying factual issues would still be litigated to trial through the counterclaim: [22].

45. However, the general position above is not conclusive. It may nevertheless still be just for the Court to exercise its discretion: even in this context "*the court must always have regard to the particular circumstances of the case*" *Anglo Irish* at [20]; *Autoweld Systems Ltd v Kito Enterprises LLC* [2010] EWCA Civ 1469 at [58] (Black LJ).

46. In *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm); [2010] 2 CLC 661, Hamblen J said at [19]:

> "*If security is not put up the likely outcome is dismissal of the claim. If the Bank wishes to obtain security it should make it clear now what its position would be in that eventuality. If it was prepared to undertake to consent to the dismissal of the counterclaim in the event of the Claimant's claims being dismissed for failure to put up security then the difficulty raised by the Crabtree principle would be avoided. However, unless an undertaking is given to that effect, I do not consider that it would be appropriate to exercise my discretion to order security*".

47. This principle is sometimes referred to as the Crabtree principle because of the analysis of Bingham LJ in *BJ Crabtree (Insulation) Ltd v GPT Communications Systems* (1990) 59 B.L.R. 43 CA.

48. Savory also relied upon the judgment of Henderson J in *Peak Hotels and Resorts Ltd* 2015 2 Costs LR 277 but I do not regard that case as establishing any different principle.

Counterclaim: application to the facts

49. Many of the cases in this area involve a claim for damages by the Claimants and a claim for different damages by the Defendants by way of Counterclaim arising from the same facts. This is not such a case. In this case there is a pot of money sitting in court in Singapore and the question before this court is: which party is entitled to it? If therefore these proceedings are stayed for failure to provide security, on the face of it, there will have been no determination as to the entitlement to the money and the issue will need to be determined elsewhere. Savory did not accept that this is the case, pointing out that it is the legal owner of the Vessel. I appreciate the proceedings in Singapore are complex because there are other parties claiming rights. But if it can obtain the monies in Singapore without the need for these legal proceedings, then it should be easy for it to give the undertaking referred to in *Dumrul*.

50. I therefore invited Mr Caplin to give a *Dumrul* undertaking. He said he had no instructions to give such an undertaking. The fact that Savory is not willing to give such an undertaking is highly material.

51. If I order security and it is not provided, then the claim will be stayed and ultimately struck out. That will mean that the action will continue in relation to the Counterclaim and the dispute will be determined in exactly the same way but if it is decided in favour of Ceto, no relief can be given. The *Crabtree* principle exists to prevent precisely that consequence, which is in principle contrary to the interests of justice.

52. Mr Caplin submitted that Ceto had been the claimant in pretty well all the proceedings to which it was party, that the test was whether it was happenstance that Savory was a defendant or a claimant and it was not here happenstance at all. That may be an appropriate way of characterising the test in some cases, but in my judgment, it is not at least in cases such as the present an appropriate substitute for the *Crabtree* analysis and this is not an appropriate case to exercise my discretion in favour of ordering security where (i) the Counterclaim is a mirror image of the claim and (ii) Savory is unwilling to give a *Dumrul* undertaking.

53. However, there is a claim for damages by Ceto for breach of the Charter. My observations do not apply to that, and, in the light of my conclusions on stifling, I will order security for the costs relating to that part of the claim in a sum to be determined by me. The sum will be much smaller than that claimed overall, and even if I was wrong on my conclusions above on stifling, I would not expect an order in that regard to stifle the claim. I would expect the payment to be staged, and the consequence if not paid is that the damages claim (and not the whole claim) be stayed.

54. I propose to give this judgment remotely with no attendance by counsel. The parties should confer on matters arising from this judgment and let me know whether outstanding matters can be resolved on paper or whether a short further oral hearing is required.