Pump Court

Alexander Wright KC and Ed Jones successful in US$30m ship transfer dispute arising out of sanctioning of Russian state transportation company

On 27 January 2023, Foxton J handed down judgment in Gravelor Shipping Limited v GTLK Asia M5 Limited [2023] EWHC 131 (Comm) in which Alexander Wright KC and Ed Jones successfully acted for the Claimant instructed by William Gidman, Philip Kelleher and Sofie Maeland Tykvenko of HFW LLP.

The dispute arose from two materially identical bareboat charterparties for the bulk carriers MV "WL TOTMA" and MV "WL KIRILLOV".

The bareboat charterparties were essentially finance leases, and common with most such instruments, the Charterparties contemplated that at their expiry the Vessels would be transferred to the charterers, Gravelor.

The owners of the vessels (and the lenders) were subsidiaries of the JSC State Transportation Leasing Company (aka "**JSC GTLK**"), owned and/or controlled by the Russian Ministry of Transportation.

The Charterparties were performed without difficulty and with all payments due from Gravelor being made promptly, until the Russian invasion of Ukraine in February 2022.

In early March 2022, the charterers exercised purchase options under the charterparties.

On 8 April 2022, GTLK and its subsidiaries were however added to the EU regimes by Council Regulation (EU) No 269/2014, because it is "*a legal entity, financially supporting and benefitting from the Government of the Russian which is responsible for the annexation of Crimea and the destabilisation of Ukraine".*

As a result, Gravelor (an EU company) was unable to pay hire and other amounts owing to GTLK, and the vessels were effectively untradeable. The vessels' P&I, H&M and FDD insurers withdrew cover.

GTLK purported to call an event of default under the charterparties, relying on the non-payment of hire, calling for accelerated redemption of the sums advanced under clause 18.3 and nominating an account in Moscow for payment in HKD, CNY or RUB. As with the purchase options, payment of the clause 18.3 sums would lead to the transfer of title to the charterers. Although the two routes had slightly different financial consequences (e.g. because of default interest) the end result (transfer of title) so far as Gravelor was concerned was the same. The key distinction, however, was that if money was paid to the Moscow account, they would be available for GTLK's free use, and not subject to any asset freeze imposed by EU sanctions.

OFAC sanctions were then imposed upon GTLK in September 2022, by Executive Order 14024, meaning that payments in the contractual currency – US dollars – became impossible because they needed to be routed through *intermediary banks in the USA*.

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As result, Gravelor contended that the following clause 8.10, entitled, “Sanctions payment restrictions” was engaged:

> “*Where a payment under this Charterparty is incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly take all necessary steps in order for the payments to be resumed. Any delay in payments resulting solely from the circumstances referred to in the immediately preceding sentence shall not be deemed an Event of Default contemplated by clause 17.1(a) of this Charterparty*.”

Gravelor issued proceedings and applied for summary judgment on declarations and a claim for specific performance of the purchase options. The hearing of that application was expedited by the Commercial Court, despite objections from the GTLK defendants.

Shortly before the hearing, the GTLK subsidiaries asserted that they had been sold by GTLK to a road repair and maintenance business controlled by the local government of Chelyabinsk Region (a landlocked area of central Russia, just north of the border with Kazakhstan) which was allegedly not subject to sanctions. Gravelor asserted that this transaction bore all the hallmarks of a sham transaction orchestrated to circumvent sanctions, and that it was unrealistic to suggest that a leading bank would make unfrozen funds available to the GTLK subsidiaries in these circumstances. It was agreed that the Court was not able to resolve the issue as to whether or not the sale was in fact a sham summarily.

Nonetheless, the Court concluded that Gravelor was entitled to summary judgment upon its claim for specific performance, and associated declarations to enable the transfer of the Vessels upon payment of approximately US$ 15 million per vessel into Court.

In doing so, the Court held:

> (1) That GTLK was under an implied obligation to make a demand for payment (following such payment title to the vessels would be transferred), applying the principles in *Alghussein Establishment v Eton College* [1988] 1 WLR 587 and the “narrow” principle in *Mackay v Dick* (1881) 6 App Cas 251: [49].
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> (2) that on a proper construction of clause 8.10, payments under the Charterparties were in fact incapable of being processed by the relevant banking institution by virtue of the Defendants having become Sanctions Target(s), and that the “*relevant banking institution*” in that clause meant both or either of the paying and receiving banks. The expression “*all necessary steps*” extends, as a matter of construction, to requiring the Defendants (a) to nominate an alternative bank account into which the required payment can be made (b) to nominate a frozen account into which payment can be received (c) to accept payment in Euros instead of USD.
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> (3) That payment into a frozen account is good discharge: payment into an account of a bank who would seek to comply with its obligations under the EU and US sanctions regimes would not leave the payment process incomplete, nor would the Owners’ difficulty in accessing those funds (or perhaps the impossibility of doing so) result from any feature of the payment process. Instead, it would be the result of an entirely external limitation arising from a perceived characteristic of the payee: [83]. That conclusion was consistent with that in another case in which Nicholas Vineall KC, Alex and Ed acted for the successful claimant, *Havila Kystruten AS v STLC Europe) Twenty-Three Leasing Limited* [2022] EWHC 3166 (Comm):
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> > *“Whether or not the payee, here the lessor, has access to or gets the benefit immediate or otherwise, of funds in such bank account is immaterial to this contractual analysis. This account was frozen when it was nominated. No other entity has access to or the benefit of such funds, and certainly not the payor, i.e. the lessee, which is what matters most”.* (at §97 per Stephen Houseman KC sitting as a Deputy Judge of the

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High Court).

(4) That while owners would suffer prejudice (*MUR Shipping BV v RTI Ltd* [2022] Bus LR 473) from payment being made into a frozen account "*that prejudice will not follow from anything inherent in the payment as such, but from legal and practical constraints that those who are obliged to comply with the EU and US sanctions regimes will experience in any dealings with the Owners*": [89].

(5) That the Court could make a final order for specific performance where in which there are two alternative rights to delivery, and the Court is not yet able to determine which is correct but is satisfied that is no arguable defence to an order on one of those grounds: [66-67].

(6) That damages were not an adequate remedy. The Court considered approaching this question in a summary judgment context, required "*an essentially evaluative and, at least in part, predictive exercise at the time when the remedy of specific performance is sought (because it is at that stage that the decision whether or to grant the remedy must be taken). It has been noted that "the standard question …, 'Are damages an adequate remedy?' might perhaps, in the light of the authorities in recent years, be rewritten: 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages? … The commentaries or cases discussing this particular reason for concluding that damages are not an adequate remedy generally speak in terms of a "risk" (of a sufficient scale) of the defendant being unable to satisfy any damages award":* [98-99].

The full judgment can be found here.

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