Neutral Citation Number: [2020] EWHC 254 (Comm)

Case No: CL-2019-000501

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

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

Date: 5th February 2020

Before:

MR. JUSTICE ANDREW BAKER

- -

Between:

FIMBANK PLC	**Claimant**
- and -	
DISCOVER INVESTMENT CORP	**Defendant**

- -

MR. CHARLES HOLROYD (instructed by **Campbell Johnston Clark LLP**) for the **claimant**
MR. SOCRATES PAPADOPOULOS (instructed by **HFW LLP**) for the **defendant**

- -

Hearing date: 28 January 2020

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MR. JUSTICE ANDREW BAKER:

Introduction

1. The defendant was the owner of the vessel "Nika" (now "Nord"). The vessel carried wheat from Chornomorsk, Ukraine, to Alexandria, Egypt, under bills of lading dated 22 March 2018, consigned to order. AOS Trading and Shipping in Alexandria ("AOS Egypt") was the notify party named on the bills of lading. The case concerns that portion of the cargo originally represented by bills of lading 1 to 26 and 61. Any further references I make to "the cargo" or "the bills of lading" refer only to that cargo or those bills of lading, as opposed to the entire shipment.

2. The claimant, a Maltese bank, claims it became the lawful holder of the bills of lading pursuant to arrangements with its customer, AOS Trading DMCC in Dubai ("AOS Dubai"), under which the claimant had financed AOS Dubai's purchase of the cargo. In April 2018, the vessel discharged the cargo at Alexandria without production of any bills of lading against a letter of indemnity in the standard wording of the International Group of P&I Clubs, issued to the defendant by the vessel's time charterers, BPG Shipping Company DMCC.

3. As required by the LOI, the cargo was discharged to AOS Egypt as receiver. Though there is no direct evidence of this before the court, the obvious inference seems to me to be that AOS Egypt is associated with AOS Dubai. It seems plainly to have been acting on its behalf in collecting cargo from the vessel – strictly, I should say, by procuring its collection by barges – and having it consigned to a bonded warehouse, pending onward delivery to AOS Dubai's buyers. Strictly speaking, indeed, I am not sure I have evidence one way or the other as to whether AOS Egypt is a separate legal entity or merely a local branch or trading name of AOS Dubai.

4. The claimant says that the cargo was delivered away out of the warehouse against production of forgeries of the bills of lading in circumstances where the originals were with Blom Bank in Egypt, acting as collecting bank for the claimant on a documents against payment basis. On the evidence, it seems that nothing was ever paid for the cargo by any end buyers; the bills of lading were not collected from Blom Bank; and, as a result, they were subsequently returned to and are still held by the claimant.

5. The claimant sent the bills of lading to Blom Bank on 16 April 2018; the collection instruction, incorporating the terms of the ICC's URC 522, was that, "*documents are only to be released for the amount paid under this collection and same day value payment to us*". The cargo, it seems, was released from the warehouse, purportedly in respect of the bills of lading, between 25 April 2018 and 12 May 2018 inclusive.

6. The claimant aims to pursue in arbitration under the bills of lading a claim for damages for misdelivery. Last week, I heard applications concerning a freezing order obtained by the claimant in support of that claim in August 2019. Although some five months had therefore passed since the freezing order was granted, in substance the hearing was the effective *inter partes* return date on the claimant's application for the continuation of the freezing order granted initially *ex parte*. It was also the hearing of the defendant's cross-application for the *ex parte* freezing order to be discharged, that application claiming that there was, or had been, non-disclosure, no good arguable case, an absence

of assets, delay, breach of undertakings and an absence of grounds in particular for paragraph 8(2) of the freezing order.

Procedural History

7. The release of the cargo from the warehouse, although the claimant was not being paid for it, was visible to the claimant at the time from daily warehouse stock movement reports it received. It took no step to stop those cargo releases, except to seek an explanation from AOS Dubai, but that only on 11 May 2018. The claimant says, if it matters at this stage, and will say on the merits again, if it then matters, that although it was evident from the information it was receiving that the cargo was exiting the warehouse and it, the claimant, was not receiving any payment, it was not evident, and the claimant did not appreciate, that that was happening without payment having been made to the collecting bank or, therefore, without the original bills in the possession of Blom Bank having been collected against payment and presented at the warehouse. All of that is, and if it mattered on the merits would be, hotly disputed by the defendant. In response to the inquiry, AOS Dubai falsely claimed that there was simply a problem by way of delay in remittance to the claimant from the collecting bank. By the time of that response, however, on 15 May 2018, all the cargo had gone.

8. The claimant sent an investigation team to Egypt, it says, in July/August 2018. The full detail of what that investigation team discovered I am not sure is in evidence. The only specific piece of information it is said in the evidence before the court was gleaned by the investigation team is that, so it is said, the team was informed by an entity called New Trans, which may have had an involvement in the initial movement of the cargo to the warehouse, that it, New Trans, had held the cargo in the warehouse to the defendant shipowner's order. That snippet of evidence from the July/August 2018 investigation is of remarkably poor quality; it is provided in a responsive witness statement late in the procedural history at, it would seem, at least two if not more removes from source, with no supporting or corroborative material. Moreover, as will become apparent, it is information that simply cannot be right and, in my judgment, could not reasonably have been understood to be right, if serious analysis had been undertaken of the arrangements in Alexandria pursuant to which the cargo had moved and been held.

9. The matter, that is to say the ultimate loss of the cargo from the warehouse, was reported to the police in Egypt, by or on behalf of the claimant, in or about November 2018. In February 2019, the claimant notified the defendant of a possible claim under the bills of lading, asserting that it had been and was the holder and indicating that its complaint would be that the defendant had discharged without presentation of the bills. The defendant's solicitors, HFW, replied initially, asking to inspect the bills of lading that the claimant was claiming still to hold and to be the original bills. An opportunity to inspect those documents was provided. On 5 March 2019, HFW responded more substantively, stating: "*Our investigations indicate that the Cargo was discharged in Alexandria, Egypt, against Original bills of lading dated 22 March 2018. The original B/Ls were surrendered to the agents appointed by the Charterers, and Owners have already had the opportunity to inspect them. This necessarily raises questions in relation to the allegedly original B/Ls your clients hold.*"

10. The parties negotiated a standstill agreement at the end of March 2019, under which the defendant promised not to sell or otherwise transfer title to the vessel, and the claimant

promised not to arrest or otherwise interfere with the use or trading of the vessel during a standstill period. The standstill period agreed ran to 21 June 2019. In May 2019, HFW provided to the claimant's solicitors copies of the bills of lading to which they, HFW, had referred in their response of 5 March 2019. On 23 May 2019, the defendant requested the claimant to agree an extension of the standstill agreement; that request was refused by the claimant. The standstill period therefore expired on 21 June 2019.

11. On 24 June 2019, the defendant completed a sale of the vessel for €5.8 million, under an MOA concluded during the standstill period. The claimant says, on what seem to me substantial grounds, even if I could not make any final finding, that this is likely to have been a sale to a connected entity, such that the vessel stayed within the same ship-owning or trading corporate group. But there is no evidence that it was not a real sale at a proper or fair market price for the vessel. Since the claimant had refused to extend the standstill agreement, it was, as it seems to me, most likely to be the means by which the defendant, or those ultimately interested in its trading or corporate group, ensured that the vessel could continue trading without fear of arrest in respect of a misdelivery claim alleging delivery without production of bills of lading, in respect of which P&I Club cover might be doubtful.

12. On 26 June 2019, the claimant commenced arbitration in London against the defendant, under the bills of lading, giving notice of that to the defendant on or about 1 July 2019. HFW responded on 2 July 2019 that they would take instructions in relation to the arbitration. There has subsequently emerged a dispute with which I am not concerned as to the validity of the steps taken by the claimant with a view to commencing arbitration. At about this time – it may be more precisely 4 July 2019 – the claimant learned of the sale of the vessel. Through its solicitors, it sought an explanation from HFW on 16 July 2019; none was provided.

13. It was not until 7 August 2019, however, that the claimant applied *ex parte* for a freezing order. That application came before Popplewell J, as he was then, on 8 August 2019. It did not succeed, it is said on the basis that Popplewell J was not satisfied by the evidence concerning the risk of dissipation of assets. I do not as such have any evidence of that hearing to be able better to identify the exact nature of Popplewell J's concern. I infer from the nature of the further evidence that the claimant therefore prepared and put before Moulder J, DBE, when reapplying *ex parte* on 22 August 2019, that it centred on whether the claimant had adequately demonstrated that the sale of the vessel was not a fully arm's-length transaction with an independent market purchaser. Certainly that, as being the concern of the judge, is what Moulder J in turn was told through the skeleton argument put before her, where it was said that Popplewell J had been "*unwilling to infer that the sale of the Vessel in June 2019 was other than in the ordinary course of business*". In the event, the further evidence, focusing on the timing and other features of the sale, persuaded Moulder J, on balance, to the view that it was indeed likely not to have been a fully independent, arm's-length market transaction and, therefore, to conclude that there was a sufficient basis for saying that there was a real risk of dissipation of assets, this is now as at 22 August 2019, for the purposes of justifying a freezing order.

14. Before moving on, and although I apprehend it will not be completely central to my analysis in this judgment, I express, with respect, a degree of surprise that it was thought to be a concern, if the application were otherwise well founded, that it had not been sufficiently shown that the sale of the ship was, or was likely to have been, in the sense

I described earlier, an in-house change of ownership. In the case of a one-ship company, an ownership structure well known to this court and in and of itself entirely legitimate, which no longer has its ship or, as is more usually the case when a freezing order is sought, is on the point of, or thought to be on the point of, selling the ship, the concern as regards the risk of dissipation of assets is not usually so much whether the sale itself is in some way a mechanism for avoiding the possibility of future enforcement of a judgment or arbitration award against the ship – although, of course, selling the ship will have that consequence. It is, rather, that an asset in the form of a valuable trading vessel, available to be arrested in future by way of enforcement of an arbitration award or judgment, has been – or, as I say, in the more usual case, is thought to be about to be – turned into readily mobile cash that will be held by an entity that existed only for the purposes of owning the ship it will then no longer own. The substantial risk of dissipation that then is ordinarily regarded as self-evident and sufficient is that, if the defendant former shipowner is not acknowledging what is said to be its liability in respect of the substantive claim, there is a real risk that the cash will have gone, that now being its only substantial asset, by the time of any final judgment or award capable of being enforced; and that cash will have gone although, *ex hypothesi* in the circumstances, the particular former ship-owning entity no longer has significant ordinary course of business expenditure to incur or defray.

15. That said by way of aside, as I have indicated, in this case it appears to have been the particular focus of concern that the claimant ought to show that the €5.8 million in exchange for the vessel was, as I have described it, an in-house restructuring of the ownership of the vessel, rather than a fully arm's-length sale of the vessel to some independent buyer. I repeat though, again, that at no stage has it been suggested by the claimant that €5.8 million was other than a proper and fair price for the vessel.

16. The application as renewed before Moulder J having succeeded, the defendant applied on 4 September 2019, in the first place on an urgent basis, for a variation of the freezing order so as to postpone to the return date the time that had been stipulated for complying with paragraph 8(2) of the order, on the basis that it would wish to argue on the return date, as indeed it has ultimately done now, that the court should not have made that order. That would be an application made irrespective of whether, more generally, the defendant's challenge to the continuation or original grant of the freezing order found favour with the court. What was required of the defendant by paragraph 8(2) was the provision of information to the claimant's solicitors of what had become of the proceeds of sale of the vessel. Strictly, the order is somewhat wider and worded in such a way as to require provision of other information, if it had turned out that the claimant's understanding that the vessel had already been sold was wrong. But in circumstances where it is now clear that the vessel had indeed been sold, the substance of the requirement under the order was, to state it broadly, an obligation to account for the proceeds of sale.

17. The variation proposed by the defendant was agreed, and a consent order was issued to formalise that amendment. The consent order also, by agreement, deferred, to 18 October 2019 (in the event), the return date and the hearing of any cross-application for discharge. That hearing came before Carr J, DBE, who took the view, not materially resisted by counsel, that the half-day estimate that had been given for the return date would prove insufficient. She and counsel were correct in that judgment, the argument

before me on the respective applications last week having occupied a full day, as she and they anticipated it might.

A Good Arguable Case?

18. The factual position now disclosed by the evidence is significantly fuller and materially different from that presented to Popplewell and Moulder JJ, *ex parte*. One of the defendant's grounds for seeking to discharge, indeed, is an alleged failure by the claimant to be full and frank in disclosing facts and explaining the possible merits of the case. That alleged failure will not independently matter, however, unless I conclude on the material now available that there is a good arguable case on the merits of the claimant's intended substantive claim – and I turn to that first.

19. The legal test to be applied – that is to say, the meaning of a 'good arguable case' in the particular context of freezing orders – was not entirely common ground before me, but it will not be necessary to resolve that difference, and I shall not lengthen this judgment therefore by reviewing the authorities to which I was taken in relation to the test.

20. The financing arrangement between the claimant and AOS Dubai was under a written finance agreement of 20 December 2017. The scheme of the relevant category of trade finance (the agreement provided for a number of different types of trading) was that AOS Dubai's sellers would receive payment for their shipments from the claimant bank against original bills of lading. The claimant would then forward those to a collecting bank in Egypt with instructions to transfer the bills to AOS Dubai's end buyers on a cash against documents basis. The bills of lading were in that way intended to be – and in practice they were – retained by the claimant and then held on its behalf until payment by the correspondent collecting bank, long after the vessel will have discharged the cargo.

21. The scheme was that the cargo would indeed be discharged by the carrying vessel, without production to the vessel of any bills of lading; the cargo would be transferred to a bonded warehouse, as occurred; and, if all went smoothly, the original bills in the hands of AOS Dubai's buyers, collected by them from the collecting bank against payment by them, would then be used by them as keys to unlock the bonded warehouse ashore and not as keys to unlock a delivery from the vessel. Thus, for example, clause 1 of the finance agreement provided for the cargo to be held, and required that the cargo would be held, by AOS Dubai in Egypt, in a bonded warehouse, and that the quantities held in that warehouse would then be monitored by a stock manager acceptable to the claimant, who would be obliged to send daily reports of stock delivered out. Indeed, it provided, in terms, that "*the Lender [i.e. the claimant] shall not release the original negotiable bills of lading until receipt of funds (mainly under documentary collections)*". By clause 11.9 of the finance agreement, the claimant had the right to request additional documents before making any advance, explicitly "*to ensure its control over the goods during the full course of the transaction*". By clause 11.11, any cargo financed by the claimant "*shall be held to the order of the Lender [i.e. the claimant] and released at the lender's sole discretion*".

22. As envisaged by the finance agreement, there was a tripartite stock management agreement ("the SMA") between AOS Dubai, the claimant and Vallis Commodities Ltd, formerly known as Drum Commodities Ltd. The SMA provided, among other things, as follows. By clause 2.3.1, "*AOS shall provide [Vallis] with all necessary*

access to the goods, as well as the Warehouse(s)/Silo(s), in which the goods are stored…". By clause 3.1.1, "*the Warehouse(s)/Silo(s) shall remain under the sole and exclusive responsibility and control of AOS or any third party with which AOS may have a warehousing relationship…*". Consistent with those provisions, and in my judgment critically, by clause 2.3.4, "*AOS shall take delivery of the Goods from the Port of discharge and escort the Goods to the Warehouse(s)/Silo(s) to ensure that the Goods are intact and not appropriated in any way inimical to the interest of Fimbank*". For completeness, I should be clear that all references in those quotes to 'AOS' are, of course, references to AOS Dubai.

23. The cargo in question discharged by the "Nika" was, it seems clear on the evidence, and it appears this was also the contemporaneous understanding of the claimant, indeed warehoused pursuant to those arrangements between the claimant, AOS Dubai, Vallis as stock manager, and the state-run – as I understand it – bonded warehouse to which the cargo was transported. There is no evidence that the defendant shipowner had at any time any communication with, or knowledge of, the warehouse, or that it appointed any party to act as its agent or warehouse keeper in respect of the cargo after discharge. Rather, from the defendant shipowner's perspective, the cargo was simply discharged by the vessel into barges, as directed by the time charterers, pursuant to the LOI, at which point and by which process the defendant gave up any control over, or possession of, the cargo. Hence it is – that is to say, pursuant to arrangements put in place by the claimant in relation to how the cargo was to be dealt with in Alexandria – the stock manager, Vallis, commenced its reports to the claimant on a daily basis, so far as this cargo was concerned the daily reports from 26 April 2018 revealing the movement out of cargo purportedly in respect of the subject bills of lading. Those daily reports communicated the continuing removal of cargo, apparently appropriated to the subject bills of lading day by day thereafter until, by the daily report of 13 May 2018, the bill of lading quantity in question had been exhausted.

24. Mr Papadopoulos for the defendant thus contended that there was here delivery by the vessel to AOS Egypt acting, he says it must be inferred, on behalf of AOS Dubai, by way of discharge from the vessel without production of bills of lading, the cargo then being warehoused pursuant to the SMA, and that was what the claimant intended to occur, and what it contracted with AOS Dubai was to occur. The defendant in his submission is no more liable than if it had delivered directly into the claimant's own custody – for example, to some premises owned and controlled by it – and the cargo had subsequently simply been stolen from those premises. In those circumstances, any claim that the subsequent loss of the cargo was the defendant's responsibility, on the basis that though it had delivered to the claimant it had done so without insisting on production of the bills of lading, would be entirely unarguable.

25. Mr Holroyd for the claimant submitted in essence that since its contractual arrangements with AOS Dubai and Vallis were not communicated to the defendant, they are irrelevant to the defendant's liability.

26. I prefer Mr Papadopoulos's submission, subject to one subtlety. The subtlety concerns the role of AOS Egypt, not itself mentioned in the claimant's contracts with AOS Dubai and Vallis. To simplify – that is, to filter out that subtlety – suppose, for the moment, that AOS Egypt was not a separate legal entity but simply a branch or trading name of AOS Dubai itself. Indeed, as I mentioned at an earlier stage, strictly I could not say that that is not the position in fact. The position then would be, in my judgment, that

by clause 2.3.4 of the SMA, AOS Dubai was authorised by the claimant, as the holder of the bills of lading, to take delivery from the vessel without production of the bills of lading and AOS Dubai did precisely that.

27. There has been debate whether a shipowner delivering to the party entitled, but without production by that party of the bills of lading, is not in breach of the bill of lading contract at all or is in breach but liable to that party only for nominal damages. For example, compare the formulations of the law in *The Houda* [1994] 2 Lloyd's Rep. 541, *per* Neill LJ at 552 rhc and Millet LJ, as he was then, at 556 rhc. It is not clear to me that any debate as to that is fully and definitively settled, but at worst for the defendant here it would be the latter – that is to say, there would be no liability for substantial damages if delivery had been to AOS Dubai as the party authorised by the claimant as holder of the bills of lading to collect the cargo for it, and to do so without producing the bills of lading to the ship.

28. That the claimant had not told the defendant that AOS Dubai was so authorised would not matter. It would preclude an argument of ostensible authority; it would mean, therefore, that the defendant acted at risk vis-à-vis the holder of the bills of lading – in the event, I assume for present purposes, the claimant – as to whether AOS Dubai had indeed been authorised by it to take delivery. But, on the facts, that risk would not have eventuated, since AOS Dubai was so authorised.

29. Does it then make any difference if AOS Egypt is, as it may well be, a separate legal entity? In my judgment, not so if AOS Egypt was acting as agent for AOS Dubai. Clause 2.3.4 of the SMA cannot sensibly be read as requiring AOS Dubai personally to take delivery, as opposed to doing so through some local agency or other at the port. On that analysis, the only viable claim against the defendant here is if, in fact, AOS Egypt was a separate entity not authorised by AOS Dubai to organise for it the collection of the cargo from the vessel pursuant to clause 2.3.4 of the SMA. That appears to me but a speculative possibility, not something on which the claimant has any good arguable case. Indeed, it does not appear even to be something the claimant had in mind to allege.

30. Even then, in my judgment formidable difficulties of causation would confront the prospective claim, since the SMA arrangements were in fact successfully accomplished, up to the point only that the bonded warehouse later released cargo against forged documents. That, as it seems to me, had nothing to do legally or factually with the defendant shipowner. In particular, it had no connection whatever to the fact that, as intended by the claimant and required by its financing arrangements, including the SMA itself, the discharge of the cargo and delivery of it by the defendant to AOS Egypt was without production to the defendant of any bills of lading.

31. If AOS Egypt, being a separate company from AOS Dubai not authorised by it to collect the cargo from the ship, had simply taken delivery and made off with the cargo – or if, indeed, the cargo had been discharged to the defendant's own order, as reportedly suggested by New Trans, and then had been lost from its, the defendant's, constructive custody – again the case might be very different. As it is, in my judgment, there is no serious argument on the evidence for any such possibility.

32. In short, in my view, there is no good arguable case that the defendant has a liability for substantial damages such as might have justified the grant of a freezing order or might justify its continuation.

33. As regards the viability of the claim against the defendant, upon the interpretation of the financing arrangements and the SMA I have indicated, Mr Holroyd's submission was that a substantial liability could still be found upon an argument that the defendant's obligation was to maintain control and, therefore, constructive possession of the cargo until bills of lading were presented to it. Had it done that – that is to say, had it not discharged the cargo until bills of lading were presented to it – the claimant, as holder of the bills of lading, one way or the other would have avoided the cargo being capable of being removed from the warehouse, as in the event occurred, against forged bills of lading. That, it was said, provided a sufficient 'but for' chain of causation to result in liability on the part of the defendant for the loss of the value of the cargo.

34. It is not clear to me that, in the circumstances of this case, and the contractual arrangements in place between the claimant and AOS Dubai, Mr Holroyd's suggested argument even asks the correct 'but for' question. As holder of the bills of lading, the claimant was obliged to meet the ship and take delivery. It may well be, it seems to me, that the proper 'but for' analysis would be to ask what would have happened if (which could have occurred if the claimant had wished to proceed in this way) the delivery from the ship – that is to say, the discharge by the ship to AOS Egypt – had been against presentation of the bills of lading, which were (or at least one original of which was) then, if the bank required it, left with the bank to enable it to operate its system of using them additionally as keys to the shore warehouse. Even if that is wrong, however, it seems to me this is not a case where, as Mr Holroyd put it, fact-sensitive questions of causation and loss arise (which he is correct to say would all ultimately be for arbitrators anyway) in respect of which the court cannot say that the claimant does not have at least a good arguable case. Even if Mr Holroyd posits a correct 'but for' analysis, in my judgment in the contractual and factual set-up deliberately structured here by the claimant, the effective cause and the only effective cause of loss is not the shipowner's discharge of the cargo otherwise than against bills of lading that the claimant had no intention of presenting to the ship or allowing the shipowner to take, but rather the breakdown in the arrangements ashore by way of the claimant becoming the victim of a fraud that had nothing to do with the shipowner.

35. I said that the factual position now disclosed by the evidence and leading to those conclusions is significantly fuller and materially different from the position presented to the court *ex parte*. The materially very limited evidence provided to the court concerning the critical contractual arrangements put in place by the claimant came in the form of a few paragraphs of a first affidavit sworn on 9 August 2019 of Andrea Botelli, an executive vice-president and group head of legal and investor relations at, and also company secretary of, the claimant. Paragraph 10 of that affidavit told the court simply that the cargo, as financed by the claimant, was discharged by the vessel and stored in a location where it was subject to stock monitoring by Vallis. By paragraph 11, it was said that discrepancies in stock quantities were detected during May 2018 and queried with AOS Dubai. By paragraph 12, it was said that by 12 June the claimant had learned that all the financed cargo had been collected from the warehouse. It was not made clear that all the relevant cargo had in fact, to the knowledge of the claimant, been removed from the warehouse a month before that. The

claimant, the court was told, was still awaiting payment in respect of a large quantity of financed cargo, and was chasing AOS Dubai for payment.

36. At paragraph 30 of that affidavit, the court was informed of HFW's statement by email in response to notification of the possible claim that the cargo had been discharged by the vessel in Alexandria against original bills surrendered to agents appointed by the charterers, and noted that HFW therefore had raised the possible question whether the bills held by the claimant bank were inauthentic. At paragraph 44 of the affidavit, it was therefore stated to the court that the claimant knew of no other possible defence available to the defendant, other than the possible dispute over the authenticity of the bills held by the claimant. Echoing that simple approach in the affidavit, the skeleton argument before Moulder J referred to, and relied upon, HFW's statement in correspondence that there had been a discharge by the ship against bills of lading, and treated a possible query as to the authenticity of the bills of lading held by the bank as the only realistic question in the case.

37. In none of that evidence, or submission to the court, were the implications of the claimant's own contractual arrangements considered. The SMA was not referred to at all, let alone produced to the court. The full factual picture actually known to the claimant was nothing like described. The July/August 2018 investigation on the ground was not mentioned at all. Even now, it is not clear to me that the court has full or frank evidence as to the findings of that investigation. As it seems to me, they are highly unlikely to have corroborated the obviously unlikely suggestion, admittedly by the defendant's solicitors, that there had been a discharge from the vessel against what the claimant would assume to be the forged bills of lading.

38. Far more likely, as it seems to me, the claimant will have been well aware that the point at which what it would say must have been forged documents came into the picture was in collecting the cargo from the warehouse, by whomever, no payment against the collection against documents arrangements with Blom Bank having been made. The merits of any possible claim against the defendant could not sensibly be addressed without considering in full the terms of the financing arrangements, and the SMA in particular, and without full disclosure of all that the claimant had learned as to what had happened at Alexandria. I can see HFW's statement, if taken at face value and not scrutinised with any care, might perhaps indicate that there could be a viable claim, but to my mind the factual circumstances perfectly apparent to the claimant at the time could only have suggested, if seriously considered, that HFW's statement was most likely to be just wrong.

39. Thus, the factual circumstances known to the claimant were not fully disclosed, which were factual circumstances material to any serious consideration of the merits of the claim, and the court was thereby disabled from giving proper scrutiny *ex parte* to the proposition that the claimant had a good arguable case on the merits.

40. It is said in evidence served only later, in response to the defendant's application to discharge, in a first witness statement of the same Andrea Botelli, that, by reference to the full detail by then disclosed in the evidence of the trading and financing arrangements to which the claimant was privy, "*My understanding is that the cargo, when in the warehouse, was (or was supposed to be) held by or on behalf of the defendant and that the defendant remained under its obligation to deliver only on production of original bills of lading*". That, in my judgment, is not a submission that

could withstand scrutiny – nor, indeed, was it a submission that in substance Mr Holroyd was even able to advance. He rested his case rather on the argument of causation to which I have referred.

41. Mr Holroyd rightly urged the court to be cautious about viewing with the benefit of hindsight and saying after, in the event, the conclusions it has reached as to the absence of a good arguable case on a proper analysis of the merits, that something went awry in the presentation of the case to the court *ex parte*. I make it clear that I have no doubt that the way in which the court has now, agreeing with Mr Papadopoulos's submissions, analysed the purport and effect of the claimant's arrangements, had not actually been identified by the claimant, or those advising it, as being likely to be fatal to any claim. It would have been outrageous for the claimant or its advisers to have reached that subjective assessment and not to have brought that to the attention of the court. I am confident that that is not what happened.

42. Nonetheless, I am unable to see this as an understandable failure to anticipate a line of defence that it was natural for the defendant to raise and that the claimant could not reasonably have expected. In my judgment, and with respect to all those involved, it was a failure to consider properly the facts known to the claimant and their implications, and to work out independently of an initial response in an email from the defendant's solicitors whether there was a serious claim here at all and whether, as part of that, what the defendant's solicitor's initial response by email had said could actually be true.

43. In my judgment, the freezing order in this case, therefore, falls to be discharged, on the basis that there is no good arguable case and on the basis that the factual circumstances relevant to, and a serious analysis of, the possible merits of the claimant's intended substantive claim were not fully and fairly presented to the court *ex parte*.

44. I propose to deal with the numerous other matters raised by the cross-application to discharge more briefly in those circumstances.

Risk of Dissipation

45. As with the merits, this involves two elements. First, there is the question whether, upon all the material now available to the court, the court assesses that there was, when the freezing order was granted, and/or continues to be, a real risk of dissipation of assets. Second, there is a complaint of non-disclosure.

46. As to the true position, the correct characterisation of the defendant's position, in my judgment, is not so much that there is not or was not a relevant risk of dissipation at some point; it is rather that, by the time the claimant came to court in early August, the dissipation of the defendant's assets had been so complete that there was nothing left to dissipate. That arises because, as I have indicated in describing the facts, the vessel was sold promptly following the expiry of the standstill period; and then, it is said, the true risk of dissipation I sought to identify as existing in a typical 'one-ship company with no ship' case indeed eventuated, but did so promptly after the sale of the ship was complete, so that, while further information as to what became of the proceeds of sale has not been provided because the operation of paragraph 8(2) of the order has been suspended, nonetheless the basic present asset position disclosed pursuant to the freezing order has been in substance a bare assertion that, materially speaking, the defendant has no assets whatever.

47. As a slight aside in that regard, Mr Papadopoulos informed the court, this not I think strictly being in evidence, that the defendant was in a position to fund, as it plainly is funding, high quality legal representation through HFW and Mr Papadopoulos himself, as a result of defence cover from the P&I Club, irrespective of whether the club may be at risk in respect of the substantive misdelivery claim.

48. Thus the defendant's not it might be thought entirely attractive position is not so much that it was not a dissipation risk; it is rather that it was such a significant dissipation risk that, as was always likely to happen, it managed fully to strip itself of assets before the claimant arrived at court in August seeking *ex parte* relief. Unattractive though it may be said that position is, if the court were in a position to see that it was highly likely to be correct, it might be constrained to say in logic that there was not in August, and is not now, a relevant risk of dissipation. However, what happened to the proceeds of sale and the defendant's disinclination to comply with paragraph 8(2) of the freezing order then become the elephant in the room.

49. In short, it should not be possible for a corporate entity in the ordinary course of business, and in such a way as would be incapable of being reversed, to rid itself of nearly €6 million in cash in circumstances where it has no ongoing business activity and it is well aware of a prospective claim against it that itself is said to run to several million dollars. The plain likelihood exists that, in whatever manner the proceeds of sale have in fact purportedly been spirited away, that has been done not properly in accordance with what will have been relevant duties on the part of those responsible for the financial affairs of the defendant company in those circumstances.

50. It is in such circumstances that, all things being equal, a proper inference arises that, even if it be the case that in August last year, or today, there are no cash balances or other assets apparently held in the defendant's name, the defendant nonetheless does have in some form or other valuable rights or assets derived initially from the receipt by it of the purchase price for the vessel.

51. It is of course true that it would be improper to draw an inference against a defendant from a refusal to provide information where no case to answer on the factual point in question arose prior to factoring in that refusal. However, for the reasons I have just given, in this case an inference does arise against the defendant that, until adequately explained away, it was likely in August 2019 that it had, and since the freezing order has been in place thereafter it would still today have, in some form valuable assets or rights caught by the freezing order, derived ultimately from its initial receipt of the purchase price. Its earnest desire to avoid providing any sensible information as to what has happened to the €5.8 million in those circumstances is, in my judgment, a matter from which, at this stage of proceedings, an adverse inference may be drawn that proper disclosure would be likely to confirm that presumptive proposition that, indeed, the defendant still has valuable assets, or rights, that could be of use to a future arbitration award creditor. Its conduct throughout, as I have already indicated, then, in substance admittedly on its part, demonstrates that if it indeed it remains in possession of valuable assets, there is a risk that those assets will be dissipated such that they are not still there for any future enforcement.

52. Those, it might be thought trenchant, conclusions having been stated, it might be wondered how there can be a non-disclosure complaint in relation to the question of risk of dissipation. However, there is in fact a serious question of non-disclosure here.

That is because the court was not told that the only reason why the claimant was exposed to such dissipation risk as the defendant represented was because the claimant had refused, for reasons which *ex hypothesi* it did not explain to the court *ex parte* and which neither for that matter has it sought to explain to the court *inter partes*, to extend the standstill agreement. However rapidly the defendant, as the claimant pointed out to the court, was seen after the fact to move to complete a restructuring of the ownership of the vessel so that she could be free to continue trading without risk of arrest, which in turn gave rise to the real risk of dissipation in this case – namely, that the cash proceeds of that sale were amenable to being disappeared – there is no basis, in my judgment, for any suggestion that the defendant was failing to comply with its obligation to maintain its ownership of the vessel so long as the claimant promised not to arrest so that the vessel would be free to trade. Nor is there any basis for any suggestion that there was any real risk that, if the standstill agreement had been extended as proposed by the defendant, the defendant would then have sold the vessel away in breach of its standstill obligations.

53. As I indicated in the chronology, it was only after the still unexplained refusal of the claimant to extend what seems therefore to have been a sensible and effective commercial arrangement that the defendant put in place the arrangements pursuant to which the vessel was sold shortly after the end of the standstill period. Indeed, although I do not have the material to make this a definitive finding, it seems to me quite likely that the motivation for the sale will not in fact have been the prevention of the vessel from being available as an asset against which to enforce some future arbitration award in circumstances where liability was hotly contested, but the much more immediate and legitimate concern, all things being equal, of the defendant as shipowner, that if it could not be confident of the provision of P&I security were the vessel arrested, in the absence of the claimant's willingness to continue to refrain from arresting the ship, the ship would be incapable of continuing to trade unless ownership changed.

54. While, therefore, none of that explains, let alone defends, the defendant's apparent decision on its own case to rid itself entirely of the proceeds of the sale so as now (it claims) to be effectively judgment-proof, it seems to me that those circumstances being the true circumstances in which the claimant in May 2019 had brought upon itself the risk of which it complained when coming to court *ex parte* make the case materially different to the case that was presented to the court. Furthermore, it makes it very much the more surprising that the claimant took until early August to move any application to the court for a freezing order, having learned at the beginning of July that the vessel had been sold and having, in the circumstances, been well aware almost a month before the standstill agreement would come to an end of what on its own case was highly likely to happen because of its disinclination to continue the standstill period.

55. In my judgment, although I have concluded that on the facts now known, the proper conclusion was that there was still in August 2019 and would still today be a real risk of dissipation of what is likely to be some species of residual valuable rights or assets of the defendant derived indirectly from its initial receipt of the purchase price, that is a very different animal to what was presented to the court. There is no satisfactory explanation for the court's not being given the full picture of why it was that the claimant on its case sought to launch one of the court's nuclear weapons in the direction of the defendant. I regard that non-disclosure in the circumstances as sufficiently

serious as to justify the discharge of the freezing order, notwithstanding my conclusions as to the behaviour of the defendant after the sale was completed.

Breaches of Undertakings

56. In the normal way, when granted, the freezing order recorded that undertakings had been given to the court. They included undertakings as soon as practicable to issue and serve an arbitration claim form to pursue the freezing order claim in court and to serve on the respondent as soon as practicable the evidence relied on before the court *ex parte*, its application for the continuation of the freezing order, and a note of the judgment given by Moulder J when making the order. There was no undertaking requiring the claimant to provide a full note of the hearing. However, it has long been the law that, when making an *ex parte* application for this sort of relief, those representing the applicant must make and provide to the defendant a full note of the hearing; they should do so without being asked and, therefore, whether or not it is the subject of any undertaking. That is set out in the *Commercial Court Guide*, at paragraph F2.5.

57. The claimant in the event issued its arbitration claim form only some 13 days after it obtained the freezing order and just two days before the original return date. Without descending into unnecessary detail at the end of this judgment, the cause of that delay was something of a catalogue of errors at the claimant's solicitors that can only realistically be summed up as a situation in which left hands did not know what right hands were doing or had done. I accept the apologies that have been given to the court that that occurred. I emphasise that it is not acceptable that, in the context of this type of application, with an undertaking to issue and serve as soon as practicable the originating process that will be required, there were not fool-proof systems in place before the claimant actually appeared before the court *ex parte* to ensure that those undertakings, which will inevitably be required, will be fulfilled the same day as the injunction has been granted, or at worst the following day, if possible. So whereas I accept that nobody acting on behalf of the claimant saw themselves as not treating the undertakings as serious obligations that needed to be fulfilled, it seems to me there was not a sufficient treatment of the undertakings, in anticipation, as serious so as to ensure that they would be complied with without fail.

58. Although, as I indicated, not the subject of an undertaking but the subject of a well-known obligation reflected in the *Commercial Court Guide*, it is also a matter of regret that there was a delay in the provision to the defendant's solicitors of the skeleton argument that had been used *ex parte*, although that was a more minor delay, and there was, further, delay until long after the freezing order had been granted – indeed, until after the initial return date had come and gone, on a consensual adjournment, up to the day before the defendant was required to serve its evidence in support of its cross-application to discharge – before the claimant provided that which it did provide as a supposedly full note of the hearing before Moulder J. In turn, that is nothing of the sort; so cryptically brief and note-form is it that, with respect, it tells me – and, I am sure, told the defendant – almost nothing about how really the hearing before Moulder J went. The court is always sympathetic to the many burdens upon busy practitioners but if on an application for a freezing order those in court have not (and they will know they have not) taken anything like a verbatim or close to verbatim note of proceedings that can then be typed up and provided to the defendant, it is incumbent on them, without being asked, and whether or not it has been made the subject of any undertaking, to

obtain a full transcript and provide it to the defendant so that the defendant can see precisely what the court has been told in its absence.

59. For completeness, I should emphasise, as regards formal service of documents required by the claimant's undertaking, "if possible" in what I said in paragraph 57 above. In this case, until HFW confirmed that they would accept service of documents, formal service would have had to be in Liberia and could not have occurred at all rapidly. It certainly could not have occurred on or the day after the injunction was granted. Mr Papadopoulos sought to make something of what he said was tardiness, or at least a lack of evidence of urgency, in the claimant's taking steps towards effecting service in Liberia. But in my view there was nothing in that point. The claimant, through its solicitors, acted promptly to notify HFW of the injunction, and served on HFW as soon as they then confirmed instructions to accept service, which was still weeks if not months before any service in Liberia could have been effected. Documents were therefore served, to the extent they were served, as soon as practicable as required by the undertaking.

Delay

60. Here there is no non-disclosure point. The chronology, broadly, was apparent to the court in August. Mr Papadopoulos understandably emphasised that, as he put it, despite the defendant's request to extend the standstill agreement, the claimant, having opted to allow it to expire, then delayed in the commencement of arbitration proceedings by at least a few working days and then, more significantly, delayed almost five weeks from learning of the sale of the vessel, which was always likely to follow the end of the standstill period, before moving its application before the court.

61. On the particular fact of this case, in my judgment, that delay does not give rise to any independent point. If, the chronology and that extent of delay notwithstanding, there was, as I have said there was, a significant extant risk of dissipation of assets that likely still existed, I would not say that the freezing order should have been refused or should not now be continued on account of those matters of delay.

Paragraph 8(2)

62. At the risk of doing no justice at all to the interesting argument presented by Mr Papadopoulos to the effect that, in a case that does not involve a claim by the claimant to proprietary interests in the direct or indirect products of the sale proceeds received by the defendant, an order of the sort made here, requiring the defendant to provide information as to what it had done with those sale proceeds, either is without the court's jurisdiction or, at all events, as a matter of discretion ought not to be made, I shall take this most briefly of all as it cannot now affect the outcome.

63. I apprehend the better view is likely to be that put forward by Mr Holroyd, namely that, where the court finds clear evidence of recent ownership of a large cash balance in circumstances where a complete absence of assets ought not to have resulted by the time the freezing order is sought and granted, the question of what has happened to those cash balances is legitimately asked ancillary to a non-proprietary freezing order, as part of enabling the court to identify what has or not been caught by it, whether or not a similar question might also be, or be part of, what the court would be interested to have a defendant answer if the claimant were pursuing proprietary claims and

therefore had an interest in those answers not merely to identify or assist in the identification of what current assets the defendant still had but also in identifying where the claimant's money could be said to have gone, even it may be into the hands of third parties that could be pursued through a tracing exercise.

64. I apprehend therefore that, if I had not otherwise been of the view that this freezing order stands to be discharged, I would not have acceded to the application to discharge paragraph 8(2). Specifically, I apprehend I would have required that it now be complied with.

Conclusion

65. For the reasons I gave in the main, initial part of this judgment, my clear view is that this is a claim on its substance that has no seriously arguable merit. That is the end of any question that the freezing order was rightly granted or should be continued; it will therefore be discharged. Having taken that view, it is not as easy as in some other circumstances it can be to judge hypothetically what I would have said was the significance taken together of the failures fully and frankly to present the case to the court *ex parte* and the breaches of the undertakings given to the court or the procedural obligation resulting from the freezing order that fell short of undertakings, if I had concluded instead that there were good arguable merits.

66. Doing the best I can, and although I have expressed a degree of dissatisfaction with the way in which the undertaking to issue the arbitration claim form came not to be complied with, and the important obligation fully to inform the defendant promptly of what the court had been told at the *ex parte* hearing was not satisfied, I do not think those failings would in this case have called for the freezing order to be discharged, if there had been a good arguable case on the merits.

67. The failure to provide the court with an accurate and full picture of why the claimant was here at all, as regards its decision to terminate and not continue what had been a successful and sufficient arrangement that meant no involvement of this court was required, however, I regard as a significant failure. In my judgment, it would have required compelling merits on the substantive claim potentially to outweigh that failing in the overall balance, and on any view it seems to me that is not this case, even were I wrong to have concluded that the merits are so weak as to be essentially speculative. Similarly, even if my own conclusion that upon the full facts and a proper analysis of those facts the claim can be seen to have no seriously arguable merit were wrong, in my judgment on any view this was not, and the claimant ought to have appreciated or been advised that this was not, the straightforward case where the only issue, or possible issue, was whether the claimant was in possession of authentic bills that was presented to the court.

68. In my judgment, therefore, even had I concluded that the merits were sufficient to cross the good arguable case threshold, on no view would they have been sufficiently strong as to outweigh in the overall justice the failures in combination fully and fairly to present the facts and an analysis of the merits of the case and fully and fairly to present the circumstances in which the claimant was now complaining that it was exposed to a risk of dissipation. For those reasons, in my judgment, the freezing order would have fallen to be discharged even if, contrary to my view, the *inter partes* merits of the substantive claim disclosed a good arguable case for the claimant.

69. For all those reasons, and thanking the parties for their patience in listening to this as an oral judgment, the freezing order will be discharged, the claimant's application for its continuance will therefore be dismissed, and the defendant's cross-application will be allowed.

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