THE HIGH COURT

ADMIRALTY

[2018 No. 7533 P]

M.V. CONNOISSEUR

BETWEEN

S.G.B. FINANCE S.A.

PLAINTIFF

AND

THE OWNERS AND ALL PERSONS CLAIMING AN INTEREST IN THE M.V. "CONNOISSEUR"

DEFENDANTS

JUDGMENT of Mr. Justice McDonald delivered on the 7th day of December, 2018.

The application before the court

1. In substance, this is an application brought by the owner of the M.V. Connoisseur ("the vessel") challenging jurisdiction. The owner of the vessel is a company incorporated in England namely Conway Club Limited ("CCL"). The principal ground of challenge is the contention that the Irish Courts have no jurisdiction to hear and determine the claim of the plaintiff by reference to the Recast Brussels Regulation (i.e. E.U. Regulation No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters) ("the Recast Regulation").

2. As an alternative to the relief claimed by reference to the Recast Regulation, CCL argues that even if the Recast regulation is not applicable, the court should nonetheless dismiss the proceedings on the grounds of *forum non conveniens.* CCL contends that the dispute in question should be determined by the courts of England &

Wales in circumstances where (so CCL argues) those courts are manifestly the most appropriate forum in which to hear and determine the dispute between the parties.

3. If the court is not prepared to dismiss the proceedings, CCL seeks, in the further alternative, an order staying the proceedings so that the dispute can be determined by the courts of England & Wales.

4. In addition to contesting jurisdiction (as set out above), CCL also seeks an order setting aside the warrant of arrest issued on 21st August, 2018 pursuant to an order of the court made on the same date under which the Admiralty Marshall was ordered to arrest the vessel until further order of the court. In support of this element of the application, CCL contends that the claim made in the proceedings does not give rise to a valid ground for arrest. CCL also contends that there was non-disclosure of material facts in the *ex parte* application seeking the arrest of the vessel such that the order of arrest should be set aside on that basis.

5. For reasons which I discuss in more detail below, the issue as to whether there was a proper basis to seek the arrest of the vessel is also at the heart of the challenge to jurisdiction. CCL contends that the claim of the plaintiff in these proceedings does not fall within any of the grounds of arrest permitted under the Brussels Convention Relating to the Arrest of Seagoing Ships, 1952 ("the 1952 Convention") which was given the force of law in Ireland by the Jurisdiction of Courts (Maritime Conventions) Act, 1989 ("the 1989 Act"). If CCL is correct in this contention, the Irish courts would not have jurisdiction over the claim made in these proceedings. The plaintiff accepts that the arrest of the ship is the foundation for the jurisdiction of the court in this case.

Relevant facts

6. The vessel is a motor pleasure boat. She is 17.29 m. long with a gross tonnage of 47.22 tonnes which, according to the affidavit evidence before the court, was purchased by CCL for commercial purposes. The vessel was built in 2017 and is registered in London. The vessel is currently moored in the port of Dún Laoghaire.

7. CCL is a private limited company incorporated under the laws of England & Wales on 9th February, 2017. The registered office of CCL is located in London. The legal and beneficial owner of the entirety of the share capital in CCL is Mr. Kevin Conway. Mr. Conway is an Irish-born but English resident (for more than 20 years) tax lawyer. Mr. Conway was a director of CCL up to 6th November, 2017 not long after he was adjudicated a bankrupt in the English courts on the petition of UK Revenue & Customs.

8. In 2017, CCL agreed to purchase the vessel from MGM Boats of Dún Laoghaire for €1,265,000.00 exclusive of VAT. The plaintiff (which is a French entity) part-financed the purchase of the vessel pursuant to a loan agreement under which the plaintiff agreed to lend €822,250.00 to CCL to assist in the purchase. The loan agreement was accepted by CCL on 21st March, 2017 and was executed by the plaintiff on 22nd March, 2017. With the exception of a number of provisions concerning the protection of personal data (which are governed by French law) the loan agreement is governed by the laws of England & Wales and the parties also agreed to the non-exclusive jurisdiction of the English courts.

9. The loan agreement was secured by a deed of assignment executed on 30th April, 2017 (which creates security over, *inter alia,* any earnings of the vessel). The loan agreement was also secured by a personal guarantee dated 22nd March, 2017 given by Mr. Conway. In addition, the loan agreement was intended to be secured by

a mortgage over the vessel. Mr. Conway signed such a mortgage although the date of his signature on one version of the mortgage is left blank. It appears that there is also another version of this mortgage (which bears a date - namely 20th July, 2018 - which was registered in the UK Companies House on 20th July, 2018). There is, however, no suggestion in the affidavit evidence before the court that the mortgage has not been registered at the UK Registry of Shipping and Seamen.

10. There is no dispute between the parties that CCL fell into arrears in January, 2018 in relation to the payment of the monthly instalments due in respect of the loan. By email dated 16th March, 2018 CCL demanded payment of the arrears for January, February and March, 2018 and warned that if the arrears were not paid by 29th March, 2018, the plaintiff would deem the loan agreement to be immediately terminated and would take all necessary action to enforce the mortgage.

11. A further letter of demand was written on 23rd April, 2018. Subsequently, in June 2018 discussions took place during which it was intimated that the plaintiff would be willing to enter into a standstill agreement to last until the end of September, 2018. Although a draft standstill agreement was subsequently forwarded by the plaintiff's English solicitors to CCL on 23rd July, 2018, the evidence before the court shows that, notwithstanding several reminders sent in late July and early August, no such agreement was ever executed.

12. In the meantime, Mr. Conway made a proposal for an Individual Voluntary Arrangement ("IVA") which he hopes will enable his bankruptcy to be annulled. I should explain that, as I understand it, an IVA is very similar to a Personal Insolvency Arrangement entered into by a debtor with his or her creditors under the Personal Insolvency Acts, 2012-2015. A copy of the proposal for the IVA was provided to the plaintiff under cover of a letter dated 6th July, 2018. The proposal therefore pre-dates

the arrest of the vessel. In s. 6 of the proposal for an IVA, Mr. Conway discloses that, among his assets, are the shares in CCL which is the owner of the vessel. He also discloses that he has a liability to the plaintiff under his personal guarantee. In the proposal, it is stated that the vessel is with MGM Boats in Dublin for the purposes of sale and that this sale should enable CCL to repay its indebtedness to Mr. Conway in full after the proceeds of sale have been used to extinguish the amount due to the plaintiff.

The arrest

13. On 21st August, 2018 the plaintiff issued a plenary summons. According to the endorsement of claim on that summons, the claim is described as being for the sum of €797,291.07 due and owing by the defendant to the plaintiff:-

> *"...pursuant to a Loan that was advanced by the Plaintiff to the Defendant pursuant to a Loan Agreement dated 21st March, 2017 and under which the Defendant, in breach of contract and/r (sic) duty has failed, refused and/or neglected to pay the capital and interest payments required to be made thereunder ...".*

14. There was no express reference to a mortgage in the endorsement of claim. However, the endorsement of claim set out the basis on which the plaintiff contends this court has jurisdiction in the following term:-

> *"[The] Court has jurisdiction to hear and determine the ...claim by virtue of the Inherent Admiralty Jurisdiction of [the] ...Court; and/or under the provisions of [the 1989 Act] including inter alia, Article 1 (1) (q) of the [1952 Convention] ..."*

15. At this point, it should be noted that, under Article 1 (1) (q) of the 1952 Convention, a ship can be arrested in respect of a claim arising out of "*the mortgage*

or hypothecation of a ship". When the *ex parte* application was made to the court on 21st August, 2018 seeking the arrest of the vessel, I queried whether the claim set out in the endorsement of claim fell within Article 1 (1) (q) in circumstances where, on the face of it, the endorsement appeared to merely seek payment of the amount due on foot of a loan agreement. There appeared to be no claim raised on foot of the mortgage *per se*. At the time, counsel for the plaintiff argued that the claim made in the endorsement of claim must be distinguished from the right of the plaintiff to arrest the vessel. He argued that it was clear from the grounding affidavit of Helen Noble that the application for the arrest was grounded on the status of the plaintiff as mortgagee; and that accordingly the plaintiff was entitled to invoke Article 1 (1) (q) in order to move the application to arrest. Counsel for the plaintiff also relied on the decision of McGovern J. in *M.V. Lady Magda* [2018] IEHC 426 in which, counsel argued, such a distinction had been expressly recognised. I made an order directing the arrest of the vessel on the basis of the submissions of counsel and on the basis of the evidence placed before the court in the grounding affidavit of Ms. Noble sworn on 21st August, 2018. Since that date, the vessel has remained under arrest. No alternative security has been put in place.

16. On 11th September, 2018 a conditional appearance was entered on behalf of CCL which was stated to be conditional to jurisdiction. However, no application was made at that time to contest the jurisdiction or to set aside the arrest.

17. A statement of claim was delivered promptly thereafter on 12th September, 2018. It should be noted that, in contrast to the claim made in the endorsement of claim, the plaintiff has purported to include a claim for an order of possession of the vessel (or in the alternative a sale of the vessel) as part of the relief claimed in the prayer in the statement of claim notwithstanding that no such claim was included in

the plenary summons. Paragraph 12 of the statement of claim expressly pleads that the plaintiff is entitled as mortgagee to exercise these rights.

18. As noted above, despite the terms of the conditional appearance, no application was filed at the time of entry contesting the jurisdiction. In those circumstances, on 17th September, 2018, the plaintiff brought a motion before the court for directions. That application was heard by me on 2nd October, 2018 when I made an order directing that, in circumstances where the vessel was under arrest, the notice of motion by the defendants should be filed immediately and I fixed the matter for hearing on 15th November. Thereafter, on 15th October, 2018 the present application was launched by CCL.

The present application

19. Before addressing the substantive issues which fall for consideration on this motion, it is convenient to first dispose of a number of technical objections which were raised on behalf of the plaintiff.

20. In the first place, it was argued on behalf of the plaintiff that the basis for the relief claimed in the notice of motion (namely s. 5 (4) of the 1989 and also the inherent jurisdiction of the court) was misconceived. I do not believe that it is necessary to spend time on this issue in this judgment. While I agree with the submission made by the plaintiff that the relief sought in the notice of motion does not, strictly, arise under s. 5 (4) of the 1989 Act or under the inherent jurisdiction of the court, there is no doubt but that any defendant in proceedings of this kind is entitled to contest jurisdiction if there are grounds for doing so. I believe that it is in the interests of all parties that the substantive issues which arise should be disposed of. This is particularly so in circumstances where there is a vessel under arrest and it is therefore desirable that the issues should be resolved at the earliest possible date.

21. The second issue raised on behalf of the plaintiff related to the reliance by CCL on O.64 r.62 (4) for the application to set aside the warrant of arrest. I agree with counsel for the plaintiff that O.64 r.62 (4) does not apply on the facts of this case. However, there is abundant authority for the proposition that an order made on an *ex parte* basis can be challenged by the party against whom it was made and I therefore do not believe that it is worthwhile spending any time on this particular issue raised by the plaintiff.

22. The next issue which is sought to be ventilated by the plaintiff is that CCL is not entitled to raise issues as to the validity of the arrest until after the jurisdiction issue is disposed of. I do not agree with that proposition. In my view, it makes sense that if a party has a number of grounds in which to challenge steps taken in proceedings, it makes sense that they should be addressed in the same notice of motion. This leads to the more efficient disposal of the issue. Moreover, it is a fairly commonplace approach for a defendant to take. In addition, as counsel for CCL observed, the question of the validity of the arrest is at the heart of the jurisdiction issue. In order to determine whether CCL has a good basis to challenge the jurisdiction of the Irish courts, it is necessary to address and decide the question of the validity of the arrest. This is for the very simple reason that the only basis upon which Irish jurisdiction could conceivably arise in this case is the valid arrest of the vessel. This is an issue which I address in more detail below.

23. The objection by the plaintiff to CCL's seeking omnibus relief in a single application also extended to the contention by CCL that the arrest had been procured as a consequence of non-disclosure of material facts by the plaintiff in the course of the *ex parte* application made on 21st August, 2018. I made it clear at the hearing that, in my view, this is an issue which is of such importance that it would make no sense

that it could not be raised in the course of a challenge to jurisdiction. I remain of that view. In any *ex parte* application the court relies on the good faith of the party making the application. It is well settled that such a party is under an obligation to make full and frank disclosure to the court of all relevant material (even material which is adverse to the position of that party). In my view, it is essential that if anyone is concerned that full and frank disclosure has not been made, those concerns should be brought to the attention of the court at the earliest possible time. I therefore do not believe that there could be any basis upon which those issues could not be raised on an application of this kind even if I were wrong in the view expressed in para. 22 above.

24. The defendant also objected to the admission of two affidavits as to English law which were filed as recently as 5th November, 2018. The first was an affidavit of Michael Kieron Mulligan a solicitor in practice in London who expressed the view that, as a matter of English law, the plaintiff cannot bring legal proceedings against Mr. Conway in respect of any liability he may have under the guarantee. This is in circumstances where the plaintiff has had notice of the IVA and will be bound by its terms. In my view, that affidavit is ultimately irrelevant to the issues which I have to determine. Mr. Mulligan expresses no view about the ability of the plaintiff to take proceedings against CCL (which is the crucial question in these proceedings). In circumstances where the affidavit is not relevant, I do not believe that the plaintiff could be said to have suffered any prejudice as a consequence of its late delivery.

25. A different issue arises in relation to the second affidavit as to English law sworn by Mr. Mark Heywood Q.C. on 5th November, 2018. In that affidavit Mr. Heywood makes a number of hearsay averments (based on information which he says is "likely to be placed before this Honourable Court") suggesting that the mortgage of

the ship was altered by the addition in handwriting of a number of dates. He also says that the mortgage is likely to be void as against any liquidator of CCL or any of its creditors (including Mr. Conway and Mr. Conway's pension fund) by reason of a failure to register the mortgage in the UK Companies House in April 2017. For completeness, it should be noted that an extract from the UK Companies House register was handed into court by counsel for CCL during the course of the hearing which suggested that a charge was registered in April 2017. It is impossible to tell whether that registration in April 2017 was of the mortgage granted in favour of the plaintiff but it would seem likely that it must be that mortgage. There is no suggestion that any other mortgage exists.

26. Mr. Heywood says that the registration of the charge in July 2018 was done without the knowledge, acquiescence or consent of CCL, its agents or representatives. That again is a hearsay statement. There is no such evidence placed before the court by CCL. In addition, Mr. Heywood provides detailed evidence in relation to the criminal law of England & Wales in relation to the alteration of documents. The plaintiff understandably objects to the admission of this affidavit at such a late stage in the proceedings just days before the date fixed for the hearing of the application by CCL. In addition, the plaintiff objects to the admission of the affidavit since so much of it is based on hearsay evidence. In response, counsel for CCL submitted that this was an interlocutory application on which hearsay evidence is admissible.

27. I reject the submission of counsel for CCL that this is an interlocutory application. It is clear from the decision of the Supreme Court in *Minister for Agriculture v. Alte Leipziger* [2000] 4 I.R. 32 (on which counsel for the plaintiff relied) that an application of this kind is an application for a final order subject only to appeal. In those circumstances, I do not believe that the affidavit of Mr. Heywood is

admissible. Even if it were admissible, I have to say that, in my view, on an application of this kind it would be extraordinary to rely on hearsay evidence as to impermissible changes being made in a document without having evidence from the signatory of the document himself. Mr. Conway has provided no evidence for the purposes of this application at all. The deponent of the affidavit grounding the application by CCL (Mr. Francis John Conway, a brother of Mr. Conway) does not make any allegation of the kind set out in Mr. Heywood's affidavit. While the deponent does refer (in a rather passing way) to the existence of both an undated and dated version of the mortgage, he does not go so far as to give any of the evidence set out in para. 5 of Mr. Heywood's affidavit (on the basis of which Mr. Heywood then expressed his views as to English law). Moreover, Mr Francis John Conway is not in a position to give evidence as to his own knowledge of any of these matters since it is accepted by CCL that he was not the signatory of the mortgage (notwithstanding that he says in para. 18 of his affidavit that he signed it).

Conditional appearance

28. The remaining technical objection raised by counsel for the plaintiff was that CCL was not entitled to enter a conditional appearance and was accordingly (so it was argued) not entitled to bring the present application on foot of such an appearance. While this point was not pursued in oral argument to the court, it is an issue that was expressly addressed in the written submission filed on behalf of the plaintiff. In those written submissions, reliance was placed on the judgment of Ní Raifeartaigh J. in *Bank of Ireland v. Roarty* [2017] IEHC 789. In that judgment, my distinguished colleague, Ní Raifeartaigh J. expressed the view that the entry of a conditional appearance was impermissible under the Rules of the Superior Courts other than in cases to which the Recast Regulation or the Lugano Convention apply. This view

appears to have been based on a view expressed in a letter written by an officer of the Central Office to the defendants in that case.

29. It would appear from a reading of the judgment in *Bank of Ireland v. Roarty* that the defendants were not, on the facts, entitled to enter a conditional appearance. I doubt very much whether my colleague Ní Raifeartaigh J. intended to suggest that a conditional appearance could not be entered in other circumstances. In my view, the decision in *Bank of Ireland v. Roarty* was clearly made on the very particular facts of that case. There is no suggestion in the judgment that the court was referred to any of the authorities which show that the entry of a conditional appearance, although not provided for in the Rules, is a well-established practice particularly in cases where a defendant (in proceedings not covered by the Recast Regulation or the Lugano Convention) wishes to contest jurisdiction but, pending the making of any such application, wishes to protect itself against the danger of judgment being entered against it in default of appearance. Similarly, a conditional appearance is sometimes used in circumstances where there is a defect in service of a summons and the defendant does not wish to enter an unconditional appearance (which would cure any such defect). In such circumstances the defendant will, in order to protect itself from the danger of judgment being entered in default, enter a conditional appearance. It is clear from *Delany & McGrath on Civil Procedure* (4th ed., 2018, at p. 209) that the common law has long recognised the propriety of the entry of a conditional appearance. The authors cite Irish authority dating back to 1871 and 1913. In addition, Ó Floinn, in "*Practice and Procedure in the Superior Courts",* 2nd ed., 2008, at p. 124, cites a range of Irish authorities dating back to the 1930s in which the courts have accepted, without question, the entry of an appearance on a conditional basis. In my view, the entry of an appearance on a conditional basis is an entirely appropriate

and necessary practice in circumstances where a defendant (in cases not covered by the Recast Regulation or the Lugano Convention) has a genuine basis on which to contest jurisdiction or where a defendant has grounds to contest the validity of service of the proceedings.

30. For completeness, I should add that, as a former officer of the Central Office, I can confirm that, in the 1980s, it was commonplace for parties (in the position of CCL) to enter a conditional appearance even though, at that time, there was no provision anywhere in the Rules for the entry of such an appearance. The Rules were subsequently changed following the enactment of the Jurisdiction of Courts and Enforcement of Judgments Act 1988 when, for the first time, express provision was made in the Rules for the entry of a conditional appearance in Brussels Convention cases.

Material Non-disclosure

31. Before turning to the substantive issues in the case, I should address the issue of material non-disclosure. As indicated above, the obligation to make full and frank disclosure is of critical importance in the context of an *ex parte* application particularly in circumstances, where, as in this case, the effect of any relief granted on foot of such an application significantly interferes with the rights of others (in this case the rights of CCL as the owners of the vessel).

32. In the affidavit grounding the present application, two complaints of non-disclosure were made. In the first place, it was suggested that the correspondence exhibited by Ms Noble to the affidavit grounding the application for the arrest of the vessel was *"one-sided"*. Secondly, it was suggested that there was an obligation on the plaintiff to disclose to the court the existence of the IVA involving Mr Kevin Conway.

33. In the course of the hearing before me on the 15th of November, two further suggestions were made namely: -

(a) That there had been a failure to alert the court, in the course of the hearing on 21 August, to the fact that no claim was made on foot of a mortgage in the endorsement of claim on the plenary summons. It is unnecessary to dwell on this issue. As mentioned above, this was an issue that I discussed with counsel in the course of the hearing on the 21st of August, 2018.

(b) The second issue (which is nowhere on affidavit) was that there had been a failure to disclose that there had been an issue in relation to the dating of the mortgage. Again, I do not believe it is necessary to spend any time on this issue. For the reasons outlined above (when dealing with the admissibility of the affidavit of Mr Heywood) I do not agree that there is any evidence before the court to establish that there is any issue in relation to the dating of the mortgage. On an application of this kind where a party is making a very serious allegation that there has been material non-disclosure, it is incumbent on the party making that allegation to place appropriate evidence before the court to prove it. In the present case, there is no such admissible evidence. Moreover, it would entirely be unfair to permit such an allegation to be made for the first time in the course of a hearing when it was never previously mentioned on affidavits. It would be unfair on the plaintiff for an issue to be ventilated in that way in circumstances where the plaintiff has never had an opportunity to address it. Clearly, if the matter had been raised on affidavit at the appropriate time, the plaintiff could have dealt with it in advance of the hearing.

34. Insofar as the "*one-sided"* correspondence is concerned, while an allegation is made to that effect in the grounding affidavit, it has not been supported by any underlying objective evidence. CCL has not exhibited any documents which it says

should have been placed before the court that were not in fact placed before the court. Absent any evidence of that kind, there is no plausible basis to suggest that there was non-disclosure on this ground.

35. With regard to the IVA, I note that in a letter of advice from Ms Marcia Shekerdemian QC of 27th of September, 2018, (which is exhibited by Mr Francis John Conway to his affidavit) it is suggested that if a similar application were made in England for the arrest of the vessel, the applicant would have been required to disclose the existence of the IVA. However, Ms Shekerdemian does not explain why this is so. It is noteworthy that, nowhere in her five-page letter of advice, does she say that the plaintiff is bound by the terms of the IVA insofar as its claim against CCL is concerned. Moreover, when CCL ultimately came to place sworn evidence of English law before the court (in the form of the affidavit from Mr Michael Kieron Mulligan) he did not go insofar as to suggest that, as a matter of English law, CCL was in any way caught by the IVA insofar as its claim against CCL is concerned. His affidavit was confined to expressing the view that, as a consequence of the IVA, the plaintiff cannot bring legal proceedings against Mr Conway in respect of any liability he may have under the guarantee There is no suggestion in Mr Mulligan's affidavit that the plaintiff is prevented by the terms of the IVA from taking action against CCL. In those circumstances, there is nothing to suggest that the IVA would have an impact on the claim which the plaintiff has as against CCL. Accordingly, I do not believe that there was any obligation on the plaintiff to disclose the existence of the IVA in the course of its application to the court in August, seeking the arrest of the vessel. The application to set aside the arrest on the ground of material non-disclosure therefore fails.

The Substantive Issues

36. As noted above, the case made by CCL is that under the Recast Regulation, any proceedings against CCL ought to have been commenced in England and Wales in circumstances where CCL is domiciled there. In order for proceedings to be taken against CCL in any other EU jurisdiction, it would, of course, be necessary to establish that, if the Recast Regulation applies, there is a proper basis under that Regulation to commence proceedings in that jurisdiction. CCL argues that it is manifest that the Irish Courts have no jurisdiction against CCL in respect of a debt owed by CCL to a French entity, namely the plaintiff. Counsel for CCL has drawn my attention to the decision of CJEU in Case: C-249/16 *Kareda v Banko* in which the CJEU held, for the purposes of the Recast Regulation, that the place of performance of obligations under a loan agreement is the place where the creditor has its registered office. Thus, it is conceivable that proceedings could have been brought in France in this case rather than in England. However, on the basis of the material before the court, counsel submitted that it is solely the courts of France or the courts of England that could assert jurisdiction in respect of the claim made by the plaintiff here.

37. In response, the plaintiff argues that the Irish courts have jurisdiction under the 1952 Convention and the 1989 Act and that Article 71 of the Brussels Recast Regulation expressly recognises the continued existence of the jurisdiction rules that apply under specific legal instruments such as the 1952 Convention. Article 71.1 provides as follows: -

"*This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or the enforcement of judgments."*

38. The language of Article 71.1 is plain and unambiguous. In my view, it is very clear that Article 71.1 has the effect suggested by the plaintiff. Thus, it is crucial to consider whether there is a proper basis to suggest that the 1952 Convention applies to the claim made by the plaintiff here. I therefore believe that the first substantive issue to be addressed is whether the 1952 Convention applies. In dealing with that issue, I will, of necessity, have to consider whether there was a valid basis to seek the arrest of the vessel at the time of the commencement of these proceedings. This is because the sole basis on which the plaintiff says the Irish Courts have jurisdiction here is that the vessel was arrested in Ireland.

The 1952 Convention:

39. Article 7 (1) of the 1952 Convention sets out the basis upon which a court will have jurisdiction to determine admiralty proceedings on the merits. It provides as follows: -

"1. The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits, if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, ***or*** *in any of the following cases, namely: -*

(a) If the claimant has his habitual residence or principal place of business in the country in which the arrest was made;

(b) If the claim arose in the country in which the arrest was made;

(c) If the claim concerns the voyage of the ship during which the arrest was made;

(d) If the claim arose out of a collision or in circumstances covered by Article 13 of the International Convention for the unification of certain rules of law with respect of collisions between vessels, signed at Brussels on the 23rd of September, 1910;

(e) If the claim is for salvage;

(f) If the claim is upon a mortgage or hypothecation of the ship arrested."(emphasis added).

40. It will be seen that there are a number of different bases on which national courts will have jurisdiction (on the merits) to hear and determine proceedings involving a ship. The Courts will have such jurisdiction in each of the individual circumstances set out in sub-paragraphs 1(a)-(f). However, it seems to me to be clear from the structure of Article 7(1) and from its opening words (and this was ultimately accepted by both sides in the course of the hearing before me) that jurisdiction will also arise under Article 7(1) in the country in which the arrest is made if the national law of that country so provides. In Ireland, s. 5(1) of the 1989 Act gives the High Court jurisdiction to hear and determine admiralty proceedings *in rem* in respect of each of the claims set out in Article 1(1) of the 1952 Convention. Thus, if a maritime claim is made in these proceedings within the meaning of Article 1(1), the Court will have jurisdiction on the merits under Article 7(1) if the vessel was validly arrested here.

41. In this context, it seems to me that the only form of arrest that could reasonably be contemplated by Article 7(1) is an arrest which is valid. Article 2 of the Convention makes clear that a ship flying the flag of one of the Contracting States (and the United Kingdom is such a Contracting State) may only be arrested in the jurisdiction of another Contracting State (such as Ireland) in respect of a *"Maritime Claim"*. The maritime claims recognised by the 1952 Convention are those set out in Article 1(1). For present purposes, only one of those claims is relevant, namely that provided for in Article 1(1)(q) which, as mentioned above, covers claims arising out of the mortgage or hypothecation of a ship. The question which I must therefore

address is whether, for the purpose of the arrest of the vessel on the 21st of August, the plaintiff can be said to have a maritime claim within the ambit of Article 1(1)(q).

Does the plaintiff have a maritime claim under Article 1(1)(q)?

42. As noted above, the Irish courts would not have jurisdiction over the dispute between the parties unless the vessel was validly arrested on foot of a maritime claim within one of the categories set out in Article 1(1) of the 1952 Convention. The only possible category in issue here is under Article 1(1)(q) namely a "*claim arising out of… the mortgage or hypothecation of any ship"*. The endorsement of claim on the plenary summons here invokes Article 1(1)(q) as the basis for jurisdiction but does not use the word "*mortgage"* anywhere in the text of the endorsement. It is true, however, that in the affidavit of Helen Noble sworn on 21st August, 2018 in support of the arrest of the vessel, it was expressly stated in para. 7 that the loan (which is the subject of the endorsement of claim) is secured by way of a first priority mortgage over the vessel. Ms. Noble also refers in para. 13 of her affidavit to the fact that, under the terms of clause 8 of the Loan Agreement, the plaintiff, on the happening of an "*Event of Default"* (as defined) is entitled to exercise all rights, powers and remedies possessed by it as a mortgagee of the vessel including the right to take possession of the vessel and to exercise a power of sale either by private treaty or by public auction. It is therefore clear that, in making the application for arrest of the vessel, the plaintiff expressly relied upon the mortgage.

43. As previously noted, when the application for arrest was made, counsel for the plaintiff submitted that a distinction is to be made between the right of the plaintiff to arrest the vessel on the one hand and the claim on the merits on the other. A similar argument was made at the hearing before me. In the written submissions delivered on behalf of the plaintiff, the plaintiff repeated its reliance upon the decision of

McGovern J. in the *"Lady Magda"*. In that case, in para. 3 of his judgment, McGovern J. recorded that the arrest there was obtained on the basis that the claim constituted a *"maritime claim"* within the meaning of Article 1(1)(n) of the 1952 Convention. The claim was formulated as a claim for disbursements. McGovern J. came to the conclusion on the substantive hearing of the proceedings that there was no basis to condemn the vessel in respect of the claim in circumstances where the defendants were never a party to the contract for the provision of agency services by the plaintiff. The claim therefore failed on the merits. In para. 19 of his judgment, McGovern J. said:-

> "*I am satisfied that this claim is based on breach of contract and the defendants were never a party to that contract. There is no evidence of a contractual relationship between the plaintiff and the defendants. The fact that the claim was one for disbursements merely went to the issue of the admiralty jurisdiction to arrest the vessel. It was not determinative of whether or not the vessel could be condemned for this claim… I am satisfied that there is no liability on the part of the defendants in respect of the claim made in these proceedings and therefore neither the vessel nor the security provided can be condemned in respect of that claim."*

44. As the above extract from the judgment of McGovern J. demonstrates, there was a distinction made there between the issue of the admiralty jurisdiction to arrest the vessel and the merits of the claim. As noted above, under Article 1(1)(n) of the 1952 Convention, master's disbursements are one of the categories of maritime claim recognised by the Convention. In the *Lady Magda*, McGovern J. found that there was no evidence before the court that the master entered into the arrangements which are the subject of the proceedings. Accordingly, there was no enforceable claim against

the *res*. However, in my view, it is essential to bear in mind that, in the *Lady Magda*, the court, at the time of arrest, clearly did not know that the disbursements in issue had not been authorised by the master. It appears likely that, at the time of arrest, the affidavit evidence before the court was sufficient to at least make out a *prima facie* case that there was a claim within the meaning of Article 1(1)(n) of the 1952 Convention. It seems to me be equally likely that if such evidence had not been placed before the court or if the claim had not been framed as a claim for disbursements, an arrest would never have been ordered. The court would have held that there was no basis for the arrest and that, consequently, the court in that case would never have had jurisdiction over the *Lady Magda.*

45. What I suspect happened in the *Lady Magda* was that the claim was properly pleaded as a claim for disbursements in the endorsement of claim such that the only way for the defendant to disprove that claim was by appropriate evidence at a full hearing. Of course, that is what very often happens; on the face of it, a claim is made out for the arrest of the vessel which is not capable of being disproved save at a trial. In such cases, the court will be seised of the proceedings on the merits under Article 7(1) of the 1952 Convention.

46. The present case is different because, here, CCL argues that it is clear on the face of the endorsement of claim that it does not disclose a valid maritime claim with the result that the arrest could not be said to be valid and, in turn, there could be no basis to secure jurisdiction in Ireland under Article 7(1).

47. I have to say that, having reflected further on the argument made by the plaintiff (as summarised in para. 43 above), I cannot see any basis upon which a court could conclude that the issue of jurisdiction in relation to the substantive claim and the ground upon which a vessel may be arrested are entirely separate and distinct. In

my view, the decision of McGovern J. in *Lady Magda* does not support that proposition. For the reasons set out in para. 44 above, I believe that the court would not have granted the order of arrest in that case if the claim made there had not been framed as a claim for disbursements or if the court had known, at that time, that there was, as a matter of fact, no sustainable maritime claim.

48. Similarly, if an endorsement of claim does not disclose the maritime claim within one of the categories set out in Article 1(1) of the 1952 Convention, there could be no basis for the arrest of a ship and accordingly no basis on which to secure Irish jurisdiction for a claim between parties neither of whom have any connection with Ireland. In my view, the provisions of Article 7 of the 1952 Convention bear this out.

49. Under Article 7(1) the courts of the country in which the arrest is made have jurisdiction to determine the case on its merits. If, however, it is clear on the face of an endorsement of claim that the plaintiff does not have a proper basis to arrest a ship, it must follow, in my view, that Article 7(1) cannot be relied upon. No authority has been cited for the proposition that Article 7(1) could be relied upon as a basis for jurisdiction in a case where the arrest was plainly not permissible under Article 1 (unless the claim fell within one of the specific categories set out in sub-paras. (a) to (f) of Article 7(1)). Instead, the plaintiff, in its submissions, concentrated on the case law which make it clear that for jurisdiction to arise under the first part of Article 7(1), there must be an arrest of the vessel. This was made clear in the decision of the Court of Appeal of England and Wales in *The Deichland* [1990] 1 QB 361 (followed in Ireland in *M.V. Turquoise Bleu* [1995] I.R. 437).

50. *The Deichland* established that it is not sufficient to secure jurisdiction over a ship, to merely serve proceedings on the ship while moored in national waters. It is

essential that the vessel be arrested. However, that case does not address the quite separate question as to how it could be said that an arrest could give rise to Irish jurisdiction in cases where it is clear on the face of the pleadings, that there is no jurisdiction to arrest under Article 1(1) of the 1952 Convention. In essence, that is what CCL contends here. CCL argues that the endorsement of claim makes no case based on the mortgage and that, accordingly, there was no basis to arrest the vessel by reference to Article 1(1)(q). If there was no basis to arrest the vessel, it would follow that the court would have no jurisdiction under Article 7(1).

51. In these circumstances, it seems to me that I must now consider whether there was a proper basis to arrest the vessel in this case given that the endorsement of claim here makes no reference to the word "mortgage". Can it be said that the claim falls within Article 1(1)(q) or Article 7(1)(f)? The difference between the former and the latter is the difference between a "*claim arising out of… the mortgage of…any ship"* and a claim which is *"upon a mortgage… of the ship arrested"*. In circumstances where the plaintiff has not sought to rely on Article 7(1)(f), I do not propose to address whether it might be said to apply.

52. In the course of the hearing before me, it was strongly argued by counsel for CCL that it was manifest that the claim did not fall within either of these two categories. Counsel submitted that it was clear on the face of the endorsement of claim that the claim was based on the loan agreement and not on the mortgage which secures that agreement.

53. However, counsel for the plaintiff maintained that the claim was correctly pleaded in the endorsement of claim because the mortgage here (as with most ships' mortgages) is in a very terse standard form. The relevant covenants relating to payment, events of default and the right of the mortgagee to take possession of the

vessel (in the event of a default) are all dealt with in the loan agreement rather than in the standard form mortgage itself. In addition, counsel relied on what is generally regarded as the most authoritative commentary on the 1952 Convention namely *Berlingieri on Arrest of Ships* (5th ed., Volume 1, 2011) at para. 5.290 where the author states:-

> "[*the wording*] *of Article 1(1)(q) is not entirely correct, for the claim does not arise out of a mortgage, but out of the contract (e.g. loan agreement) in respect of which the mortgage is executed. It would have been more correct to refer to claims secured by a mortgage. This, however, would have created practical drafting difficulties, since the maritime claims are listed under the opening sentence of Article 1(1) which is worded: '"Maritime Claim"' means a claim arising out of one or more of the following: …"' a correct wording is used instead in the French text of Article 7(1)(f) of the Convention, which provides: '"Si la créance est garantie par une hypothèque maritime ou un mortgage sur la navire saisi.'"*
>
> *The word 'hypothecation' is used in Article 1(1)(f), as in the unofficial translation of the MLM Convention 1926, whilst in subsequent conventions the word hypothèque is used in the English text. The reason for this change is that the word '"hypothecation"' has a different meaning in English law, for it is used in respect of bottomry and respondentia*."
>
> No case law is cited by *Berlingieri* for the proposition quoted in para. 5.290 of his work. Nonetheless, the author is an undoubted expert on the 1952 Convention and is recognised as such. His observations must be read in the light of the fact that the form of a ship's mortgage is unlike the form of a

typical mortgage of real property. As noted above, it is in a standard form and does not contain the relevant conditions which empower the mortgagee to enforce the security created by the mortgage over the vessel. Those powers are contained in the loan agreement.

54. As a consequence of the way in which ships' mortgages are frequently drafted, it will often be considered necessary, when seeking to enforce a claim secured by a mortgage over a ship, to rely on the terms of the relevant loan agreement in order to show that an event of default has occurred giving the mortgagee the right to enforce the mortgage against the ship in question. Viewed against that background, the statement made by *Berlingieri* (quoted in para. 53 above) is less surprising than might at first appear. The author is surely correct to say that, in many cases, a claim at the suit of the mortgagee arises out of the loan agreement rather than the mortgage itself and that it might have been more correct in those circumstances for the English language version of the 1952 Convention to refer to claims secured by a mortgage rather than claims arising out of a mortgage. It must also be borne in mind in this context that Article 18 of the 1952 Convention makes clear that both the English and French language versions of the convention are equally authentic. It is therefore necessary to consider not only the English language version of the Convention but also the French language version.

55. It seems to me that *Berlingieri* is correct in suggesting that the French language version shows that Article 1(1)(q) is not intended to be limited to claims arising out of a mortgage but is in fact intended to extend to claims which are secured on a mortgage. As I understand it, the opening words in French of Article 1(1)(q) are correctly translated as "*a claim secured by a maritime mortgage…".* Given the fact

that both the French and English texts are equally authentic, it follows that a claim secured by a mortgage must come within Article 1(1)(q).

56. Having regard to the considerations outlined in paras.53 to 55 above, I have come to the conclusion that a claim secured by a mortgage is sufficient of itself to fall within the ambit of Article 1(1)(q) of 1952 Convention. The question which I must now consider is whether the endorsement of claim on the plenary summons (which makes no express reference to the word "mortgage") can still be said to disclose a claim which is secured on a mortgage. For this purpose, it seems to me that I must confine my consideration of this issue to the terms of the endorsement of claim as it existed at the time of arrest. In my view, it would be inappropriate to assess this issue by reference to the way in which the statement of claim was subsequently pleaded some weeks after the arrest was effected. The statement of claim was delivered on 12th September, 2018 and it expressly refers in para. 12 to the claimed entitlement of the plaintiff to exercise all the rights powers and remedies possessed by it as mortgagee of the vessel.

57. As noted above, the plenary summons makes no express reference to the word "mortgage". The opening paragraph of the endorsement of claim is in simple terms and seeks payment of the sums due on foot of the loan agreement. The opening paragraph goes no further than that. However, I do not believe that this opening paragraph can be read on its own. In my view, it must read in the context of the endorsement of claim as a whole which includes a paragraph dealing with the jurisdiction of the court to hear and determine the claim. In that section of the endorsement of claim, it expressly refers to Article 1(1)(q) of the 1952 Convention. When the endorsement of claim is read as a whole, it seems to me that the plaintiff was asserting a claim on foot of a loan agreement which is secured by a mortgage. It

would obviously have been preferable if the plaintiff had expressly referred to the existence of a mortgage. Nonetheless, the invocation of Article 1(1)(q) seems to me to make it clear to the reader that the claim is not simply one based on a loan agreement but is, in fact, based on a loan agreement which, in turn, is secured by a mortgage over the vessel.

58. Having regard to the discussion in paras. 53 to 57 above, I am of opinion that the endorsement of claim thus discloses a maritime claim within Article 1(1)(q) as explained by *Berlingieri*. I therefore hold that the plaintiff has a maritime claim which was sufficiently disclosed at the time of arrest of the vessel such as to give the plaintiff a right to arrest the vessel. In turn, the arrest of the vessel to enforce that maritime claim gives the court jurisdiction over the substance of the claim against CCL under Article 7(1) of the 1952 Convention and the 1989 Act. In these circumstances, I refuse CCL's application to set aside the proceedings as claimed in para. 1 of its notice of motion.

Forum non conveniens

59. As an alternative to setting aside the proceedings against it, CCL seeks an order staying the proceedings on the basis that the English courts would be a far more appropriate forum for the hearing and determination of the dispute between the parties. This application is made on the basis that CCL is English, the issues canvassed by Ms. Shekerdemian Q.C.and Mr. Heyword Q.C. (to the extent that they are relevant) are all matters of English law, and the loan agreement itself is subject to English law (save in relation to data protection issues which are not immediately relevant). CCL relies in this context on the decision of the Supreme Court in *Intermetal Group Limited v. Worslade Trading Limited* [1998] 2 I.R. 1 where the

Supreme Court approved the approach taken by the Court of Appeal of England and Wales in *Re Harrods (Buenos Aires) Limited* [1992] Ch. 72.

60. CCL very properly acknowledged that the doctrine of *forum non conveniens* no longer forms part of Irish Law in cases governed by the Recast Regulation. This was made clear by the decision of the CJEU in Case C-281/02 *Owusu v. Jackson* [2005] ECR 1-1383. However, CCL argued that, under Article 71 of the Recast Regulation, the Regulation does not affect any Conventions (including the 1952 Convention) which, in relation to specialised matters, governs jurisdiction.

61. In response, the plaintiff argued, on the basis of *Briggs*: *"Civil Jurisdiction and Judgments"* (6th Ed., 2015) p. 83, that Article 71 does not have the effect of carrying the proceedings under the 1952 Convention outside the scope of the Recast Regulation altogether. *Briggs* expresses the view that, in fact, the opposite is the case. *Briggs* maintains that the *lis alibi pendens* provisions of the Recast Regulation apply even to proceedings that fall within Article 71.1 with the result that the *Owusu* principle must also apply.

62. According to *Briggs*, the correct position is as follows:

"To begin with there had been some uncertainty whether the effect of taking jurisdiction under a particular Convention might carry the case outside the scope of the Regulation altogether. The practical significance of the question was whether jurisdiction asserted on the basis of a particular Convention was subject to, or removed from, the lis alibi pendens rules of what are now Articles 29 to 34 of Regulation 1215/2012. But when it is seen that the recognition of such judgments falls within Chapter III of the Regulation and that what are now Articles 29 to 34 are designed to facilitate the free movement of judgments, the conclusion that jurisdiction taken under Article 71 was taken within the scope of the Regulation was inevitable".

63. No case law of the CJEU was cited to me in relation to this issue. Were it necessary to adjudicate on this issue, I believe it might very well be essential to make a reference to the CJEU for guidance on the issue. However, it does not seem to me to be necessary to do so in circumstances where I am of opinion that I can determine the application for a stay on the assumption that the *forum non conveniens* doctrine continues to apply.

64. In my view, even if one assumes that the doctrine continues to apply, it would not be appropriate to exercise my discretion in favour of a stay. It is instructive in this regard to consider the approach actually taken by the Supreme Court in the *Intermetal* case. Although the Supreme Court, at that time (which was pre-*Owusu*), accepted that the doctrine applied, the court came to the conclusion that justice required that the proceedings should nonetheless be heard in Ireland. For completeness, I should mention that the test to be applied in considering whether a stay should be granted on the basis of *forum non conveniens* is a broad one. The court must first consider whether there is some other available forum (i.e. other than Ireland) having competent jurisdiction, in which the case might be tried more suitably for the interests of all parties and the ends of justice. If the court comes to the conclusion that there is such a jurisdiction, the next question for the court to consider is whether justice requires that the proceedings should nonetheless be heard in Ireland. In his judgment in the *Intermetal* case, Murphy J. emphasised the requirement that, in so far as the latter part of the test is concerned, the onus lies on the plaintiff to show that justice requires that the proceedings should be heard in Ireland.

65. In my view, the matters at issue in these proceedings are most closely connected with England and Wales. The factors mentioned in para. 59 above all point in the direction of the English courts as being the more appropriate forum in which to

hear and determine the substance of the dispute between the parties. The question which therefore arises is whether the plaintiff here has shown that justice requires that the proceedings should nonetheless continue in Ireland.

66. I have come to the conclusion that justice does require that the proceedings should be heard in Ireland. My reasons for reaching this conclusion are as follows:-

(a) In the first place, I am very conscious that the vessel is under arrest. It is not in the interests of any party that there should be any delay in the determination of these proceedings while the vessel remains under arrest. These proceedings in Ireland are already up and running. A statement of claim has been delivered. I will be in a position to ensure that the proceedings are given an early hearing date. I will also be in a position to case manage the proceedings to ensure that the remaining steps to be taken between now and the trial will all be undertaken expeditiously. I have been provided with no information to suggest that the courts of England and Wales would be in a position to hear and determine the dispute more speedily than here. In my view, the speed of determination of the proceedings is a critical factor in circumstances where there is a ship under arrest. In this regard, I should make clear that even if I were to stay the proceedings, the vessel would have to remain under arrest. It is quite clear from the provisions of s. 5(4) of the 1989 Act that the court has power, even where the proceedings are stayed, to order that the ship arrested should be retained for the purposes of satisfying any award or judgment which may be given in legal proceedings in another country. In my view, the plaintiff was entitled to arrest the vessel and accordingly the vessel would have to remain under arrest in the event that a stay were granted.

(b) secondly, I bear in mind what was said by Murphy J. in the Supreme Court in the *Intermetal* case at p. 38 where he made clear that a failure on the part of the defendant to signal an intention to contest jurisdiction is a significant factor in weighing where the interests of justice lie. He said:-

"*The…defendant must have realised that [its]… activities…would be called into question by the plaintiffs. Whilst the correspondence pre-dating the institution of these proceedings took place over a period of little more than one week importance must be attached to the failure of the defendant in the one letter written on its behalf to address the complaints made against it or to dispute expressly or by implication the appropriateness of Ireland as the forum in which to institute proceedings. Whilst it could not be suggested that the entry of the conditional appearance…or the delivery of the defendant's notice of motion on…claiming the stay…involved anything approaching delay, the fact remains that the proceedings were instituted and the motion for an injunction apparently served before the appropriateness of the forum was challenged. Furthermore, it is clear that both parties recognised the urgency of the matter and must have overcome extreme difficulties to extract information, assemble documents and draft the numerous affidavits filed in connection with the two motions. Justice required that the action and in particular the interlocutory aspects thereof should be dealt with expeditiously. If the…trial judge had granted a stay and refused to hear the interlocutory application such a refusal would have constituted the denial of justice not merely to the plaintiffs but also to the defendant. They shared a concern to have this extremely important commercial problem resolved at the earliest date even though their expectations as to the ultimate outcome necessarily differed. The trial of this action in a different forum would not serve the ends of justice."*

In my view, there is a clear parallel between the facts of that case and the present case. In particular, a letter was sent by Keystone Law on 23rd April, 2018, on behalf of the plaintiff, making very clear that the vessel would be seized in the event of nonpayment of the debt. A standstill agreement was subsequently offered to CCL. However, despite several emails during the course of July 2018 it was never executed by CCL. In the course of the emails sent on behalf of the plaintiff at that time it was indicated in clear terms that the failure to execute the agreement would result in the plaintiff taking action for default. At the time these emails were sent, the vessel was already in Dún Laoghaire. This is clear from the terms of the proposed IVA which was executed some time prior to 6th July 2018. Therefore, if proceedings were to be taken to seize the vessel, it was obvious that any such proceedings would be taken in Ireland. Yet, notwithstanding that this was so, CCL at no stage intimated that it would challenge Irish jurisdiction in the event that enforcement proceedings were taken here.

67. Furthermore, even when these proceedings were commenced, CCL failed to act with any alacrity to challenge the jurisdiction of the court. While an appearance was entered solely to contest jurisdiction, it was necessary for the plaintiff to bring an application for case management directions in relation to the challenge to jurisdiction so as to ensure that the motion challenging jurisdiction was ultimately filed by CCL. This seems to me to further reinforce my conclusion that the interests of justice would not be served by staying these proceedings at this point. On the contrary, it seems to me that everything points in the direction of ensuring that these proceedings are heard and determined as speedily as possible so that the dispute between the parties can be finally resolved at the earliest possible time.

Conclusion

68. For all of the reasons set out above, I have come to the conclusion that each element of the application made by CCL should be refused.

69. I will hear the parties in relation to the further case management directions that require to be given in order to ensure a speedy trial. I will also hear the parties in relation to costs. I should add that, subject to any submissions that may be made in relation to costs, my initial view is that cost should be costs in the cause. While CCL has failed in its application, the fact remains that the endorsement of claim could have been clearer in setting out that the claim was secured by a mortgage over the vessel.