[2003–04 Gib LR 500]

CROCI INTERNATIONAL B.V. v. OWNERS and/or DEMISE CHARTERERS OF THE M.Y. "ISLANDER"

SUPREME COURT (Dudley, A.J.): October 26th, 2004

Shipping—arrest of ship—release from arrest—security—to include damages charterer may recover in action against owners for repudiatory breach of charterparty on its reasonably arguable best case, with interest and costs—reasonably arguable best case merely arguable in fact and law, detailed consideration of merits not required—claim for greater damages than sum specified as liquidated damages in charterparty not reasonably arguable

The defendants sought the release of their yacht from arrest.

The claimant had agreed with the defendants to charter a yacht for a fee of US$388,580. Due to mechanical failures, the defendants failed to deliver it and the claimant instead chartered two other vessels, at a total cost of US$911,667. The defendants refunded the payments for the original yacht.

The terms of the charterparty provided that if the defendants failed to deliver the yacht at the commencement of the charter period "other than by reason of *force majeure*," the charterer would be entitled to treat the agreement as repudiated. In addition to repayment of the full amount for the charter of the original yacht, it provided that the charterer would also be entitled to liquidated damages of 50% of the charter fee.

The claimant arrested the yacht and brought proceedings for liquidated damages, pursuant to the charterparty, of US$194,000. It alleged that the mechanical failures resulting in the repudiation had been caused by the

defendants' negligence, whereas they sought to rely on the *force majeure* clause. The claim raised complex technical arguments. The defendants brought the present proceedings, seeking the release of the yacht from arrest upon provision of security. The claimant sought security of US$300,000, which included the damages of US$194,000, expenses and legal fees. Subsequently, it brought an alternative claim for damages, based on anticipatory breach or impossibility, for US$530,913, which represented the difference between the returned charter fee for the original yacht and the cost of chartering the substitute vessels. The defendants submitted that if security were to be ordered it should be in the form of a first priority ship mortgage.

Held, ordering security as follows:

(1) The defendants would be ordered to pay security in the sum of US$250,000, which covered the liquidated damages of US$194,000, to which the claimant might be entitled under the charterparty, with interest and costs. The claimant was entitled to security to cover the amount of damages it could receive on its reasonably arguable best case. In determining the claimant's reasonably arguable best case, the court had merely to consider whether its claims would be arguable in fact and law, and was not required to conduct a detailed consideration of the merits. On the evidence, the claimant had a reasonably arguable claim for liquidated damages of US$194,000, pursuant to the charterparty. It did not, however, have an arguable claim to a greater sum on the basis of anticipatory breach or impossibility. Alternatively, even if it could bring a claim on those grounds, it could not thereby recover greater damages than the amount stipulated in the charterparty as liquidated damages. Security in the sum of US$250,000 would therefore be adequate for the release of the yacht (para. 4; para. 8; paras. 13–14).

(2) In addition, the security should be provided in the form of a bail bond, a suitable bank guarantee or a cash deposit with the Admiralty Marshal. Although the court had discretion to determine the form of the security to be ordered, a first priority ship mortgage would not be ordered since, in the present case, it would represent a lesser form of security than the physical presence of the yacht, as the yacht could incur liabilities which would take priority to the mortgage. Furthermore, if the claimant were to succeed in its claim for damages, it might be required to rearrest the yacht in order to enforce the mortgage (paras. 17–18).

Cases cited:

(1) *Mihalis Angelos, The*, [1971] 1 Q.B. 164; [1970] 3 All E.R. 125; [1970] 2 Lloyd's Rep. 43; (1970), 114 Sol. Jo. 548, distinguished.
(2) *Moschanthy, The*, [1971] 1 Lloyd's Rep. 37, applied.
(3) *Vanessa Ann, The*, [1985] 1 Lloyd's Rep. 549, distinguished.

A. Christodoulides and *Ms. D. Suisi* for the claimant;
C.C. Hernandez and *S. Figueras* for the defendant.

1 **DUDLEY, A.J.:** The application notice filed for the defendant seeks the release of the vessel from arrest upon the provision by the defendant of security in an amount and form to be determined by the court.

2 At the hearing of the application, however, Mr. Hernandez sought to broaden the scope of his application by seeking the release of the vessel, submitting that the claimant has abused the process of the court by virtue of undue delay in the prosecution of the action and by failing to make full and frank disclosure. No authority has been brought to my attention as to whether it is open to me to consider these submissions when the relief sought is not to be found on the face of the application notice. It may of course be that I could deal with it by virtue of this court's inherent jurisdiction. That route, if available, ought to my mind to be seldom used. The purpose of an application notice is precisely to put the other side on notice of the nature of the orders being sought. It is not in the interests of justice that this court should lightly proceed to hear submissions for relief in respect of which one side has been unable to prepare. In the premises, I shall not deal with the abuse of process arguments.

3 The issues for determination by me are therefore:

(a) an assessment of the amount of security required for the release of the vessel; and

(b) the form of such security.

4 There is no dispute that the test to be applied in determining the amount of security is that established in *The Moschanthy* (2). As said by Brandon, J. in that case ([1971] 1 Lloyd's Rep. at 44): "The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his reasonably arguable best case." In determining the claimant's reasonably arguable best case, I must, it seems to me, consider merely whether the case is arguable in fact and in law. It is not for the court at this stage to embark upon a detailed consideration of the merits.

5 Briefly, the factual background to this claim is the following. On June 22nd, 2004, the claimant entered into a charter agreement with the defendant to charter the motor sailing yacht the *Islander* from July 29th to August 18th, 2004, for a charter fee of US$388,580. Mechanical failures (the nature and cause of which will no doubt prove fundamental to a determination of the matter on the merits) prevented delivery of the vessel. The claimant then chartered the *Capri* from July 29th to August 7th, 2004, and the *Zenobia* from August 6th to 16th, 2004, for US$411,667 and US$500,000 respectively, plus delivery and redelivery fees. Payments effected by the claimant to the defendant for the charter of the *Islander* have been returned.

6 For the purpose of this application, it is useful that I set out the clauses in the charterparty which are of significance:

> "**Clause 2:** The owner shall at the beginning of the charter period deliver the vessel to the port of delivery and the charterer shall take delivery in full commission and working order, seaworthy, clean, in good condition throughout and ready for service, with full equipment . . .
>
> . . .
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> **Clause 9(c):** If the owner fails to deliver the vessel at the port of delivery at the commencement of the charter period other than by reason of *force majeure*, the charterer shall be entitled to treat this agreement as repudiated by the owner. The charterer will be entitled to repayment without interest of the full amount of all payments made by him to the owner or stakeholder and shall in addition be paid by the owner liquidated damages of an amount equivalent to 50% of the charter fee.
>
> . . .
>
> **Clause 18a:** In this agreement, '*force majeure*' means any cause directly attributable to acts, events, non-happenings, omissions, accidents or acts of God beyond the reasonable control of the owner or the charterer (including, but not limited to, strikes, lock-outs or other labour disputes, civil commotion, riots, blockade, invasion, war, fire, explosion, sabotage, storm, collision, grounding, fog, governmental act or regulation, major mechanical or electrical breakdown beyond the crew's control and not caused by owner's negligence). Crew changes do not constitute *force majeure*. *Force majeure* does not excuse owner from payment of commissions."

7 In terms of the formulation of the claimant's claim, the matter is at an early stage in that the particulars of claim had not been filed as at the time of the application, albeit a draft was exhibited to an affidavit. As I understand from the draft particulars and from the skeleton and oral submissions, there are two distinct financial claims by the claimant. I shall deal with them in turn.

8 The first and original claim (in that it is the claim relied upon in the affirmation in support of the arrest) is for liquidated damages pursuant to cl. 9(c), that is some US$194,000. For the purposes of this claim, the substantive issue is whether or not the defendant can rely upon the *force majeure* provision in cl. 9(c) or whether, as alleged by the claimant, the mechanical breakdown was caused by the defendant's negligence. The affidavit evidence filed by both parties for the purpose of this application raises technical mechanical issues which may be of some complexity. Of

course, now is not the time to form a conclusive view as regards the evidence, what is apparent, however, given the terms of the charter agreement and the affidavit evidence, is that as a matter of law and fact the claimant has an arguable case.

9 As aforesaid, that was the only claim on the face of the affirmation by Isaac Marrache supporting the request for the arrest of the vessel. At that stage, the security sought by the claimant was of US$300,000, such figure taking account of the damages sought, expenses (presumably of arrest) and legal fees.

10 The claimant now, in the alternative, seeks damages for some US$530,913. This sum is in essence the difference between the returned charter fee for the *Islander* and the cost of chartering the substitute vessels. The legal bases upon which this claim is framed are multiple. They were described in submissions as arising by virtue of "anticipatory or actual breach" and based upon *The Mihalis Angelos* (1). Mr. Christodoulides did not take me to any particular passage but rather urged me to read the case and relied upon it "as a whole." It strikes me that there is a fundamental difference between that case and the present facts and it is, I think, particularly instructive to look at the judgment of Megaw, L.J., who said ([1971] 1 Q.B. at 209–210):

> "In my view, where there is an anticipatory breach of contract, the breach is the repudiation once it has been accepted, and the other party is entitled to recover by way of damages the true value of the contractual rights which he has thereby lost, subject to his duty to mitigate. If the contractual rights which he has lost were capable by the terms of the contract of being rendered either less valuable or valueless in certain events, and if it can be shown that those events were, at the date of acceptance of the repudiation, predestined to happen, then in my view the damages which he can recover are not more than the true value, if any, of the rights which he has lost, having regard to those predestined events."

11 Two matters, I think, arise from that passage. The first is that it highlights a fundamental difference between that case and the present facts, in that in *The Mihalis Angelos* there was a breach which was accepted. In the present case, it is not at all apparent how it is that the breach was accepted, particularly when the affirmation by Isaac Marrache leading to the arrest relies upon the charterparty as the basis for the relief and there is no suggestion of the breach having been accepted and the agreement thereby rescinded. Having inquired from Mr. Christodoulides as to the acceptance of the breach on the hearing of the application and he being unable to deal with the matter, and given time constraints, I afforded Mr. Christodoulides the opportunity of lodging written submissions. In those written submissions, Mr. Christodoulides, it seems

to me, no longer pursued a claim for anticipatory breach but submitted that the breach was not accepted and the charter remains alive. He then transformed the basis of his claim to a common law action of impossibility. As I understand it, impossibility would allow for renunciation of the contract, that is, it is but a different route to a claim for anticipatory breach.

12 I now turn to the second issue that arises from the passage by Megaw, L.J. When affording Mr. Christodoulides the option to lodge written submissions, I further requested that he explain why, depending upon the manner in which the claim was formulated, the quantification of damages would vary. That is an issue with which he dealt rather sketchily in his written submissions. To my mind, *The Mihalis Angelos* (1) is supportive of the proposition that on discharge of a contract the damages which are capable of being recovered are no more than those which could be recovered on application of the terms of the contract. It is also instructive to consider 1 *Chitty on Contracts*, 29th ed., para. 24–048, at 1398 (2004), under the heading "Consequences of Discharge," which states:

> ". . . [I]n assessing damages, the court must have regard to the terms of the contract in order to ascertain the performance promised in it, including performance which would have fallen due after the date of discharge. It must also give effect to terms of the contract which, for example, liquidate the damages recoverable or exclude or restrict the remedies otherwise available for breach."

13 Given the foregoing, I am of the view that the claimant does not have an arguable case for anticipatory breach or impossibility. Moreover, if I am wrong and a claim could properly be framed on that basis, the claim cannot be for more than the amount recoverable under the terms of the contract as liquidated damages. Howsoever the claim may be formulated, the only reasonably arguable claim is for the liquidated damages.

14 In the premises, I am of the view that adequate security in this case would amount to US$250,000, together with such further amounts as the Admiralty Marshal shall have defrayed to date in connection with the arrest and such further amount as she may estimate she will defray until release.

Form of security

15 The defendant further seeks that, in the event that security is ordered, such security be in the form of a first priority ship mortgage. He relies upon *The Vanessa Ann* (3) as authority for the proposition that the release of a vessel is a discretionary remedy and that the court can order that the security be in the form of a mortgage.

16 It seems to me that Mr. Hernandez is right in so far as the principle is concerned and therefore what I need consider is whether in the exercise of my discretion I should order the security to be in the form of a mortgage. *The Vanessa Ann* is a case where the facts are very distinct from the case before me; it involved a dispute between part-owners of a vessel which had been engaged on a charterparty previously authorized by the arresting party.

17 The security represents the *res*. The grant of the mortgage would, in the present case, represent a lesser form of security than the physical presence of the vessel, in that, albeit unlikely, the vessel could incur *in rem* liabilities with priority over the mortgage. Moreover, were the claimant to succeed in its claim, it could then possibly be forced to enforce the mortgage by rearresting the vessel.

18 In the premises, I am of the view that the security to be given is to be in the form of a bail bond, as was provided for in the old O.75, r.16 of the Rules of the Supreme Court; or by way of a suitable bank guarantee in a form satisfactory to the claimant's solicitors or to the court; or by way of a cash deposit with the Admiralty Marshal, who would no doubt deposit it in an interest-bearing account, with any interest accruing to the benefit of the defendant.

19 To the extent that issues may arise as to the detail of any security to be provided, the parties are to have liberty to apply.

20 Order:

(1) That the vessel be released to the defendant upon the provision of security in the sum of US$250,000 and such further sum as may have been expended to date by the Admiralty Marshal and such further sum as she estimates may cover the costs of arrest up to the date of release.

(2) That the security be in the form of:

(i) a bail bond;

(ii) a bank guarantee in a form satisfactory to the claimant's solicitors or to the court; or

(iii) a deposit of cash with the Admiralty Marshal.

(3) Liberty to apply for directions as regards (2).

Order accordingly.