Case No: 2009 FOLIOS 295 AND 1168

Neutral Citation Number: [2011] EWHC 2618 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2011

Before :

MR. JUSTICE TEARE

- -

Between :

RIMPACIFIC NAVIGATION INC	**Claimant**
- and -	
DAEHAN SHIPBUILDING CO.LTD	**Defendant**
-AND-	
WONDER ENTERPRISES LTD	**Claimant**
-and-	
DAEHAN SHIPBUILDING CO., LTD	**Defendant**

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Vasnati Selvaratnam QC and Sandra Healy (instructed by **Ince and Co LLP**) for the **Claimants**
The Defendant was not represented.

Hearing dates: 7 October 2011

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Judgment

Mr. Justice Teare :

1. This is the trial of an action by the Claimants, the owners of the vessels JIN MAN and JIN PU, against the Defendant for damages pursuant to two contracts of guarantee alleged to have been provided by the Defendant to the Claimants in respect of the liabilities of Daehan Shipping Co.Ltd. as charterers of each vessel. Although the Defendant applied to set aside service (which application was dismissed by Steel J. on 24 November 2009, [2010] 2 Ll.Rep. 236) the Defendant did not appear at the trial which accordingly took place in its absence. The facts of the case are summarised by Steel J. at paragraphs 2-10 of his judgment. I adopt them but do not repeat them.

2. After the hearing of this action on 7 October 2011 I concluded that the Claimants were entitled to judgment and made an order to that effect. These are the reasons for that judgment.

3. The Court has power to hear an action in the absence of a defendant; see CPR Part 39.3 and PD 39A para.2.2(1). I am satisfied by the 11th statement of Edward Graham of Ince and Co LLP, the Claimants' solicitors, that the Defendant has had notice of this hearing and of all the evidence on which the Claimants intend to rely. The documents which have been served on the Defendant in preparation for this trial are summarised in paragraph 6 of the Skeleton Argument prepared for the hearing by counsel for the Claimant.

4. Although no defence has been served in these proceedings counsel for the Claimant referred me to the points taken on behalf of the Defendant before Steel J. in November 2009 and to the pleading and evidence submitted by the Defendant to the courts of Korea in 2011. She invited me to consider those matters before deciding whether the Claimant was entitled to judgment in this action on the basis that those matters were likely to be the matters which the Defendant would have raised had it been represented at the trial. In essence the defence to the Claimant's claim would have been that the guarantees on which the Claimant sues were not binding upon the Defendant because the person who signed them, Mr. Ie Su Oh, did not have authority to bind the Defendant.

5. The Claimants accept that under Korean law, which governs the question of actual authority, Ie Su Oh did not have actual authority to bind the Defendant because, in circumstances where he was a representative director of both the Defendant and Daehan Shipping Co.Ltd. (the charterers), he required the approval of the board of the Defendant to bind the Defendant and he did not have such approval. However, the Claimants submit that under English law, which they say governs the question of ostensible authority, Ie Su Oh had ostensible authority to bind the Defendant. If, contrary to the Claimant's case, it is appropriate to consider Korean law the Claimants say that Korean law affords protection for parties acting in good faith with the result that the Korean court would only consider the guarantees not to be binding on the Defendant if the Defendant established either that the Claimants were aware of or, alternatively, were grossly negligent in remaining ignorant of the fact that (a) the issuance of the guarantee was an interested director transaction and (b) that approval of the board had not been obtained. It is said that neither matter can be established and so the guarantees are binding upon the Defendant notwithstanding the absence of actual authority.

6. These submissions were also made before Steel J. who, after hearing argument from counsel for both parties, held in a reasoned judgment, [2010] 2 Ll.Rep. 236, that the Claimant had very much the better of the argument that ostensible authority was governed by English law (see paragraphs 28-34) and that Ie Su Oh had ostensible authority to act on behalf of the Defendant (see paragraphs 35-43). He further concluded that under Korean law the courts would hold that the guarantees were binding upon the Defendant (see paragraphs 44-62).

7. On 25 March 2011 Steel J. ordered that the trial of this action be listed for hearing. The evidence relied upon by the Claimants and the Defendant at the jurisdiction hearing was to stand as their evidence at the trial but provision was made for the exchange of further factual witness statements and expert evidence on Koran law.

8. On 29 March 2011 the Claimants received a pleading served by the Defendant in Korea in parallel Korean proceedings. Annexed to it were a statement and other factual evidence. Although the pleading and evidence have not been served in this action the Claimants decided to respond to it as if it had been so served and accordingly have served further factual and expert evidence.

9. The approach I have taken in determining the issues in this action is as follows. The issues which might have been raised on this trial of liability were the subject of rival submissions between the parties before Steel J when the Defendant challenged the jurisdiction of this court. In a fully reasoned judgment he stated which of those submissions he preferred, though without formally resolving any of the issues. There was no appeal, permission to appeal having been refused by the Court of Appeal. In those circumstances the appropriate course appears to me to start with the views of Steel J., who expressed them having had the benefit (unlike me) of submissions on behalf of the Defendant, and then consider whether the material since produced in Korea causes me to reach a different view. If the additional material does not cause me to reach a different view, it will be necessary to make findings as to quantum.

Ostensible authority; the applicable law.

10. I have carefully considered the views expressed by Steel J. and respectfully agree with them. The authorities to which he referred show, in my judgment, that ostensible authority is governed by the law which applies to the contracts of guarantee purportedly made between the Claimants and the Defendant.

Ostensible authority; the facts

11. Steel J. set out the arguments addressed to him on behalf of the Claimants at paragraphs 37-38 and the arguments addressed to him on behalf of the Defendant at paragraph 39. He concluded that the latter arguments did not give the Defendant "anything approaching the better of the arguments on ostensible authority" and that the Claimants had much the better of the argument.

12. The pleadings and evidence provided by the Defendants in the Korean proceedings have given rise to additional arguments which might have been advanced by the Defendant had it appeared at this trial. Counsel have summarised those arguments under four headings:

The meeting of 5 March 2007

13. The case of the Defendant in Korea is that on 5 March 2007 Ie Su Oh visited the Claimant's agents Goldbeam in Hong Kong on behalf of Daehan Shipping, the charterers. Ie Su Oh has said in a statement dated 5 November 2009 (just before the hearing before Steel J. but not disclosed at that hearing) that in circumstances where he also signed the guarantees dated 20 December 2007 Goldbeam, and hence the Claimants, "probably had clear knowledge" that he was a director both of Daehan Shipping and of the Defendant. When being questioned on 27 August 2009 under suspicion of having committed a criminal offence connected with the signing of the guarantees he said that when he was appointed president and CEO of both companies in August 2007 the "maritime transport industry was shocked by the news that a young person had assumed the office of the president and CEO of the two companies." It appears that he was aged 39 at that time.

The intended guarantor

14. The case of the Defendant in Korea is that Ie Su Oh decided that the guarantor of the liabilities of Daehan Shipping under the charterparties was to be YS Heavy Industries which was soon to be "spun off" from the Defendant. He agreed this with "the Claimants' side". However, the split was not done as early as planned and so he decided "to provisionally provide letters of guarantee in the name of the Defendant." Thus the Claimants "were well aware that the act of providing the Guarantees …..had no effect at all on the Defendant." It was for this reason that he did not seek approval from the Board of Directors of the Defendant. This case is supported by Ie Su Oh's statement dated 5 November 2009 and by answers given by Ie Su Oh when being questioned on 27 August 2009 under suspicion of having committed a criminal offence.

The address of the defendant in the guarantees

15. The case of the Defendant in Korea is that the address of the Defendant is stated in the guarantees to be the address of YS Heavy Industries. That is said to "clarify" that YS Heavy Industries was to be "the only party assuming guarantee obligations."

The stamp affixed to the guarantees

16. The case of the Defendant in Korea is that Ie Su Oh affixed the stamp of YS Heavy Industries to the guarantees.

The effect of such matters on the decision and reasoning of Steel J.

17. Steel J. addressed an argument based on the fact that the Claimants had received an email dated 19 October 2006 from Yasoo Oh, CEO of Daehan Shipping. It was argued that the dual status of Ie Su Oh was apparent from the email; Yasoo Oh and Ie Su Oh were said to be same person. Steel J. said of this argument:

> "In my judgment this is thin material on which to base an allegation of awareness on the part of the claimants of joint directorship. But even if that fact was apparent despite the difference in name, it does little if anything to suggest that the

> claimants ignored the opportunity of ascertaining the consequential limitation on Mr. Oh's authority to execute the guarantee."

18. Mr. Lam Ting Pong of Goldbeam has made a witness statement (verified on oath in Hong Kong, served on the Defendant and not responded to by the Defendant) dealing with the meeting of 5 March 2007. Importantly he has produced the business card produced by Mr. Oh on that occasion. It declared the bearer to be Yasoo Oh, CEO of Daehan Shipping. Mr. Pong has said that he had no reason to think that the individual who signed the guarantees was the same person whom he met on 5 March 2007. No representative of the Claimant was present when the guarantees were signed on behalf of the Defendant. "Oh" is a very common name in Korea and he said he had no reason to connect Yasoo Oh who had visited on 5 March 2007 with the signatory to the guarantees, Ie Su Oh. He added that Yasso Oh visited Goldbeam again on 5 November 2008 following the collapse of the freight market. His card on that occasion again said the bearer was Yasoo Oh and said that he was CEO of Daehan Shipping and CMO (Chief Marketing Offier) of the Defendant. Yasoo Oh did not reveal on that occasion that had signed the guarantees. The first time Mr. Pong became aware that Yasoo Oh and Ie Su Oh were one and the same person was following the hearing before Steel J. in November 2009. He noted the allegation that it was common knowledge that the same person had been made CEO of the Defendant and Daehan Shipping at a young age but said that he did not know that and that no particulars had been given of where such information was reported.

19. I do not consider that the pleading served and evidence adduced in the Korean proceedings by the Defendant assists the Defendant in resisting the Claimant's case that Ie Su Oh had ostensible authority to sign the guarantees on behalf of the Defendant. He signed as CEO of the Defendant and for the reasons set out in paragraphs 37 and 38 of Steel J.'s judgment that is sufficient to give rise to ostensible authority to sign the guarantees. I am not persuaded that the fact that Ie Su Oh visited the premises of the Claimants in March 2007 under the name of Mr. Yasoo Oh, CEO of Daehan Shipping was sufficient to put the Claimants on notice, when they received the guarantees signed by Ie Su Oh in December 2007, that the signatory was the CEO of Daehan Shipping. One may speculate that "Yasoo" is another way of referring to "Ie Su" but this is speculation unsupported by evidence, or, as Steel J. put it, "thin material" upon which to base such an allegation.

20. Another principal strand of Ie Su Oh's evidence in Korea is that he, to the knowledge of the Claimants, intended that the guarantor would be YS Heavy Industries and that the Defendant, though named as guarantor, was never intended to be guarantor. It is difficult to follow why it is said that the Claimants must have appreciated that it was never intended that the Defendant was to be the guarantor when the guarantees were signed by the CEO of the Defendant apparently on behalf of the Defendant. In any event the Defendant's case does not appear to be supported by answers given by Guk-Hwan Cho, a broker acting for Daehan Shipping, in an examination in Korea on 7 January 2010. He said there was no prior agreement that YS heavy Industries would be the guarantor. Further, Mr. Lam has said in his statement, verified on oath, that he did not know of any agreement that YS Heavy Industries would be the guarantor. I therefore do not consider that the material before the court establishes that the Claimants appreciated that it was never intended that the Defendant be the guarantor.

21. So far as the final two points are concerned there appears to be no substance in them. The address of the Defendant on the guarantees was, according to the statement of Mr. Lam (verified on oath) the same address given on a previous guarantee issued by the Defendant dated 31 October 2006. There was therefore nothing in the address to put the Claimant on notice that it was not intended that the Defendant be guarantor. So far as the stamp is concerned it purports to be the stamp of the Defendant, not of YS Heavy Industries.

22. In my judgment there is therefore nothing in the additional evidence adduced by the Defendant or in the case advanced in Korea by the Defendant which leads to the conclusion that the views expressed by Steel J. on the jurisdiction application were wrong. I therefore find and hold that Ie Su Oh had ostensible authority to sign the guarantees on behalf of the Defendant.

23. It is unnecessary to deal with the argument that, assuming Korean law were relevant, the guarantees would be enforceable against the Defendant in any event. However, I have been asked to make a finding about these matters. It was argued before Steel J. that they would be enforceable because the Claimants had acted in good faith, that is to say, that they did not know, and had not been grossly negligent in remaining ignorant, that the guarantees were an interested director transaction and that board approval had not been obtained. Steel J. considered and rejected the Defendant's arguments on this issue at paragraphs 44-26 of his judgment.

24. I do not consider that the evidence adduced in Korea establishes that the Claimants either knew or were grossly negligent in remaining ignorant of the fact that the guarantees were interested director transactions. In any event Mr. Chang-Joon Kim, a Korean lawyer, has considered the evidence adduced in Korea by the Defendant in his further expert report dated 2 June 2011 and remains of the opinion that the guarantees are binding on the Defendant. He does not consider it likely that the Korean court would conclude that the Claimants either knew that Ie Su Oh was not authorised to sign the guarantees or had been grossly negligent as to the fact that he was not authorised by the Board to sign those guarantees. I have no reason not to accept that evidence and do accept it. I therefore find on the balance of probabilities that, if Korean law were relevant, the Claimants did not know that Ie Su Oh was not authorised to sign the guarantees and were not negligent, grossly or otherwise, as to the fact that he was not authorised by the Board to sign the guarantees. It follows that in my judgment the guarantees would be enforceable in Korean law.

Quantum

25. The sums claimed by the Claimants against the Defendant are set out in, and satisfactorily proved by, the 10th witness statement of Edward Graham. They are based upon and evidenced by the arbitration awards issued against Daehan Shipping. In respect of Rimpacific Navigation's claim damages in the sum of US21,767,454.92 are payable in respect of hire and damages, £11,963.54 in respect of the tribunal's costs and HK$102,498.73 in respect of Rimpacific Navigation's costs of the awards. In respect of Wonder Enterprise's claim damages in the sum of US$23,903,380.34 are payable in respect of hire and damages, £11,963.54 in respect of the tribunal's costs and HK$102,498.73 in respect of Wonder Enterprise's costs of the awards.

26. It was suggested before Steel J. that in circumstances where the Claimants sold the two vessels in June 2009 the Claimants should not be entitled to damages for the periods after the sale of the vessels. I do not accept this argument. The tribunal quantified the damages in an orthodox manner by assessing the rate at which the Claimants could have chartered out the vessels after termination of the charterparties and crediting that against the charter rates which they had lost. That crystallises the Claimants' damages. The fact that thereafter the Claimants sell the vessels is irrelevant to that calculation. The Claimant' position is no different as a result of the sale. Before the sale they had the capital value of the vessels. After the sale they had realised that capital value.

27. I therefore find the damages in the sums set out above together with the interest referred to in Mr. Graham's statement. The costs of the actions remain to be assessed.