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To: Transport Industry Operators

Sale of ship by court

The Court of Appeal of Hong Kong issued a judgment on 28 March 2019 dealing with a matter concerning the sale *pendente lite* of an oil tanker Brightoil Glory. [CAMP49/2019][2019HKCA395]

Background

The plaintiff was the mortgagee of the Brightoil Glory ("Vessel"), which was valued at approximately US\$60 million. The mortgagee's claim was about US\$33.8 million. There was therefore substantial equity in the Vessel of over US\$20 million, even taking into account the costs of maintaining the arrest estimated at US\$345,000 a month.

The Vessel was arrested by the bailiff on 21 January 2019. The mortgagee issued a notice of motion dated 25 January 2019 for appraisal and sale *pendente lite* of the Vessel for hearing on 4 February 2019. The defendants, which were the owners of the Vessel, did not attend the hearing. The High Court made an order as sought.

Pursuant to the order, an invitation to tender was issued by the registrar on 27 February 2019 and published on 13 March 2019 in newspapers and tenders were to be submitted by 2 pm on 28 March 2019 with completion to take place on 4 April 2019.

It was only on 26 March 2019 that the shipowners issued a summons for an order that the sale of the Vessel *pendente lite* be stayed for three months until 27 June 2019. The High Court did not accede to that application but on 27 March 2019 ordered to grant instead a stay until 24 April 2019. The mortgagee sought leave to appeal against the High Court's order.

Discussion

The main reason urged by the shipowners for a stay was that the shipowners group of companies, which were in grave financial difficulties, had reached an "advance stage" in the process of re-financing and signed a non-binding term sheet with a global investment firm. The global investment firm sent a letter dated 12 March 2019 to the mortgagee requesting a standstill agreement in respect of its action against the Vessel but the mortgagee had remained silent. The shipowners sought a stay as the refinancing was based on a defined list of assets and the Vessel was included in the list. If the assets of the group should change due to the sale of the Vessel, the shipowners were afraid that might prejudice the proposed refinancing.

The mortgagee advanced a number of reasons opposing a stay. The mortgagee submitted that the shipowners were potentially in contempt of court in including the Vessel in the refinancing negotiations and thereby attempting to interfere with the court ordered sale process. The mortgagee emphasised that to grant a stay in these circumstances would set a poor precedent in that a defendant who was potentially in contempt could, for a "thin reason", throw the court ordered sale process into disarray by seeking a stay at the eleventh hour. The mortgagee submitted this would have an impact not just on the parties but on all those who had submitted tenders for the

Vessel and this would reflect poorly on the jurisdiction of the Hong Kong court. The mortgagee also stressed the safety concerns of the Vessel in view of the coming typhoon season.

These matters had been weighed by the High Court in the exercise of its discretion to grant a stay. The Court of Appeal was asked to interfere with the exercise of the High Court's discretion. The Court of Appeal was not persuaded there was any valid basis to do so on the well-established principles governing an appeal against the exercise of discretion. The High Court declined to grant a three-month stay as sought and granted a stay short of one month to give a limited opportunity to the shipowners to pursue the proposed refinancing. The shipowners had provided an undertaking to the court to pay the costs for maintaining and preserving the Vessel during this period. The outstanding principal and default interest that would continue to accrue would be secured by the Vessel under arrest with a substantial equity. It could not be said that the High Court was plainly wrong to take a realistic and pragmatic route and suspend the sale process for a short period.

Conclusion

The Court of Appeal was not satisfied the proposed appeal would have reasonable prospect of success, nor was there some other reason in the interests of justice it should be heard. The Court of Appeal therefore refused leave to appeal and dismissed the mortgagee's application.

Please feel free to contact us if you have any questions or you would like to have a copy of the judgement.

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