LITIGATION DIGEST

Bitumen Invest AS v. Richmond Mercantile Ltd FZC [2016] EWHC 2957 (Comm), 2016 WL 07156944 [England]

Topics: Characterization; Independence; Leasing Finance; Demise Charters; Indemnity

Note: In a sale and lease-back transaction, Bitumen Invest AS (Shipowners/Beneficiary), a special purpose vehicle created by a group of Norwegian investors, bought a vessel, renamed Bitu Gulf (Vessel), in 2008 for USD 8.25 million from Concord Worldwide Inc (Charterer), a subsidiary of Richmond Mercantile Ltd FZC (Guarantor), with funds largely borrowed from Nordea Bank, which held a mortgage on the vessel. The Shipowners/Beneficiary demise chartered Vessel for 7.5 years to Windrush International SA (Charterer), another subsidiary of Guarantor, on a "hell or high water" basis, which then sub-demise chartered Vessel back to Charterer (the Charter). The opinion explained that "[t]he Demise Charter was a form of sale and lease-back of the Vessel."

As a condition of the transaction, Guarantor executed and issued an eight-page "Deed of Guarantee" (Guarantee) dated 16 May 2008 in favor of Shipowners/Beneficiary to ensure the performance of obligations incurred by Charterer. Guarantee referred to itself in the execution clause as "this Guarantee and Indemnity."

After Charterer failed to fulfill obligations under the Charter for payments including costs awarded in arbitration against Charterer, Shipowners/Beneficiary made certified written demands for payments on Guarantee and Guarantor refused to pay. As a result of this nonpayment, Shipowners/Beneficiary sued Guarantor and sought summary judgment. The High Court of Justice Queen's Bench Division, Commercial Court, Cooke, J., granted summary judgment in favor of Shipowners/Beneficiary.

Guarantor admitted that demands were made by Shipowner/Beneficiary but denied that the Guarantee was "an 'on demand' guarantee," that Charterer was in breach of the Charter, and challenged the alleged costs claimed and claimed set-offs and other costs.

Counsel based their arguments on what the Judge described as "two competing lines of authority with opposite presumptions to

be applied," one of which stated that no presumption should attach with respect to an undertaking given by a non-bank. The Judge cited *Marubeni Hong Kong and South China Ltd. v. Mongolian Government*, in which the *Marubeni* Judge stated "the absence of description of the document with which he was concerned as a 'performance bond' or 'on demand bond' in a transaction outside the banking context created a strong presumption against it being such and the question arose as to whether the wording of the instrument was sufficient to displace that presumption." [2005] EWCA (Civ) 395 [England], noted in 2006 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE 394. The other authority was *Paget's Law of Banking* (11th ed.) which states that "Where an instrument (i) relates to an underlying transaction between parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee."

The Judge noted that "these presumptions are, to some extent, based on particular labels or features of banking or non-banking transactions and any presumption can be displaced by the wording used. As this transaction is in the nature of a financing transaction, though taking the form of a Sale and Demise Charter arrangement, with a Deed of Guarantee as part of it, any presumption applicable to non-banking transactions that might be thought to apply will more readily give way to language which indicates the contrary."

As to the name given to the undertaking, the Judge stated "The particular label that the parties apply to the document is not determinative, nor very significant if the wording points in the opposite direction." The Judge stated that the issue was "whether or not the Deed constitutes an 'on-demand guarantee,' payable on the certification of sums due by the Owners, or whether, before liability arises under the Deed, the Owners must establish the liability of the party guaranteed."

The Judge decided that because the guarantee, sale, and the demise charter of the vessel were bound up "as part and parcel of an overall transaction," the transaction was "in the nature of a financing transaction, taking the form of a Sale and Demise Charter arrangement, with a Deed of Guarantee as part of it," and that any "presumption applicable to non-banking transactions" should give way to language that indicates the contrary. Shipowners/Beneficiary contended that on a true construction the guarantee was an "on-demand" guarantee, preventing any set-off defense, or counterclaim operating to reduce the claim. Guarantor argued that it was not an "on-demand" guarantee, denied liability pending adjudication or assessment, and contended that it was entitled to set-off. Guarantor cited authority that the absence of description as a "performance bond" or "on demand bond" in a transaction outside the banking context "created a strong presumption against it being such."

The Judge identified several features of the guarantee making it an "on-demand" guarantee, not a "see to it" demand. "Some of those features are not conclusive in themselves but point in that direction but others are not capable of sitting with the notion that this is a 'see to it' guarantee – in particular what can appropriately be described as the trigger for payment under the Deed. The key feature of the Deed of Guarantee appears in paragraph C of the Owners' classification of clause 2. The trigger for payment is the issue of a demand by the Owners for an amount certified by them, by written notice, as due as a consequence of Windrush failing to fulfil its obligations under the Charter.

This is referred to as an 'express' undertaking, no doubt to emphasise the absolute and unconditional nature of it."

The Judge was not persuaded that the Guarantee was not "on demand" by the absence of the phrase "conclusive evidence." "There are other features of the wording which support this but in themselves do not conclude the matter. It is true that the provision that the guarantor is to be a primary obligor and not merely a surety can be used with a view to avoiding the effect of the principle in *Holme v. Brunskill* that a guarantor is discharged where the beneficiary of the guarantee agrees with the primary debtor to vary the debtor's obligations. (1878) 3 Q.B.D. 495 [England]. There is however doubt as to whether this is necessarily effective…The guarantor is not merely to stand as surety for the 'due and proper…performance of all obligations, including payment obligations' but is to be primarily liable therefor." "[Guarantor] placed reliance upon other clauses in the Deed of Guarantee. Particular reliance was placed upon clause 5 which provided that the liability of the Guarantor should not be affected by (inter alia) 'anything which would have released or reduced the ability of the Guarantor to the Owners had the liability of the Guarantor under clause 2 been as principal debtor of the Owners and not as a guarantor.' Such a provision was, it was said, inconsistent with the notion that this was an 'on-demand' ordinary type guarantee and not a 'see to it' ordinary type guarantee. Whilst that may be so, this provision, as with many forms of guarantee, was one of a number of ancillary provisions which cannot affect the primary obligations in clause 2. That would be a case of the tail wagging the dog."

The Judge observed "Such provisions may be included to avoid any argument that variation of the underlying contract could imperil recovery under the Guarantee, regardless of whether or not as a matter of law it would do so. It could have been inserted simply to ensure that the rule applicable to true guarantees did not apply to the on-demand guarantee." "Furthermore, reliance on clause 5(h) which referred to both 'guarantee' and 'indemnity' cannot take the matter any further when considering the main obligations undertaken in clause 2, particularly bearing in mind the terms of the wording of execution at the end of the Deed."

The Judge denied Charterer's attempted defenses relying on set-off or counterclaim by pointing to terms in the guarantee that stated "any payments under this guarantee shall be made in full, free and clear of any deductions, withholdings, set-offs or counterclaims of any nature whatsoever." The Judge again pointed to the character of overall arrangement being a financing transaction, and determined that "the clear objective intention of the instrument is that payment should be triggered upon certification." ■

[AYW / ZLK / CEF]

Text: The opinion contained the following excerpt from the Guarantee:

"In consideration of the Owners entering into the Charter with the Charterers and delivering the vessel thereunder, and for other good and valuable consideration (the receipt and adequacy of which the Guarantor hereby acknowledges) the Guarantor hereby unconditionally and irrevocably guarantees as primary obligor and not merely as surety the due and proper performance of all obligations, including payment obligations, which the Charterers incur or may incur towards the Owners under the Charter (the 'Guaranteed Obligations') and to pay to the Owners on demand all monies as may fall due from the Charterers to the Owners and to discharge all Guaranteed Obligations or any part thereof when the same become due for payment or discharge."