Neutral citation No [2018] EWHC 4061 (Admlty)
Claim no. AD-2017-000042

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
BEFORE ADMIRALTY REGISTRAR JERVIS KAY QC

B E T W E E N

CLOSE BROTHERS LIMITED

Claimant

-and-

1. AIS (MARINE) 2 LIMITED (in liquidation)
2. MR PAUL SIMON CHANDLER

Defendants

Appearances
For the Claimant – Mr James Watthey instructed by Shoosmiths LLP
For the Second Defendant – Mr Marc Rivalland instructed by Direct Access

Hearing dates: 3rd- 5th July 2018
Handed down 17th September 2018

JUDGMENT

The Claim

1. By a Claim Form dated 6th April 2017, the Claimant seeks to recover the sum of £220,602.35 together with interest and costs, being the shortfall, arising out of a Marine Loan and Mortgage taken out by the First Defendant, dated 8th April 2015, with the backing of a Personal Guarantee provided by the Second Defendant.

Background

2. The Claimant, Close Brothers Limited, is a London based bank. The First Defendant, AIS (Marine) 2 Limited, was a company registered in December 2013 but which was placed in Compulsory Liquidation by a Court order of 23rd November 2017. The Second Defendant is Mr Paul Simon Chandler, the Personal Guarantor of the mortgage taken out by the First Defendant and issued by the Claimant. Mr Paul Simon Chandler is also a Director of the Second Defendant.

3. In April 2015, the First Defendant, as the owner of 64/64 shares in the British registered wind farm support vessel “OCEAN WIND 8 OF HARTLEPOOL” (“the Vessel”) entered into a ship mortgage whereby the shares in the Vessel were mortgaged to the Claimant to secure the terms of a loan agreement for €2,247,000 to assist the purchase of the Vessel for a price of €3,210,000.

4. The mortgage and its terms are evidenced by a Loan Agreement, dated the 7th April 2015 (the “Loan Agreement”), a Statutory Ship Mortgage dated the 8th April 2015 (“The Ship Mortgage”) and a Deed of Covenant dated the 8th April 2015 (“the Deed”). The relevant terms provided, *inter* alia, as follows:
    a) By Clause 3.1 of the Loan Agreement, that the First Defendant would repay the Claimant the amount of the loan together with contractual interest and make the payments in the manner and times set out in Schedule 1 of the Loan Agreement.
    b) The Repayments in Schedule 1 were to be made by way of 59 monthly instalments of €27,500 starting one month after drawdown, followed by a balloon payment of €1,149,850.60.
    c) Interest chargeable at 5.9% above base and upon late payments at the rate of 1.5% per month from the due date until payment, including after judgment.
    d) By Clause 8.1 of the Loan Agreement that the full loan would become repayable immediately together with interest, costs and expenses upon various listed acts of default, which included failure to pay instalments.
    e) By Clause 14, in the event of default the Claimant was entitled to take possession of the Vessel and to sell her.

5. The First Defendant failed to pay instalments under the mortgage as they fell due. As such, the account fell into default and the Vessel was repossessed and sold by the Claimant on 31st January 2017 for a gross price of £1,700,000.00. The Claimant appointed Braemar ACM Shipbroking to act as its selling agent.

6. From the gross sale proceeds, the sale costs of £93,296.49 were deducted. An issue has been raised as to the reasonableness of the costs. The net sale proceeds were applied to the balance outstanding on 31st January 2017, which was €2,106,102.70. At an exchange

rate of £1: €1.1585, this is £1,817,956.58. As the sale proceeds were insufficient to discharge the outstanding account, there remained a shortfall of £215,813.07. Further charges and interest have accrued since the sale.

7. The Second Defendant guaranteed the obligations of the First Defendant under a Deed of Guarantee and Indemnity dated 7th April 2015 ("the Guarantee"). As the First Defendant did not repay the loan and as there is an outstanding shortfall the main issues before the Court are whether the Claimant is entitled to recover the outstanding amount from the First Defendant and therefore whether the Claimant is entitled to recover it from the Second Defendant under the terms of the Guarantee.

8. By the undated Defence, the First Defendant accepted the fact of the mortgage and its terms, that it was in default and that the Vessel was sold by the Claimant on the 31st January 2017 for the sum of £1,700,000, that there was an outstanding balance of €2,106,102.70 and that the shipbroker was entitled to be paid the reasonable sum of £47,000. As to the remainder of the sale costs amounting to £93,296.49, and said to include legal costs of £9,186.83, mooring and maintenance costs of £33,570.54 and "not invoiced insurance" of £3,439.12, the First Defendant made no admissions because it had not been supplied with sufficient information. However a positive case has been raised that, in breach of its duty, the Claimant failed to sell the Vessel at the best price reasonably obtainable. By way of specific particulars the First Defendant has contended (i) that the value of the Vessel, by comparison with 2 older "DAMEN twin axe boats" which were on the market at the time, was no less than €2,500,000; (ii) the Claimant chose to sell the vessel to one of its own clients, C-Wind Limited without advertising the Vessel and below the true value of the vessel so that the burden rests upon the Claimant to prove that the Vessel was sold at the best price reasonably obtainable; (iii) that the Defendants will rely upon expert evidence. The Second Defendant adopted the Defence of the First Defendant and has averred that he therefore owed no sum to the Claimant.

The Claimant's Case

9. For the Claimant, Mr James Watthey has submitted:
    a. That this matter began as a claim for a shortfall under a Ship Mortgage against the First Defendant and for a full indemnity under a Deed of Guarantee and Indemnity against the Second Defendant.

b. That the First Defendant was placed in Compulsory Liquidation by Court Order of 23rd November 2017, therefore the claim against the First Defendant cannot be determined because it is stayed under s.130 Insolvency Act 1986.

c. Regardless of the Defendants' case of "sale at an undervalue", the claim against the Second Defendant is made upon an express contractual indemnity for which, under its terms, "sale at an undervalue" is not an available defence.

d. With respect to the costs and expenses of the sale the relevant vouchers have been provided and duly proved.

e. With respect to whether the sale of the Vessel was at Arm's Length or made to a connected person:

    i. The burden rests upon the debtor to show that a bank has acted unreasonably unless and until the debtor establishes that the sale was to a "connected person".

    ii. There was no evidence of such a relationship between the Claimant and the C-Wind Group of companies and that point has been abandoned by the Defendants.

    iii. Therefore the burden rests upon the Defendants to show that the Vessel was sold below value due to the lack of reasonable care on part of Close Brothers.

f. With respect to whether the Claimant failed to take reasonable care to sell the Vessel for the best price reasonably obtainable and whether, in doing so, the Claimant was in breach of its obligations to the Defendants:

    i. The Second Defendant is not just a guarantor with secondary liability, he is a primary obligor who, having agreed to the express terms of Clause 2.3 of the Indemnity, has undertaken to indemnify the bank against all losses. There is no scope of language in this Clause 2.3 for construing the words in such a way that the Second Defendant's liability is limited by any so-called sale at an undervalue. Therefore the question of sale at undervalue does not arise.

    ii. The expert evidence does not support a sale at undervalue.

        1. Even if the bank owed a duty to the Second Defendant to expend reasonable efforts to obtain a proper price, they did so. Bowtle - "*The Law of Ship Mortgages*" makes it clear that, in any event, the

threshold is a low one and should take into account commercial realities.

2. The Claimant's expert evidence demonstrated that the Vessel was sold within a proper price bracket and therefore that should be the end of the matter because only if the sale price was low enough to raise eyebrows would the Claimant need to show it has exercised reasonable efforts.
3. The Claimant relies on evidence on valuation from Mr Mross, Managing Partner and Owner of Global Renewable Shipbrokers GmbH (or "GRS"), which is in fact the broker that the Defendants insist that the Claimant should have used in the first place.
4. Unlike the Defendants' expert evidence from Mr Finlay, Mr Mross' report took into account "real life" value, market conditions and the value of other comparable vessels subject to "correction factors".
5. Mr Mross' graph in his report shows a likely spread of market values at various times in 2016 and, even before applying any margin of error, the sale price of the Vessel was clearly within that spread.
6. The Court should accept Mr Mross' opinion that "*It is questionable whether a higher sales price could have been obtained, given the poor market conditions for second-hand sales at that time and after the down cycle in CTV charter rates in 2016*". And further "*it is the Author's opinion that the obtained price was under the given circumstances within the range of obtainable prices*."
7. In the experts' Joint Statement, even Mr Finlay accepted that the applicable market was "*quiet*" and, in his report, it was described as "*poor or depressed*".

g. With respect to the allegation, raised by the Second Defendant, that there was a personal vendetta by Mr Kearsey against the Second Defendant ("the Kearsey factor"):
    i. The Claimant denies the Second Defendant's campaign that Mr Kearsey had a personal vendetta against Mr Chandler, was out to get him and therefore sought a low valuation.

ii. The reality is more mundane. The Second Defendant has had a series of failed and inoperative businesses and by the time of repossession, the First Defendant was in arrears, had been given its final chance and had no satisfactory plan to get back on track; further, it was alarming the bank with its lack of management control, the Second Defendant had disastrously fallen out with his joint venture partner Mr Chris Church and the Vessel was unemployed with no future business lined up.

iii. No bank in these circumstances would have continued to extend credit.

iv. There was no vendetta, the bank had simply and justifiably lost all confidence in the Defendants.

h. With respect to the choice of Braemar as broker:

i. Close Brothers appointed Braemar ACM Offshore as broker; a well-known London PLC that is entirely reputable with a large offshore department. Despite the Defendant claiming otherwise, this was an appropriate choice of broker.

ii. It is hard to see where this point, that Braemar was an inappropriate choice, takes the Second Defendant given that he says GRS was the right broker and GRS says the Vessel was sold in an appropriate price band.

iii. Braemar expended more than adequate efforts to sell the Vessel at a decent price, despite receiving little interest in the Vessel. It is to be noted that the Vessel's particulars were sent to 245 addresses and then to another 75 and that Braemar did a good job of selling the Vessel quickly in a weak market.

iv. The only offer higher than that of the eventual buyers, CWind Ltd who paid £1,700,000, was from JR Shipping who offered "EUR 2.2 to 2.3m" on the condition that the bank funded the purchase with EUR 2.3m loan. This was rightly considered to be unacceptable by the bank. As was the offer from the First Defendant itself at £1.4m.

v. Therefore, the Claimant took reasonable care to sell the vessel for the best price reasonably obtainable.

i. With respect to whether there was a recoverable shortfall and, if so, the quantum thereof:

i. In the circumstances, the full amount claimed of £220,602.35 together with costs and interest is owing.

ii. Close Brothers is entitled to a full contractual indemnity. Even if the bank owed duties to the Second Defendant, the Claimant did expend reasonable efforts and the Vessel was sold within a reasonable price bracket.

The Second Defendant's Case

10. For the Defendants, Mr Marc Rivalland has submitted:

a. With respect to the Mortgagee's Rights and Obligations:

i. Although the timing and the manner of sale is a matter for the mortgagee, the mortgagee owes a duty in equity to take reasonable care to obtain the best price reasonably obtainable at the time (*Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 at 1355 and others) which has been equated with the true market value (*Cuckmere Brick Co v Mutual Finance Ltd* [1971] Ch 949).

ii. The mortgagee will not be adjudged to be in default unless he is "plainly on the wrong side of the line". A true market value can have an acceptable margin of error (*Michael v Miller* [2004] EWCA Civ 282 where a bracket between £1.6 million and £1.9 million was permissible).

iii. "*It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property*" (*McHugh v Union Bank of Canada* [1913] AC 299 at 311. Cases predating this one need to be treated with caution for the reasons that appear in Cousins *The Law of Mortgages* 3ed at 26-52ff. From *McHugh* onwards, it is clear that good faith is not enough to rescue a mortgagee who sells at too low a price.)

iv. The mortgagee must act fairly towards the mortgagor. He can protect his own interests but he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor. He must take reasonable care to maximise his return from the property (*Palk v Mortgage Services Funding Plc* [1993] Ch 330).

v. The mortgagee owes the same duty to a guarantor. (*Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410; *China and Southsea Bank Ltd v Tan* [1990] 1 AC 536).

b. With respect to whether and the extent to which the sale should be reviewed by the Court, the so-called 'Red Flag test' should be applied.

   i. Fisher and Lightwood's *Law of Mortgage* suggests at 30.254 that a sale at just above the sum required to discharge the mortgage may be looked at carefully by the court, although there may well be occasions when that is the proper price or true market value.

   ii. It is questionable:

      1. How many mortgagees know that it is the law that the mortgagee must behave as a reasonable man would behave <u>in the realisation of his own property</u>, so that the mortgagor may receive credit for the fair value of the property sold.

      2. How many times a mortgagee sells a property to the first half-decent buyer, without ever giving the mortgagor's equity of redemption a thought. Yet the law is that the mortgagee may not sell hastily at a knockdown price sufficient to pay off the debt: *Palk v Mortgage Services Funding* [1993] Ch 330.

   iii. There are five reasons why this Vessel was sold at an undervalue of £1.7 million:

      1. *The Kearsey factor*. It is reasonable inference that the hurried sale process and the final selling price was driven by Mr Kearsey or Mr Kearsey/Mr Dramby. There is clear enough oral and written evidence from both Mr Chandler and Mr Bagshaw about Mr Kearsey's hostility. In fact Braemar notionally offered the Vessel for sale at €2.5 million) although "*anything with a 2 in front of it will do*". Who could that have come from and why such a large drop? Who tries to sell a property by saying the sale price is €2.5 million but €2 million will do. And why? Because the price has been set to cover the book debt of €1.98m. In the end they settled for €1.9 million. The reason in part is because Mr Kearsey had formed such a negative view of the business that even paying off the arrears was rejected. He wanted out. He was entitled to get out. But he wanted out too much.

      2. *The Braemar Factor.* Braemar was not experienced in the CTV field. There is no explanation as to how they came to a figure of

€2,250,000 on 30th September 2015. The comparables of which Mr. Chandler has given evidence were not discussed in the Braemar report. It may be that Braemar did not research the field properly through inexperience, or it may be that they took the comparables into account, but didn't refer to them or raise their valuation as a result and if not why not. It is clear that Mr Kearsey and the Claimants sold the ship in ignorance of the value of any comparables. Mr Blundell confirmed that there was no file note suggesting that they looked for comparables and the Braemar report doesn't draw their attention to it. It is trite law that it is no answer for a mortgagee to say that he hired a generally competent broker: *Raja v Austin Gray* [2002] EWCA Civ 1965 at [34]. The duty is not delegable by the mortgagee. If the broker fails to bring something to the mortgagee's attention, the penalty is not paid by the mortgagor.

3. *The failure by the mortgagees to know their necessary obligations.* Mr Blundell conceded that there is not a single note or email on the file in which the mortgagor's equity of redemption is ever discussed. By November 2016, driven by Mr Kearsey, Close Brothers did not conceive of any duty it owed to the mortgagor. They should have had a more reasoned approach which should have required Close Bros to ask questions such as: (i) We've been doing this for years, has the market turned this bad? Or (ii) are we selling for the wrong price now? (iii) Why has the mortgagor's equity of €963,000 been wiped out so quickly and contrary to the Bank's projections when there were only two and a half months of arrears?
4. *The personal guarantee factor.* It may be and probably is a very sensible <u>commercial</u> approach for a mortgagee to have regard to a personal guarantee from the mortgagor's director. But it can lead a mortgagee astray because: (i) A bank that fails to sell a chattel for the right price because it knows it can make the shortfall elsewhere will be held to account. (ii) Instead of 'sticking to its guns' at the counter-offer price of £2 million (€2.3m), the Claimant collapsed

and accepted an offer of £1.7 million (€1.944m). No doubt the Claimant would have preferred C-Wind to offer another £200,000, but when they didn't the Claimant had no compunction accepting the lower offer, not because it was behaving as a reasonable man would, but because it knew it could sue the Second Defendant on his personal guarantee. (iii) That is not a legitimate way for a mortgagee to market a vessel. In focusing on the personal guarantee, the Claimant lost sight of its duty to achieve the best price reasonably obtainable. The Claimant has a duty to take reasonable steps to achieve the best price reasonably obtainable and it is not a reasonable step to sell at a price on the grounds that any shortfall will be made up elsewhere.

5. *The failure to start off the sale process at the right price.*
    a. This depends upon the effect of the expert evidence.
    b. It is not correct that the Claimant cannot be criticised for the timing of the exercise of its power of sale because it does not have a freestanding discretion. The Court won't countenance a mere criticism of the timing or the method of the sale but the mortgagor, is required to take such steps as will realise the "proper" price. Timing may be a matter for the mortgagee, but not if it also results in a reasonable price not being obtained.

c. *The indemnity point.* With respect to the Claimant's argument to the effect that even if the Vessel should have been sold for more than €1.9 million that would provide a defence only for the insolvent First Defendant but not for the Second Defendant because the document that he signed entitled "Guarantee and Indemnity" is, on its true construction, not a guarantee but an indemnity.
    i. It is too late to take this point on the first day of trial. It should have been pleaded in the Particulars of Claim or, after Mr Chandler's denial of liability, by way of Reply. The Court should not hear this argument without requiring a further amendment to the pleading which should be refused at this stage. Mr Chandler may well have a Defence to a claim on an indemnity like misrepresentation or rectification. It's too late to investigate that now.

ii. The point is, in any event, bad. This Court is exercising its equitable jurisdiction, not a common law jurisdiction involving the true meaning of the words in the personal guarantee. Equity would never allow contractual words to defeat in these circumstances: *China and South Sea Bank v Tan Soon Gin* [1990] AC 536.

d. *With respect to the sale costs.* Although certain costs can be accepted as proper nonetheless it is for the Claimant to prove its case adequately which has not been done.

Consideration

11. It is to be noted that the proceedings against the First Defendant have been stayed. In these circumstances Mr Rivalland is only acting on behalf of the Second Defendant.

12. It is, I think, helpful to consider the relevant principles applying the relationship between a mortgagee and mortgagor with respect to the sale of property of which a mortgagee has taken possession in the exercise of its rights under the mortgage deed. At the hearing for summary judgment Mr. Rivalland submitted and I accepted that the relevant authorities demonstrate the following:

   a. The mortgagee of a ship owes the same duty of care in relation to the sale as any other mortgagee owes, see *Gulf and Fraser Fisherman's Union v Calm C Fish Ltd* [1975] I Lloyds Rep 188.

   b. The mortgagee owes a duty in equity to take reasonable care to obtain the best price reasonably obtainable at the time, see *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 at 1355 and others, which has been equated with the true market value *Cuckmere Brick Co v Mutual Finance Ltd* [1971] Ch 949.

   c. Although the timing and the manner of sale is a matter for the mortgagee, he will be liable to the mortgagor if he fails to act with reasonable care to obtain a proper price. The property must be fairly and properly exposed to the market, absent cases of real urgency, see *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA Civ 1409.

d. The mortgagee will not be adjudged to be in default unless he is "plainly on the wrong side of the line". A true market value can have an acceptable margin of error, *Michael v Miller* [2004] EWCA Civ 282 where a bracket between £1.6 million and £1.9 million was permissible.

e. The mortgagee must behave as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold, see *McHugh v Union Bank of Canada* [1913] AC 299. (Cases predating *McHugh* are to be treated with caution for the reasons that appear in Cousins *The Law of Mortgages* 3rd ed. at 26-52ff).

f. If the mortgagee breaches his duty, the remedy is not common law damages, but an order that the mortgagee account to the mortgagor, not for what he actually received, but what he should have received.

g. The mortgagee must act fairly towards the mortgagor. He can protect his own interests but he is not entitled to conduct himself in a way which unfairly prejudices the mortgagor. He must take reasonable care to maximise his return from the property, *Palk v Mortgage Services Funding plc* [1993] Ch 330.

h. The mortgagee owes the same duty to a guarantor, *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410; *China and Southsea Bank Ltd v Tan* [1990] 1 AC 536.

i. The mortgagee's duty, to take care to sell for the best price reasonably obtainable, is not delegable. He does not perform his duty merely by appointing a reputable agent to conduct the sale, see *Raja v Austin Gray* [2002] EWCA Civ 1965 at [34].

j. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off the debt": Lightman J sitting in the Court of Appeal in *Silven Properties*.

k. A sale at just above the sum required to discharge the mortgage may be looked at carefully by the court, although there may well be occasions when that is the proper price or true market value, as suggested by Fisher and Lightwood's *Law of Mortgage* at 30.254.

l. The mortgagee cannot sell to himself, either alone or with others, or to a trustee for himself, nor to anyone employed by him to conduct the sale unless the sale is ordered by the court and he has obtained permission to bid, *Farrar v Farrars Ltd* (1888) 40 ChD 395 at 409, and

m. Where the mortgagee sells to a "connected" person, the burden of proof is reversed and the mortgagee must prove that he took reasonable care to obtain the best price, *Saltri III Ltd v MD Mezzanine SA Sicar & ors* [2012] EWHC 3025.

n. The reason for considering whether the mortgagee and the purchaser are or may be "connected" is the need to guard against unconscious bias as well as the risk of other forms of skulduggery, *Australia & New Zealand Banking Bangadilly* (1978) 139 CLR 195, quoted with approval in *Alpstream AG & ors v PK AirFinance SARL & ors* [2013] EWHC 2370.

13. In my view the above is a correct statement of the relevant principles and I have heard nothing at the recent hearing to persuade me otherwise. At the earlier hearing I refused to give summary judgment in favour of the Claimant because it appeared to me: (i) that there was an issue as to whether the sale had been made to a "connected person" in the form of C-Wind which, it was asserted, was a client of the Claimant which would, if proved, reverse the usual burden of proof; and (ii) there was insufficient evidence available to come to any safe conclusion as to whether the Vessel had been sold at a proper price or not.

14. At the trial no evidence was provided which could support a conclusion that the purchaser was a "connected person" as considered in the decision of *Saltri III Ltd v MD Mezzanine SA Sicar & ors* [2012] EWHC 3025 and, in those circumstances Mr Rivalland, properly, abandoned that point. That was important because it meant that the burden of demonstrating that the sale was at a price which was improperly low remained upon the Second Defendant.

15. Mr Rivalland maintained his arguments relating to the manner in which the sale had taken place and the possible reasons for that. That was an acceptable stance because, if it

is established that the sale was made at a price which was improperly low, he still has the additional burden of demonstrating that the sale came about because of the Claimant's behaviour, such as the manner in which the Vessel was placed upon the market and allegedly marketed and, in the somewhat peculiar circumstances of the present case, because of the evidence of the antipathy which arose between Mr Kearsey, the official at the Bank at the relevant time. However the vital issue is whether the vessel was, in fact, sold at an undervaluation because it is only in those circumstances that it is relevant to consider whether the Bank acted improperly. In my view to argue that the mere fact that the Bank acted unreasonably so as to reach a conclusion that the Vessel was sold at an improper value is to put the cart before the horse, because there is no legal basis for concluding that the Bank should be made accountable to the owner unless that behaviour actually gave rise to a proved loss.

16. With respect to the issue of whether the sale price was within the acceptable ambit for a vessel of her type at the relevant time each party called a person to give expert opinion evidence. The Claimant obtained a report from Mr Matthias Mross, a shipbroker of Global Renewable Shipbrokers ("GRS"), who also gave oral evidence. The Second Defendant instructed Mr N Finlay MBE, who has over 60 years marine experience as a ship's engineer, as Superintendant Engineer with Westminster Dredging Co and from 1979 as a surveyor and Marine Consultant with an interest in 'workboats'.

17. Mr Mross opined that the sale price obtained for the Vessel "*was at the lower side but within a sales price range considered by the Author as reasonable*". In addition he stated "*It is questionable whether a higher sales price could have been obtained, given the poor market conditions for second-hand sales at that time and after the down cycle in CTV charter rates in 2016.*" He based his opinion on his knowledge of the market and, because there were actually no or few direct comparables available, on a careful, and in my view, acceptable assessment of the values of broadly similar vessels from his data, over a period re-calibrated so as to equate those sales to the Vessel in question.

18. Mr Finlay opined that a "*fair and reasonable estimate of the value of the Vessel was Euros 2.8 million to 2.9 million*". His report stated that this was "*Having researched the market, taken into consideration the age, Class, condition of the vessel, outstanding repairs and current market forces.*" He also stated that: "*The valuation has been carried*

out using the standard method of evaluation and the recommended depreciation rate for vessels of this type. As standard it is based on a willing buyer and a willing seller. It does not take into account the adverse effects of a poor or depressed market, such as exists now. In those circumstances it becomes a buyers market and it is unknown what someone would pay for a vessel." In the joint statement Mr Finlay revised his opinion that, in the market conditions appertaining to Category 1 vessels in January 2017, a sale price of Euros 2.4 million to Euros 2.5 million "*should have been achievable*".

19. Having been involved, during my time at the bar, in a very large number of cases which required consideration of ship valuations I think that it is appropriate to observe that not only is it a difficult operation requiring a wide and intimate knowledge of the relevant markets which have been known to fluctuate rapidly and significantly but that opinions may differ markedly between brokers as to the true value of a vessel at any given time. Usually the best guidance is to be obtained from actual sales of similar vessels. Since it is rare for any two vessels on the market at a relevant time to be identical the best that can usually be done is to assess the market in the light of whatever information is available with regard to similar vessels. Mr Mross was trained as a Naval Architect and has been with a firm involved with and specialising in the marketing of vessels similar to the subject Vessel for a number of years. His opinion was clearly stated and backed by a recorded data base and as scientific a process as was possible in the circumstances of the present case. He was not pedantic but his views were well measured and sensible. He clearly had a very sound knowledge of the general market conditions relating to the relevant class of vessels at the appropriate time. I found him to be an impressive witness in whose opinion I consider the court can have confidence.

20. Despite his long association with and service to the workboat industry for which he has been decorated, I did not find Mr Finlay's evidence as helpful or as persuasive as that of Mr Mross. There are a number of reasons for that: (i) he is not an accredited broker although he may have been "involved with sales and valuations" over the years; (ii) he does not maintain a data base of comparable vessels and was not even aware of the sale of the subject Vessel until after he was instructed; (iii) he told me that he did not look for comparable vessels when considering his valuation for the court which was surprising; (iv) he stated that he would 'sound out' the market in order to get information to make a valuation; (v) he would use contacts but that he would not ask GRS even though it might

be a leading broker; (vi) he was very vague about who he would talk to; (vii) he accepted that he was not a broker and that valuing vessels was about 10-15% of his business; (viii) despite the fact that he acknowledged that a vessel was worth what someone would pay for it, ie a sale between "a willing buyer and a willing seller", it was very surprising that he had given no consideration to the state of the market at the time of his initial valuation; (ix) finally I was concerned as to how or what his instructions from the Second Defendant were. These instructions were not, contrary to present practice, provided to the court.

21. In reality it was difficult to ascertain what was the basis for Mr Finlay's valuation of the vessel or whether it could be said to have had real validity. Taken as a whole there was an aura of vagueness and uncertainty about his evidence so that I do not consider that I can place reliance upon it as expert evidence.

22. Taking these factors into account I accept Mr Mross' evidence that the sale price, albeit perhaps on the low side, was in the appropriate bracket for the Vessel at the time when the sale took place. It was also striking that he considered that it was unlikely that a higher price could have been achieved because of the state of the market at the relevant time. More importantly, since the burden rests upon the Second Defendant, I am satisfied that the evidence of Mr Finlay does not establish that the sale price actually achieved was less or materially less than the Vessel's open market value at the time.

23. Since I do not consider that the Vessel was sold at an undervalue it is unnecessary to consider why that came about or whether it arose from a breach of any duty which the Claimant owed to the Defendants to achieve the best reasonable price. However for the sake of completeness I have the following comments.
    a. *With respect to the appointment of Braemar.* If a mortgagee, which is a professional lending bank, wishes to repossess and sell a vessel it is hardly surprising that it would employ a broker to perform this duty and to give the Bank advice. Braemar is a well established International Ship broker of good reputation and I do not consider that making such an appointment can seriously be regarded as acting in breach of an obligation to the mortgagor or guarantor.
    b. However, as the authorities indicate that the mere appointment of a broker cannot diminish the duties of the mortgagee itself, this must mean that the mortgagee will be liable for any failings by its broker. In other words the broker is acting as a

selling agent of the mortgagee rather than as an independent contractor for whose actions the mortgagee is not liable. That being so, the question is whether the actions of the broker or the Bank brought about the sale of the vessel at an undervalue.

c. Although a criticism has been made that Braemar did not advertise the Vessel nonetheless the evidence showed that it sent the particulars to over 300 recipients. Given the restricted nature of the market and the number of operators involved it seems probable that Braemar's marketing efforts were more than adequate. No evidence was provided and no case put forward as to what Braemar should have done to improve the marketing. For instance no case was made out as to where or how Braemar could or should have advertised or whether that would have had a significant effect.

d. The reality is that there was a response which was muted. The only offer made which exceeded the sale price was based upon borrowing conditions which would have meant that the Bank was wholly or almost wholly financing the deal. No reasonable Bank could have been expected to accept such conditions.

e. Mr Watthey submitted that Mr Chandler agreed to his suggestion that Braemar did nothing wrong. That is correct but Mr Chandler qualified that by saying that "*they do what they are told by Close Bros*". Insofar as that referred to whether a broker would actually conclude a sale without the instructions of its principal I consider that is correct. However there is no evidence that Close Bros ever suggested to its broker, or would have been likely to suggest, that the vessel should be deliberately sold at an undervalue. I regard that a such a suggestion is so far fetched that it should be discarded.

f. The First Defendant relied upon the fact that vessel was apparently sold in haste. However ships are wasting assets which cost money to moor and maintain. In the present case the mooring and maintenance costs put forward were £33,570.54. This demonstrates that a mortgagee is usually justified in obtaining a sale at the earliest date which is commensurate with recovering as much of the capital as possible.

g. *With respect to the apparent antipathy between Mr Chandler and Mr Kearsey.* The evidence is that Mr Kearsey, according to Mr Chandler, took a strong dislike to him. That is not contested as Mr Kearsey did not give evidence. However Mr Watthey submitted that this probably arose out of the fact, which is demonstrated

in the documentary evidence, that Mr Kearsey was concerned about the state of the loan, its security, Mr Chandler's business record which was very poor and the fact that Mr Church and Mr Chandler had fallen out so that the Vessel was not under charter. It is a fact that Mr Chandler's business record was poor and that the existing business was obviously foundering in circumstances where the Bank was likely to lose money. I consider that Mr Watthey is probably correct in his analysis and that Mr Kearsey had lost all confidence in the Defendants. The most important factor is that the First Defendant was in arrears with its repayment schedule and the Bank was entitled to realise its security. In my view the apparent antipathy, although real, had little to do with the sale of the vessel or how it took place.

24. *With respect to Mr Watthey's submission on the indemnity point.* Mr Rivalland complained that the point was not pleaded and had been made very late so that it should be ignored. It is really a point of construction of the Guarantee and raises some interesting points but for the reasons already given I do not need to consider it.

25. *The deductions from the sale value.* These were referred to as being £93,296.49 in paragraph 9 of the Particulars of Claim but were not particularised. Mr Rivalland accepted that there were bound to be some expenses but, as they had not been admitted, they should be proved. I was told that the relevant "vouchers" had been disclosed and that no formal objection had been taken to them. If this was a claim for damages in an Admiralty Reference it would be usual for the Defendant to take specific objection to such part of this type of expense as it considered appropriate. It appears to me that both sides have taken their eye off this particular ball so that it has not been properly considered. I have little doubt, as Mr Rivalland fairly accepted, that costs of the nature of those put forward would be usual where the sale of a vessel took place. Where a vessel is sold by the court those costs form part of the Marshal's expenses and are recovered from the proceed of sale before other priorities are worked out. This may explain why these items have been overlooked. Be that as it may I consider that a fair way of dealing with them would be for the Claimant to provide a Schedule setting them out to which the Defendant may respond. If there is further information necessary then that should be provided to the Second Defendant. In the event that there remains a dispute I direct that each party should provide its evidence and a joint schedule which succinctly contains

each party's case 5 days before the date which will be fixed for handing down this judgment (which cannot take place before September) and that any outstanding disputes will be considered at that hearing.

Conclusion

26. For the reasons set out above I conclude that there should be judgment for the Claimant in a sum to be assessed upon consideration of any further submissions to be made as to the appropriate deductions from the sale price.

Dated this 17th day of September 2018