IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ADMIRALTY COURT (QBD)

Case No. AD-2020-000084

[2021] EWHC 1582 (Admlty)

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

15 June 2021

Before:

MR ADMIRALTY REGISTRAR DAVISON

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Between:

TECOIL SHIPPING LTD

Claimant

- and -

(1) NEPTUNE EHF
(2) RSG UNDERWRITING MANAGERS EUROPE LTD (trading as "LODESTAR MARINE")
(3) ROYAL & SUN ALLIANCE INSURANCE PLC

Defendants

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Mr Tom Bird (instructed by **Stephenson Harwood**) for the **Claimant**
Mr Kishore Sharma (instructed by **Clyde & Co**) for the **Defendants**

Hearing date: 18 May 2021 (by Microsoft Teams)

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Approved Judgment (promulgated via publication on Bailii)

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Introduction

1. On 18 May 2021 I heard cross-applications – the defendants' application to set aside judgment in default and the claimant's application for summary judgment. I reserved my decision. On 25 May 2021, which was after I had drafted my judgment but before I had circulated the draft, I received an email from the parties to the effect that they had settled in principle. The parties invited me to "down tools" pending finalisation of the settlement agreement.

2. Following the practice encouraged in *HFC Bank Plc v HSBC Bank Plc* (CAT 10th February 2000), the parties were absolutely correct to have informed me of the settlement in principle and I record my gratitude to them for having done so. As the Court of Appeal said in that case:

> "… in a case where judgment has been reserved, it is the duty of the parties and their professional advisers to inform the court immediately they become aware of any development which may make it unnecessary for judgment to be delivered. The foundation of that duty is not the personal inconvenience caused to the members of the court, acute though that may be. It is the requirement, which should be obvious to all, that the court's resources should be properly and efficiently deployed. These observations apply just as much to cases where judgment is reserved at first instance as to cases in which judgment is reserved in this court".

3. Because the case had been fully argued and because those arguments, so far as they related to the application to set aside the judgment in default, raised issues of wider interest, I said that I proposed, notwithstanding the settlement, to promulgate that part of my judgment. In doing so, I am following the practice described at paragraphs 23.70 to 23.74 of Zuckerman on Civil Procedure: Principles of Practice 4th Ed. Essentially, whether to promulgate a judgment in these circumstances is a matter of judicial discretion:

> "In exercising this discretion, the court must determine what course of action is in the public interest. Relevant factors will include, naturally, the nature and significance of the judgment on the one hand, and the wishes of the parties on the other; they will also include the relative positions of the parties, whether one of them is a litigant in person, reputational considerations and the like."

4. Of those factors, it seems to me that the wishes of the parties would be the dominant consideration and would be deserving of very careful consideration. Here, the parties did not object to my taking the course I proposed. Indeed, they encouraged it by the making of further submissions on the status and effect of an *in rem* judgment; see below.

Narrative

5. These proceedings arise out of a collision on 18 July 2018 between two ships, the "POSEIDON" and the "TECOIL POLARIS". The claimant ("Tecoil") is the owner of the "TECOIL POLARIS", an oil tanker. The first defendant, ("Neptune"), now in liquidation, is the owner of the "POSEIDON", a research/survey vessel. The "TECOIL POLARIS" was at berth at Albert Dock, Hull. The "POSEIDON" was manoeuvring towards berth when she struck the starboard side of the "TECOIL POLARIS" causing considerable damage. Neptune has never disputed liability for the collision.

6. The "POSEIDON" had P & I insurers, Lodestar Marine Limited ("Lodestar"). Lodestar acted as agent for Royal & Sun Alliance Insurance Plc ("RSA"), who were the underlying insurer. (I will refer to them together as "the Insurers" or "the Insurer Defendants"). The Insurers are respectively the second and third defendants. On 3 August 2018 Lodestar issued a letter of undertaking ("the LOU") "for and on behalf of" RSA, which provided as follows:

> "IN CONSIDERATION of your releasing and/or refraining from arresting or re-arresting at any time hereafter or otherwise detaining the 'POSEIDON' or any other vessel or property

> in the same or associated ownership, management, possession or control for the purpose of obtaining security in respect of your claim arising out of the above collision we hereby undertake to pay you on demand such sum or sums as may be due to you from the owners of the 'POSEIDON' in respect of your said claim either by agreement between the parties hereto or by the final unappealable judgment of the English Courts, provided always that our total liability hereunder inclusive of interest and costs shall not exceed the sum of US$200,000."

7. On 28 June 2019, Tecoil commenced *in rem* proceedings against the "POSEIDON". No acknowledgement of service was filed and on 18 December 2019 Tecoil applied for judgment in default. According to the longstanding practice and procedure of the Admiralty Court, the application required "evidence proving the claim to the satisfaction of the court" (see CPR rule 61.9(3)(a)) and a public hearing of the application in open court. The hearing took place before the then Admiralty Registrar, Mr Jervis Kay QC, on 14 January 2020. The Registrar handed down his judgment on 24 February 2020; see [2020] EWHC 393 (Admlty). Tecoil was awarded EUR124,462 and £119,033 plus costs assessed at £105,584.50 (a grand total of around US$525,000). Some time before that judgment was delivered, it had become clear that RSA were not intending to make payment under the LOU. In an email sent to the claimant's solicitors, Stephenson Harwood, on 9 January 2020, Clyde & Co, acting for RSA, had said as follows:

> "any judgment that your clients may obtain in these proceedings can and will only be a judgment against the "POSEIDON" itself as a *res*, and cannot and will not take effect as an *in personam* judgment against any legal or natural person, in particular, the owners of the "POSEIDON"."

8. It was very clear from this correspondence that the Insurers intended to argue that the LOU would not respond to an *in rem* judgment. Although it had always been the claimant's position that the LOU responds to an *in rem* judgment, Clydes' position in correspondence left the claimant with no real choice but to issue an *in personam* claim against Neptune seeking substantially the same relief before the expiry of the 2-year time limit under the Merchant Shipping Act 1995 on 18 July 2020.

9. The claimant issued the present claim on 16 July 2020.

10. On 12 October 2020 Tecoil made formal demand under the LOU for the sum of US$200,000, which, as expected, Clydes rejected on the ground that the LOU only responded to an *in personam* judgment against Neptune. They further said that, notwithstanding that Neptune and RSA had taken no part in the *in rem* proceedings and notwithstanding that the judgment was an *in rem* judgment, it would be open to Neptune to contest liability and quantum in the *in personam* proceedings.

11. Before the service of the claim form, Tecoil amended it pursuant to CPR 17.1(1) so as to add Lodestar and RSA as parties and to include the claim against them for the sum due under the LOU, plus interest and costs. Tecoil served the amended claim form on the Insurers within the jurisdiction, and on Neptune's liquidator in Iceland pursuant to an order of 7 January 2021, which gave permission to serve out of the jurisdiction. (Neptune had gone into liquidation two years previously on 4 January 2019.)

12. On 5 February 2021, time having expired for Neptune to file an acknowledgement of service, the claimant made a request for judgment in default. Judgment was entered against Neptune on 12 February 2021. That same day, Tecoil made a further demand under the LOU, but this too was rejected. In an email dated 17 February 2021 Clydes advanced arguments as to why the Insurers' liability under the LOU was not engaged. These were that (a) the Default Judgment was not a "final unappealable judgment" and that (b) the LOU was not intended to protect Tecoil from the risk of Neptune's insolvency in the event that the "POSEIDON" was not of sufficient value to satisfy its claims. The latter argument was expressed as follows:

> "As we have touched on in our email of 15 October 2021, the fundamental point that you seek to overlook is that, on its true construction, and as was contemplated by the parties at the time that it was given, the function of the LOU was to place your clients in no less favourable position that if they had arrested the vessel in consideration of your clients agreeing to release and / or not arrest and / or not re-arrest her. The LOU did not constitute an "all risks" insurance protecting your client from all risks of being unable to enforce their claims against the "POSEIDON". The fact is that Vessel is available within the jurisdiction to be enforced against. Your clients' problem is that she does [not] appear to be of sufficient value to satisfy their claims, and that her owners are insolvent. Neither risk was intended to be covered by the LOU and neither is covered by it on its true construction."

13. On 8 December 2020, the Insurers applied to set aside the service of the Amended Claim Form on them and on 26 February 2021 they applied to set aside (1) the order giving Tecoil permission to serve Neptune out of the jurisdiction in Iceland and (2) the Default Judgment against Neptune.

14. Those applications came before me at a hearing on 12 March 2021. I rejected the procedural objections taken by the Insurers to the service of the Amended Claim Form on them and to the order giving permission to serve out on Neptune. But I deferred consideration of the substantive application to set aside the default judgment against Neptune. This was because, subject to the outcome of the procedural issues, Tecoil intended to apply for summary judgment against the Insurers under the LOU and the application to set aside the default judgment against Neptune was best heard at the same time as that application.

15. On 23 March Tecoil issued an application for (1) permission to re-amend the claim form so as to plead a claim based on the 12 February demand; and (2) for summary judgment against RSA.

The application to set aside the default judgment against Neptune

16. Mr Sharma put this application on two bases. First, he submitted that the judgment was "wrongly entered" and therefore fell to be set aside as a matter of right pursuant to CPR rule 13.2. Second, in the event that that submission failed, he submitted that the judgment ought to be set aside as a matter of discretion pursuant to CPR rule 13.3.

Set aside as of right?

17. The first submission was based upon the proposition that, in a collision claim, judgment in default was not available unless the party seeking judgment had either filed a collision statement of case or, at least, obtained an order dispensing with that requirement.

18. CPR rule 61.9 is in these terms:

> "(1) In a claim in rem (other than a collision claim) the claimant may obtain judgment in default of –
>
> (a) an acknowledgment of service only if at the date on which judgment is entered–
>
> (i) the defendant has not filed an acknowledgment of service; and
>
> (ii) the time for doing so set out in rule 61.3(4) has expired; and
>
> (b) defence only if at the date on which judgment is entered –
>
> (i) a defence has not been filed; and
>
> (ii) the relevant time limit for doing so has expired.
>
> (2) In a collision claim, a party who has filed a collision statement of case within the time specified by rule 61.4(5) may obtain judgment in default of a collision statement of case only if at the date on which judgment is entered–
>
> (a) the party against whom judgment is sought has not filed a collision statement of case; and
>
> (b) the time for doing so set out in rule 61.4(5) has expired.
>
> (3) An application for judgment in default –

(a) under paragraph (1) or paragraph (2) in an in rem claim must be made by filing-
(i) an application notice as set out in Practice Direction 61;
(ii) a certificate proving service of the claim form; and
(iii) evidence proving the claim to the satisfaction of the court; and
(b) under paragraph (2) in any other claim must be made in accordance with Part 12 with any necessary modifications."

19. Mr Sharma submitted that we were in the territory of sub-rule (2) and that judgment in default was therefore only available against Neptune if Neptune had not filed a collision statement of case. I was referred to passages from various textbooks which were said to support this view.

20. I do not think that this submission reflects the wording of the rule. The requirement to serve a collision statement of case is triggered by the filing of an acknowledgement of service; see CPR rule 61.4(5). By rule 61.4(3) an acknowledgement of service is mandatory. By rule 58.6(2) the period for filing the acknowledgement of service was 14 days after service of the claim form. The order giving permission to serve out of the jurisdiction relaxed this requirement in accordance with PD6B paragraph 6.3 so that the period stipulated in this case was 22 days after service of the claim form. Here, no acknowledgement of service was filed and the requirement to file a collision statement of case was never triggered. That meant that the application was governed by sub-rule (3)(b) of rule 61.9, i.e. it had to be made "in accordance with Part 12 with any necessary modifications".

21. Contrary to Mr Sharma's submission, the textbooks are unanimous that judgment in default of acknowledgement of service is indeed available in a collision action which has been brought *in personam*. It is sufficient to quote from two of them. Marsden & Gault on Collisions at Sea, 15th Ed at 20-054 say this: "In a claim *in personam*, a failure to acknowledge service and give notice of intention to defend in time may result in the claimant obtaining judgment in default". Meeson & Kimbell on Admiralty Jurisdiction and Practice, 5th Ed at 7.74 say this: "In a claim *in personam* judgment may be obtained in accordance with the ordinary rules for default judgments under the CPR. A request for judgment should be made in Form N227."

22. Although it does not arise, had we been in the territory of sub-rule (2) of CPR rule 61.9, it would have been necessary for Mr Sharma to distinguish Mr Admiralty Registrar Kay QC's decision that judgment in default of acknowledgement of service was available in a collision claim *in rem*. This point had been carefully considered by the Registrar. Had it been necessary for me to decide it, I would have followed his decision, with which I respectfully agree.

23. Mr Sharma had a subsidiary point, which was that the inclusion in the request for default judgment of sums in respect of "fixed interest" and "costs" rendered the judgment "wrongly entered" because these were not claimed in the claim form. There are two short answers to this. First, "wrongly entered" in CPR rule 13.2 is confined to cases where "any of the conditions in rule 12.3(1) and 12.3(3) was not satisfied". Mr Sharma's point was not in either category. Second, these sums were claimed in the claim form.

24. Before leaving the points made by the Insurer Defendants under rule 13.2, I feel I should mention their sheer redundancy. If a collision statement of case had been filed by Tecoil (despite the absence of an acknowledgement of service) no one would have read it. If the sums (in my view rightly) included for fixed interest and costs were removed from the default judgment, it would still greatly exceed the maximum sum due under the LOU.

Set aside as a matter of discretion?

25. Rule 13.3 provides:

"(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –
(a) the defendant has a real prospect of successfully defending the claim; or
(b) it appears to the court that there is some other good reason why –
(i) the judgment should be set aside or varied; or

> (ii) the defendant should be allowed to defend the claim.
>
> (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.
>
> (Rule 3.1(3) provides that the court may attach conditions when it makes an order)"

26. Mr Sharma's starting point was the one foreshadowed in Clydes' response to the 12 October 2020 demand under the LOU. That response, dated 15 October 2020, said that it would be "open to Neptune in *in personam* proceedings against it to contest liability for and/or the amounts of the sums for which the Registrar gave judgment *in rem*". Mr Sharma developed this response by reference to the cases of *The Stolt Kestrel* [2016] 1 Lloyd's Law Rep 125 and *Pattni v Ali* [2007] 2 AC 85. In short, he said that Mr Admiralty Registrar Kay QC's judgment of 24 February 2020 was not an *in rem* judgment because it did not determine the status of the *res*, i.e. the "POSEIDON". The Registrar's determinations were "*in personam* decisions" (paragraph 25 of Mr Sharma's skeleton) not "*in rem* decisions". Accordingly, they did not "bind all the world" and were not "conclusive evidence of the matters decided therein".

27. On the face of it, that somewhat surprisingly framed submission was at variance with the stance taken by Clydes in their email of 9 January 2020 set out at paragraph 7 above (which stated emphatically that any judgment in the *in rem* proceedings would not have the status of an *in personam* judgment). It was also contrary to the general understanding of practitioners as to what is meant by an *in rem* judgment. The proceedings before Mr Admiralty Registrar Kay QC were quite clearly *in rem* proceedings in that they were brought against a *res*, the "POSEIDON", and they established rights over the *res* which were good against all the world. In fairness, I do not think that Mr Sharma, or Clydes, were saying differently. What I understood them to be submitting was that the monetary judgment awarded by the Registrar and the determinations that led to that monetary judgment were not binding on Neptune; they were only binding on the "POSEIDON".

28. Subject to that threshold point, and by reference to accepted principles governing the assessment of damages in collision cases, Mr Sharma went on to submit that there was a "real prospect" of establishing that because of the unsafe and dilapidated state of the "TECOIL POLARIS" at the time of the collision and her detention by the Maritime and Coastguard Agency, she was effectively worthless. Hence, he submitted, the damages should be either nil, or, at least, less than those awarded by Mr Admiralty Registrar Kay QC and below the limit of US$200,000 in the LOU.

29. Without so deciding, I think that Mr Sharma was probably correct to say that the judgment in the *in rem* proceedings against the "POSEIDON" could not be enforced (I might perhaps better say "directly enforced") against the owners, Neptune. The following passage from the judgment of Hobhouse J in the *Nordglimt* [1987] 2 Lloyd's Law Rep 470 was approved by the Court of Appeal in the *Stolt Kestrel*:

> "Unless and until anyone appears to defend an [Admiralty] action *in rem*, the action proceeds solely as an action *in rem* and any judgment given is solely a judgment given against the *res*. It is determinative and conclusive as against all the world in respect of the rights in the *res* but does not create any rights that are enforceable *in personam.*"

The following quotation from Brandon J's judgment in *The "Conoco Britannia"* [1972] 2 QB 543 at 555 is also in point. Having considered *The Dictator* [1892] P. 304, *The Gemma* [1899] P. 285 and *The Banco* [1971] P. 137, he said:

> "It has been thought to be implicit in those decisions that, in a case where the defendant did not appear to an action *in rem*, there would be no right in the plaintiff to do more than satisfy the judgment out of the *res*. There would be no further right to issue the ordinary forms of execution in order to recover the balance outstanding."

30. But these are references to enforcement of the judgment in the *in rem* proceedings. In the present proceedings, Tecoil are not seeking to enforce the *in rem* judgment of the Registrar against Neptune. They have, rather, brought an entirely fresh action. To quote from Admiralty Jurisdiction and Practice, 5th Ed at paragraph 3.24: "it is a well-established principle that even though judgment has already been obtained in a claim *in rem*, a party may bring a subsequent claim *in personam* in respect of the same claim, unless the proceeds of sale are sufficient to cover the damages". In such a claim, it does not at all follow from the judgments of Brandon J and Hobhouse J quoted above that Neptune is entitled to re-litigate all the issues in the *in rem* action. I would hold that as against Neptune the judgment *in rem* is indeed conclusive evidence of the matters therein decided and it is not open to Neptune to go behind it. This is because although Neptune were not, strictly speaking, parties to the *in rem* proceedings, they were "at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court"; see the analysis of Brett LJ in The "*Parlement Belge*" (1880) LR 5 PD 197 (CA) at 218. The liability to compensate was "fixed not merely on the property, but also on the owner through the property", *ibid*. That is why, following longstanding practice, the owners appeared on the *in rem* claim form as nominal defendants and were described there and in other documents as "The Owners of the Ship "POSEIDON""; (see PD61 paragraph 3.3). Understood as a claim in which they were "indirectly impleaded" and fixed with liability "through the ["POSEIDON]"", it is clear that in this subsequent action *in personam* they are bound by the determinations in the *in rem* claim and there would therefore be no point at all in setting aside the default judgment. I would hold that that result would follow save, perhaps, in a case where, despite service on the ship, the owners were able to satisfy the court that they had not had notice of the *in rem* proceedings. That would be a very rare case.

31. Following the hearing, my attention was drawn by Mr Sharma to the decision of the Court of Appeal in *Ward v Savill* [2021] EWCA Civ 1378. That case concerned a declaratory judgment given in *in personam* proceedings. The judgment was held not to be binding against the respondent, Katherine Savill, who was not a party to the proceedings in which the declaratory judgment was given. Therefore, when the claimants brought a second, proprietary claim against her, they were required to re-plead and prove the facts which formed the subject matter of the declaratory judgment. The declaratory judgment had not been expressed to be *in rem* and had only been intended to take effect against the original seven defendants. The nub of the decision was that Mrs Savill was a stranger to the declaratory judgment and it would have been contrary to fundamental principles of natural justice for her to have been bound by it.

32. *Ward v Savill* has little, if any, relevance to this case. Mr Admiralty Registrar Kay QC's judgment was an *in rem* judgment given in *in rem* proceedings in which Neptune were "indirectly impleaded" in the sense described above. Neptune cannot be regarded as strangers to those *in rem* proceedings and no principle of natural justice is offended by holding that they are bound by the outcome.

33. A proposition of law can often be tested by the extent of its appeal to common sense. If the Insurers in this case were to try to explain to the man in the street their proposition that a judgment expressed as being against "The Owners of the Ship "POSEIDON"" was not binding upon the owners of the ship "POSEIDON", they would be met with incredulity – or worse.

34. In case I am wrong about this, I will set out briefly my reasons why I would not, anyway, as a matter of discretion set aside the judgment:

    i. The Insurers had a full opportunity to participate in the *in rem* proceedings, which, if they wished to contest the quantum of the claim, would have been the proper thing to do. They were served with the proceedings and with the application for judgment in default. They quite deliberately decided to take no meaningful part. All they did was to send a junior fee earner from Clydes to the hearing in order to take a note. That was a tactical decision which they took advisedly. They can hardly be heard to complain about the outcome or to deploy their complaints as a basis for their application to set aside judgment in these proceedings.

ii. To the extent that issues arose concerning "TECOIL POLARIS's" state of repair, her detention by the MCA and her trading prospects, those issues were fairly drawn to the attention of the Registrar and his judgment considered and reflected them. The Insurers had had the ship surveyed after the collision. But the report of their surveyor was not shared with Tecoil nor produced at the hearing. If the Insurers wanted to question the cost of repairs as the correct measure of loss, (which it usually is), then it was incumbent on them to deploy evidence to demonstrate that that was not the proper measure in this case. They did not do so. (They have still not produced their surveyor's report.) In these circumstances, even if the judgment of the Registrar is not conclusive evidence against Neptune of Tecoil's losses, (which, in my judgment, it is), it is nevertheless highly persuasive evidence which I am not persuaded there is a real prospect of disturbing.

iii. Even if I thought that some heads of damage might be reduced, I am wholly unpersuaded that Neptune could ever reduce the sums awarded below the US$200,000 maximum of the LOU. Even if the collision repairs and the loss of freight were to be reduced to zero, (itself a fanciful proposition), the claim with interest and costs still topped US$200,000.

iv. The liquidator of Neptune has said that he does not intend to challenge the Registrar's judgment.

v. If (as I assume to be the case) the Insurers have the right to be subrogated to the defence of this claim, they should have filed an acknowledgement of service and exercised that right. They did not do so. Indeed, they have still not filed an acknowledgement of service. That appears to have been a stance adopted in order to avoid submitting to the jurisdiction – a stance only reversed at the hearing itself.

vi. The cost of setting aside judgment in default and requiring Tecoil to prove its claim for a second time would be wholly disproportionate. That is especially so given (a) the real value of the claim (US$200,000) and (b) the costs that have been generated by the Insurers' conduct of their opposition to the claim so far. Mr Bird characterised that conduct as taking "any procedural point, however misconceived, in the hope of derailing or delaying the claim". Regrettably, that description was, in my view, justified.

35. Following *Gentry v Miller* [2016] EWCA Civ 141 the exercise of the discretion to set aside judgment in default under CPR rule 13.3 is governed by *Denton* criteria. In the light of the foregoing, those criteria point decisively to my refusing the application. But I would go further. In the light of the factors set out at i. and ii. above, to set aside judgment and to allow the Insurers to re-litigate Tecoil's claim would be an abuse of the process.

The application for summary judgment

36. As I have already indicated in the introductory paragraphs to this judgment, because the parties have settled (on confidential terms) it is unnecessary and it would be inappropriate to promulgate my judgment on this aspect.