

1979 September 21

[MALACHTOS, J.]

1. DEUTSCHE SCHIFFFAHRTSBANK A.G.,
2. STAATLICHE KREDITANSTALT,

Plaintiffs,

v.

THE SHIP BILLY EX JANNE WEAR NOW LYING
AT THE PORT OF LARNACA,

Defendant.

(Admiralty Action No. 133/79).

Admiralty—Ship—Mortgage—Loan—Statutory mortgage on ship in consideration of loan—Default of payment of loan—Judgment for the principal amount and interest—And order for appraisalment and sale of ship.

5 *Admiralty—Practice—Ship—Appraisalment and sale—Mode of.*

By virtue of a loan agreement dated 30th November, 1977, the plaintiffs, banking corporations incorporated in the Federal Republic of Germany, agreed to loan to the owners of the defendant ship and to another company the amount of D.M. 460,000. In consideration for the advancement of this loan and as security for the repayment thereof the owners agreed to grant to the plaintiffs a second statutory mortgage on the defendant ship. The said amount of D.M.460,000 was repayable on demand, and in any case not later than six months from the date of the draw down, together with accrued interest and incidental expenses. In case of default in the payment on the due date of the above amount or the accrued interest it was agreed that the balance of the principal amount remaining outstanding should carry interest at the rate of 10% per annum. It was further agreed that the owners should pay to the plaintiffs all costs to be incurred by them in connection with the protection, preservation and enforcement of their security. The principal amount of D.M. 460,000 and interest thereon became due and payable on June 15, 1978 and the owners inspite of repeated demands by the plaintiffs wrongfully defaulted in the payment

thereof. Hence this action whereby the plaintiffs claimed as follows:

(a) The outstanding balance of the principal amount	D.M.460,000	
(b) Accrued interest on the principal amount at the rate of 10% per annum from 15.6.1978 until 31st May, 1979	D.M. 44,211.11	5
(c) Expenses incurred by plaintiffs in connection with the protection etc. of their security	D.M. 2,758.32	10
Total	<u>D.M.506,969.43</u>	

On the aforesaid amount of D.M.506,969,43 the plaintiffs, also, claimed interest at 10% per annum as from 1st June, 1979 until final payment and an Order of the Court for appraisal and sale of the defendant ship, which has since the filing of the action been under arrest, in satisfaction of their claim. 15

The owners of the defendant ship admitted that the mortgage in question was executed and registered but they denied that the plaintiffs advanced to them the said amount of D.M.460,000 or any other amount. 20

Held, that the evidence adduced by the defendant on the issue of consideration cannot be accepted; that, therefore, the defence of failure of consideration cannot stand; and that, accordingly, judgment and order is hereby given in favour of plaintiffs against the defendant ship as follows: 25

- (a) Judgment for the equivalent in Cyprus currency of the sum of D.M.460,000.
- (b) Interest at the rate of 7% per annum on the above sum from 20.12.77 to 19.6.78 and at 10% per annum thereafter to final payment, minus D.M.15,737.22 paid on 26.10.78. 30
- (c) The plaintiffs are entitled to their costs, including the costs of P.W.2 who came from abroad, specially allowed, to be assessed by the Registrar. 35
- (d) Order that the defendant ship, which is under arrest in the port of Larnaca, be appraised and sold. The Marshal himself or any one or more experienced person or persons he may choose to appraise the said ship

according to the true value thereof and immediately after carrying out such appraisal, furnish forthwith to the Registrar of this Court a statement in writing showing the value of the appraised ship and also the amounts of fees, costs and charges and expenses incurred.

(e) The ship in question to be sold by the Marshal by public auction or private treaty for the highest price that can be obtained for it but for not less than the appraised value unless the Court, on the application of the Marshal, allows it to be sold for a lesser amount. Notice of the date of sale to be given to both the first and the second mortgagees; and

(f) Immediately upon completion of the sale the gross proceeds thereof should be paid into Court and a statement signed by the Marshal showing the amounts so paid, as well as all fees, costs, charges or expenses incurred in carrying out the sale, should be furnished to the Registrar of this Court. Such statement should be accompanied by any vouchers necessary to show the amount of the monies expended.

Judgment and order for appraisal and sale of defendant ship as above.

25 **Admiralty action.**

Admiralty action for D.M. 450,000 due under a mortgage.

E. Lemonaris, for the plaintiffs.

E. Psillaki (Mrs.), for the defendant ship.

Cur. adv. vult.

30 MALACHTOS J. read the following judgment. On the 25th day of May, 1979 the plaintiffs who are the second mortgagees of the defendant ship, instituted in this Court legal proceedings in order to realise the amount of D.M. 460,000 secured by the mortgage plus interest and costs. At the same time the plaintiffs
35 applied and obtained a warrant of arrest and since then the defendant ship has been stranded in the Larnaca port as her owners could not bail her out.

The relevant facts of the case are the following:

The plaintiffs are banking corporations incorporated in the

Federal Republic of Germany. The defendant ship is flying the Cyprus flag and is owned by Santamar Maritime Co. Ltd., a company formed and incorporated in Cyprus with limited liability.

By virtue of a loan agreement dated 30th November, 1977 the plaintiffs agreed to loan to Santamar Maritime Co. Ltd. (hereinafter referred to as "the owners"), and Etorgio Maritime and Commercial S.A. of Panama jointly the amount of D.M. 460,000.

In consideration for the advancement by the plaintiffs of the aforesaid loan and as security for the repayment thereof, the owners agreed to grant to the plaintiffs a second statutory mortgage on the defendant ship. It must be noted here that at the time a first statutory mortgage on the defendant ship was existing in favour of Utraco Trading Company Ltd. of Gibraltar as security of a current account up to the sum of 700,000 Dollars.

On 19th December, 1977, the said mortgage was executed before the Consul of the Republic in Athens and was recorded according to law in the Ships Register at the Office of the Registrar of Cyprus Ships.

Pursuant to clause 2(B) of the deed of covenants accompanying the said mortgage, the owners agreed to repay to the plaintiffs on demand and in any case not later than six months from the date of the draw down, the principal amount of D.M. 460,000 loaned to them together with accrued interest and incidental expenses.

By virtue of clause 2(A) of the deed of covenants it is provided that in case of default in the payment on the due date of the amount or accrued interest the balance of the principal amount remaining outstanding should carry interest at the rate of 10% per annum.

By virtue of clause 5(0) of the deed of covenants the owners further covenanted to pay to the plaintiffs on demand all costs to be incurred by them in connection with the protection, preservation and enforcement of their security.

It is the allegation of the plaintiffs, as it appears in the petition, that the principal amount of D.M.460,000, loaned to the owners, and interest thereon, became due and payable on 15th June, 1978 and the owners inspite of repeated demands by the plain-

tiffs, wrongfully defaulted in the payment thereof and so they claim as follows:

	(a) The outstanding balance of the principal amount	D.M. 460,000
5	(b) Accrued interest on the principal amount at the rate of 10% per annum from 15/6/78 until 31st May, 1979	D.M. 44,211.11
10	(c) Expenses incurred by the plaintiffs pursuant to clause 5(0) of the deed of covenants	D.M. 2,758.32
	TOTAL	<u>D.M. 506,969.43</u>

On the aforesaid amount of D.M. 506,969.43 the plaintiffs also claim interest at 10% per annum as from 1st June, 1979 until final payment and an Order of the Court for appraisalment and sale of the defendant ship in satisfaction of their claim.

The owners of the defendant ship in their answer admit that the mortgage in question was executed and registered against the defendant ship but they deny that the plaintiffs advanced to them the amount of D.M. 460,000 or any amount whatsoever as agreed, or at all, either on the day of the execution of the mortgage or at any time and, alternatively, alleged that the loan, if any, was advanced to Etorgio Maritime and Commercial S.A. alone, who was the purchaser of the vessel Socrates, and contend that the mortgage was given for a consideration which has failed and is, therefore, void and of no effect whatsoever.

An alternative defence that the mortgage was void ab initio as having been granted ultra vires since George Hadjiyiannis who signed for the owners was not authorised to do so, was abandoned during the hearing of the case.

George Hadjiyiannis, the only witness called in support of the defence, stated that the only shareholders in the owning company is himself and his wife Zoe holding 80% and 20% of the shares respectively. He is the sole Director of this company. George Hadjiyiannis Shipping Co. Ltd. is a Cyprus company in which he and his wife are also the only shareholders holding 99% and 1% of the shares respectively and he is the sole Director of this company as well. This company is also registered in Greece in accordance with the Greek Law, Law 89/1967.

Etorgio Maritime and Commercial S.A. is a Panamanian

company and is owned by four shareholders, including himself, but he is not a Director of this company. However, George Hadjiyiannis Shipping Co. Ltd. is the administrator of the affairs both of Santamar, the owning company, and Etorgio in Greece as these companies are not registered there. 5

Etorgio negotiated the purchase from the plaintiffs of the ship Platon, which was laid up at Pireus for two years. This ship, according to the surveyor of the plaintiffs, needed about 300,000 U.S. Dollars for repairs. As spare parts for Platon were not available in the international market and the ship Socrates, which was laid up for many years in Pireus, owned also by plaintiffs No. 1, and was intended to be sold as scrap and as her engines were of the same make as those of Platon, purchase of this ship was also negotiated. Santamar, the owning company, got involved in this transaction in order to facilitate Etorgio. Both Platon and Socrates were delivered to Etorgio who took out the engines from Socrates in order to repair Platon and sold the rest as scrap. This witness further stated that although the plaintiffs had an obligation to deliver the ship Socrates to both companies they delivered it only to Etorgio. 10 15 20

Finally, this witness stated that as the repairs of Platon exceeded their expectations and after spending all their funds amounting to 1.5 million Dollars, they gave it up as the plaintiffs, whom they asked to finance them further, refused to do so. 25

I must say from the outset that the defence of failure of consideration put forward by the owning company of the defendant ship, cannot stand. I must further say that I do not accept the evidence of George Hadjiyiannis on this issue, who, according to documentary evidence adduced in this case, had the upper hand in the management of the affairs of all three companies involved. The owning company and George Hadjiyiannis Shipping Co. Ltd. are owned by him and his wife and in both of them he is the sole Director. He signed the loan agreement of the 30th November, 1977, *exhibit 2*, both for the owning company and Etorgio Maritime and Commercial S.A., as well as in his personal capacity. He also signed the memorandum of agreement of the 17th December, 1977, *exhibit 5*, as President of Etorgio company where it is stated that the buyer of the ship Socrates is Etorgio and on 19/12/77 signed the mortgage on behalf of the owning company, *exhibit 1*. So, it cannot be said that the owning company, two days later, 30 35 40

when the mortgage was signed on its behalf, did not have any knowledge that the ship Socrates was to be delivered to Etorgio.

5 From the certificate of delivery, *exhibit 3*, it is clear that the ship Socrates was delivered on behalf of the plaintiffs on the 20th December, 1977, to Captain Antonis Mourmouris who received her for and on behalf of George Hadjiyiannis Shipping Co. Ltd., and who, admittedly, was the Chief Pilot of this company at the time.

10 Having dealt with the main issue in this case, what remains to be considered next is to ascertain on the evidence adduced the amount due on the mortgage.

15 Helmut Patschke, assistant manager of plaintiff No. 1 bank, in giving evidence as P.W.2, stated, among other things, that the loan of D.M. 460,000 was to be repaid in full within six months after the date of delivery of the ship Socrates and that the interest for the loan was fixed at 7% per annum for this period and at 10% per annum for any time thereafter.

20 On 26/10/78, the amount of D.M. 15,737.22 was paid as against the mortgage debt representing interest as from 15/6/78 to 26/10/78. He also stated that on 27/8/1979, the day he was giving evidence before this Court, the amount due, including costs as he put it, meaning I suppose, the costs incidental to the mortgage, was D.M. 526,627.80, including interest up to that date.

25 As regards the expenses incidental to the mortgage, no particulars were given as to their nature and extent, to enable this Court to ascertain if they could be recoverable by virtue of the terms of the deed of covenants attached to the mortgage. The mode of payment, however, of the loan and the rate of interest
30 are provided by terms IV and V of the loan agreement, *exhibit 2*, and so the exact amount due can easily be ascertained. These terms read as follows:

35 "IV. The rate of interest for the loan is seven per cent (7%) per annum on the original principal sum from time to time outstanding and ten per cent (10%) per annum on any overdue instalment of interest. In the event that any instalment of interest shall not be paid within fourteen (14) days following its due date, then all remaining principal shall bear interest at the rate of ten per cent

(10%) per annum until payment of the overdue instalment of interest.

Interest begins to run at the date of delivery of the vessel to you. Interest is to be paid on the date of repayment of the loan as mentioned under clause V below. 5

- V. The loan is to be repaid in full within six (6) months after the date of delivery of the MV 'SOCRATES' to you."

Therefore, for the above reasons judgment and order is hereby given in favour of plaintiffs against the defendant ship as follows: 10

- (a) Judgment for the equivalent in Cyprus currency of the sum of D.M. 460,000.
- (b) Interest at the rate of 7% per annum on the above sum from 20/12/77 (the day on which the ship Socrates was delivered), to 19/6/78 and at 10% per annum thereafter to final payment, minus D.M. 15,737.22 paid on 26/10/78. 15
- (c) The plaintiffs are entitled to their costs, including the cost of P.W. 2 who came from abroad, specially allowed, to be assessed by the Registrar. 20
- (d) It is further ordered that the defendant ship, which is under arrest in the port of Larnaca, to be appraised and sold. The Marshal himself or any one or more experienced person or persons he may choose to appraise the said ship according to the true value thereof and immediately after carrying out such appraisal, furnish forthwith to the Registrar of this Court a statement in writing showing the value of the appraised ship and also the amounts of fees, costs and charges and expenses incurred. 25 30
- (e) The ship in question to be sold by the Marshal by public auction or private treaty for the highest price that can be obtained for it but for not less than the appraised value unless the Court, on the application of the Marshal, allows it to be sold for a lesser amount. Notice of the date of sale to be given to both the first and the second mortgagees; and 35

(f) Immediately upon completion of the sale the gross proceeds thereof should be paid into Court and a statement signed by the Marshal showing the amounts so paid, as well as all fees, costs, charges or expenses incurred in carrying out the sale, should be furnished to the Registrar of this Court. Such statement should be accompanied by any vouchers necessary to show the amount of the monies expended.

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Judgment and order for costs as above together with order for the sale and appraisalment of the defendant ship.

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