

1986 December 13

[DEMETRIADES, J.]

LAZAROS SOLOMONIDES & ANOTHER,

*Plaintiffs.*

v.

CLEARELAND SHIPPING COMPANY LTD.,

*Defendants.*

(Admiralty Action 346/78).

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*Admiralty—Mortgage of ship—Statutory mortgage effected by an attorney for a company with limited liability, which was the owner of the ship—Neither the mortgage nor the relevant Deed of Covenants were executed under the company's common seal—However, the relevant resolution of the Board of Directors and the Power of Attorney were duly executed under such seal—The finalisation of the resolution did not require the stamping of the documents with the company's seal—Consequently defendants cannot derive any assistance from sections 33(2), 35 and 36 of the Companies Law, Cap. 113.*

*Companies—The Companies Law, Cap. 113, sections 33(2), 35 and 36—See Admiralty, ante.*

The plaintiffs' claims are based on a statutory mortgage dated 27.9.77, to which a Deed of Covenants was appended, whereby the defendants, as the owners of the ship GEORGIA, had mortgaged her in favour of the plaintiffs as security for the payment to them of 12,000,000 Greek Drachmas with interest thereon at the rate of 1% per annum as from 27.9.77 till final payment. The said sum was to be paid by two instalments, namely 3,000,000 Drachmas plus all accrued interest on or before the 25.9.78 and the balance on or before 25.9.79. The plaintiffs brought the present action alleging that the whole mortgaged debt had become due and payable forthwith by reason of the fact that the defendants had broken

certain conditions of the Deed of Covenants, which provided that "in case of default in the due and punctual observance of any of the provisions of the Deed of Covenants.... the mortgagees may... declare the debt with interest thereon, to be due and payable immediately....".

The defendants in their Answer put up various defences, but they did not adduce any evidence at the trial, although most of them had to be proved by evidence. One of such defences was that neither the statutory mortgage nor the Deed of Covenants were executed by the defendants under the common seal of the company.

*Held:* (1) Though it is correct that the Mortgage and the Deed of Covenants were not executed under the common seal of the defendants, sections 33(2) and 36 of the Companies Law, Cap. 113 do not afford any assistance to the defendants, because, as both the resolution of the Board of Directors of the defendants, relating to purchase and mortgage of the ship to the plaintiffs, and the power of Attorney, signed by such Directors, by which authority was given to two persons to negotiate and complete such purchase and mortgage, were duly executed and properly sealed by the company's seal, the finalisation of such resolution did not require the stamping of the documents signed by one of the said Attorneys with the company's seal.

(2) There is support in the Answer filed by the defendants for the plaintiffs' version that the defendants had committed a breach of clause 12 of Article 1 of the Deed of Covenants.

(3) In the light of the above judgment would be given for the plaintiffs.

*Judgment as per claim.  
Costs against defendants.*

Cases referred to:

35 *Electricity Authority of Cyprus v. Petrolina Company Ltd.* (1971) 1 C.L.R. 19.

Admiralty Action.

Admiralty action for the sum of 12,000,000 Greek Drachmas on a mortgage duly registered on the defendant's ship "Georgia."

*L. Papaphilippou*, for the plaintiffs. 5

*M. Vassiliou*, for the defendants.

*Cur. adv. vult.*

DEMETRIADES J. read the following judgment. The plaintiffs in this action claim against the defendants, who are a limited company registered in Cyprus - 10

"(a) The equivalent of 12,000,000 Greek Drahas together with interest at the rate of 1% per annum as from the 27th September 1977 until payment on a mortgage duly registered on the defendant's Cyprus ship "GEORGIA". 15

(b) An order of the Court directing the defendants to deliver to the plaintiffs the ship "GEORGIA" wherever the same may be together with all her engines, machinery, apparel, equipment and all appurtenances appertaining or belonging to her on board or ashore including all nets, wires, nylon and polythylene ropes and chains and other properties and things of the said ship. 20

(c) A declaration that the Plaintiffs are empowered to sell the said ship "GEORGIA" by private treaty or otherwise for the payment of the mortgage debt, interest and costs. 25

(d) The costs and expenses of this action and of all proceedings herein."

It is the allegation of the plaintiffs that by a statutory mortgage dated the 27th September, 1977, to which a Deed of Covenants is appended, the defendants, as the owners of the ship "GEORGIA", which is registered in Cyprus, mortgaged her in their favour as security for the payment to them of the sum of 12,000,000 Greek Drach- 35

mas with interest thereon at the rate of 1% per annum as from the 27th September, 1977, till final payment and that this sum was to be paid to the plaintiffs in two instalments as follows:-

- 5      (a) On or before the 25th September, 1978, 3,000.000 Drachmas plus all accrued interest, and
- (b) On or before the 25th September, 1979, 9,000.000 Drachmas plus all accrued interest.

10      According to the plaintiffs, the said mortgage and the Deed of Covenants were executed in Greece and were signed on behalf of the defendants by their duly authorised agent Mr. Argyris Saliarellis, one of the Directors of the defendants. By their Petition the plaintiffs claim that these documents provided, inter alia, that:-

- 15      “(a) So long as the mortgage shall be outstanding, the owner shall not cause or permit the vessel to be operated in any manner contrary to applicable law.
- 20      (b) The owner will not sell or transfer or mortgage or demise charter the vessel in any manner without the written consent of the Mortgagees first had and obtained.
- 25      (c) In case of default in the due and punctual observance or performance of any of the provisions of the Deed of Covenants including those mentioned above, the mortgages may (inter alia):-
- 30      (1) declare the debt with the interest thereon, to be due and payable immediately and upon such declaration, shall become and be immediately due and payable.
- 35      (2) exercise all of the rights and remedies in foreclosure and otherwise given to mortgagees by the provisions of the laws of the Republic of Cyprus, and all acts amendatory thereof and supplemental thereto and of any other applicable jurisdiction.

- (3) bring suit against the Owner to recover the debt, interest, or any other obligation due thereunder.
- (4) take the vessel, wherever the same may be, without legal process and without being responsible for loss or damage; and the Owner or other person in possession forthwith upon demand of the mortgagee shall surrender to the mortgagee possession of the vessel and the mortgagee may hold, lay up, lease, charter, operate or otherwise use the vessel for such time and upon such terms as it may deem to be for its best advantage, etc. 5 10
- (5) the mortgagees shall be entitled as a matter of right and not as a matter of discretion (i) to the appointment of a receiver or receivers of the vessel, (ii) to a decree ordering and directing the sale and disposal of the vessel, and the Mortgagee may become the purchaser at such sale and shall have the right to credit on the purchase price any and all sums of money due under the mortgage." 15 20

The plaintiffs now allege that the defendants, in breach of the provisions of the said Deed of Covenants, removed and disposed the nets, wire ropes, polythelene ropes and other equipment and properties of the said vessel, the value of which exceeds \$70,000.00 and that they rendered the ship liable to be confiscated by the authorities of Kenya because, in breach of the laws of that country, the ship was engaged for fishing in its territorial waters without licence and without having her registered as a fishing boat. 25 30

The plaintiffs further allege that although they repeatedly asked the defendants to reinstate the nets, wire ropes and other properties of the vessel and to cease to commit the aforesaid breaches, the latter failed to comply to their request and as a result they, by a telex of their advocates dated the 31st July, 1978, which is exhibit No. 4 before me. notified the defendants that the said amount of 12,000.000 Drachmas with interest was, by reason of de- 35

faults under clauses 5 and 12 of Article 1 of the Deed of Covenants, due and payable immediately. These clauses read:

5            "5. So long as the Mortgage shall be outstanding, the Owner will not cause or permit the Vessel to be operated in any manner contrary to applicable law."

10            "12. The Owner will not sell or transfer or mortgage or demise charter the Vessel in any manner without the written consent of the Mortgagee first had and obtained, and any such written consent to any one sale, mortgage, transfer or charter shall not be construed to be a waiver of this provision in respect of any subsequent proposed sale, mortgage, transfer or charter. Any sale, mortgage, transfer or charter of the Vessel shall be subject to the provisions of the Mortgage and the lien it creates."

20            By their Answer the defendants allege that neither the statutory mortgage nor the Deed of Covenants were executed by them under the common seal of the company, nor were either of these documents executed by an attorney duly authorised by them and that same were simply signed in Athens and were not made by Deed as required by Law. By their said Answer the defendants, in the alternative, allege that, assuming that both documents were valid and binding on them, a fact that they deny, -

30            (a) they were subject to a condition precedent, namely that the plaintiffs would not, in any way, interfere with the operation of the ship or enforce the purported security in their favour, nor claim immediate repayment of the debt provided that the debt due to the plaintiffs was paid to them by instalments on the agreed dates;

35            (b) their terms were, on the same day, amended by an agreement entered into between the parties and one Argyris Saliarellis and a certain Akbar Kurji to the effect that upon payment of the debt due to the plaintiffs in the manner described in the said documents, the ship was to belong, free from all encumbrances, to the defendants and that because

of this agreement the plaintiffs cannot enforce the purported security in their favour, nor demand repayment of the debt until the defendants failed to repay it and that in view of this alleged agreement the plaintiffs are estopped from demanding immediate repayment or to enforce the purported security. 5

A further alternative defence pleaded by the defendants is that in July 1978 the first plaintiff, who was also acting as an attorney for his co-plaintiff, said to Mr. Saliarellis, who was acting on behalf of the defendants, that the plaintiffs were only interested in being paid the instalments in time and agreed that the defendants could charter the said vessel to Alpha Enterprises S. A. who, under the Charter Party, would advance the necessary money to the defendants to pay the debt due to the plaintiffs by instalments on the agreed dates and that the defendants, relying upon this representation, acted to their detriment by chartering the said vessel to the said Alpha Enterprises S. A. In the circumstances, the defendants further claim that the plaintiffs, in view of their said representations, are estopped from enforcing the purported security in their favour or demanding immediate repayment of the debt. 10 15 20

In support of their allegations the plaintiffs called three witnesses, namely Ms. Georgia Solomonidou, their daughter, who is employed in the Accounts Department of her father's business in Djibuti, and who said that the defendants paid nothing on account of the mortgage debt. Ms. Rozanna Koutsidou, an administrative officer attached to the Department of Merchant Shipping of the Ministry of Communications and Works of Cyprus, who gave evidence as to the registration of the ship "GEORGIA" as a Cyprus ship, her ownership and the registration on the 27th September, 1977, of a mortgage securing on her the sum of 12 million Drahas in favour of the plaintiffs. This witness further produced, without objection on the part of counsel appearing for the defendants, photocopies of (a) the Resolution of the Directors of the defendants relating 25 30 35

to the purchase and the mortgaging of the ship to the plaintiffs, which is *exhibit No. 3*, and (b) a power of attorney signed by the Directors of the defendants, which is *exhibit No. 2*, by which authority was given to two persons, one of them being Mr. A. Saliarellis, empowering them to negotiate and complete the purchase of the ship and to mortgage her to the plaintiffs. Both documents were authenticated by the Cyprus Consul in Greece and both bear the seal of the defendant company.

Finally Mr. Simos Papadopoulos, the third witness of the plaintiffs, told the Court that during his visit in Mombassa in 1978 he visited the ship and noticed that she had been stripped of her equipment, that is nets, ropes etc. He further told the Court that the captain of the ship admitted to him that on one occasion, whilst unlawfully fishing, the ship was grounded whilst trying to evade Government boats. This witness further told the Court that two of the Directors of the defendants, that is Mr. Saliarellis and Mr. Akbar, also admitted to him that they had removed the ship's equipment and used them on another boat.

The defendants did not adduce evidence in support of the allegations put forward by them in their Answer, although most of them had to be proved by evidence.

It is correct that the Mortgage and the Deed of Covenants attached to it, which documents are *exhibits 3A and 3B* before me, do not bear the seal of the defendants. However, *exhibits 2 and 3*, which were produced by Ms. R. Koutsidou, do bear, as I have earlier said, the company's seal. Considering, therefore, that the Resolution of the Directors of the Company and the Power of Attorney given were duly executed and properly sealed by the company's seal, I am of the view that the further acts of the attorney of the company for the finalization of the resolution of the company did not require the stamping of the documents signed by him with the company's seal and that the provisions of sections 33(2), 35 and 36 of the Companies Law, Cap. 113, on which counsel for the defendants relied in his address, afford him no assistance.



In reaching my conclusions on this issue, I had useful guidance from the majority decision in the case of *Electricity Authority of Cyprus v. Petrolina Company Ltd.*, (1971) 1 C.L.R. 19.

The allegation of the defendants in their Answer that one of the plaintiffs gave his consent on behalf of himself and his other co-plaintiffs for the chartering of the ship by the defendants to Alpha Enterprises S. A., supports the version of the plaintiffs that a breach of clause 12 of Article I of the Deed of Covenants was committed.

As a result of my findings I give judgment and I make an order for the plaintiffs in terms of their prayer in their Petition.

Defendants to pay the costs of the action.

Costs to be assessed by the Registrar.

*Judgment for plaintiffs as per their prayer with costs.*