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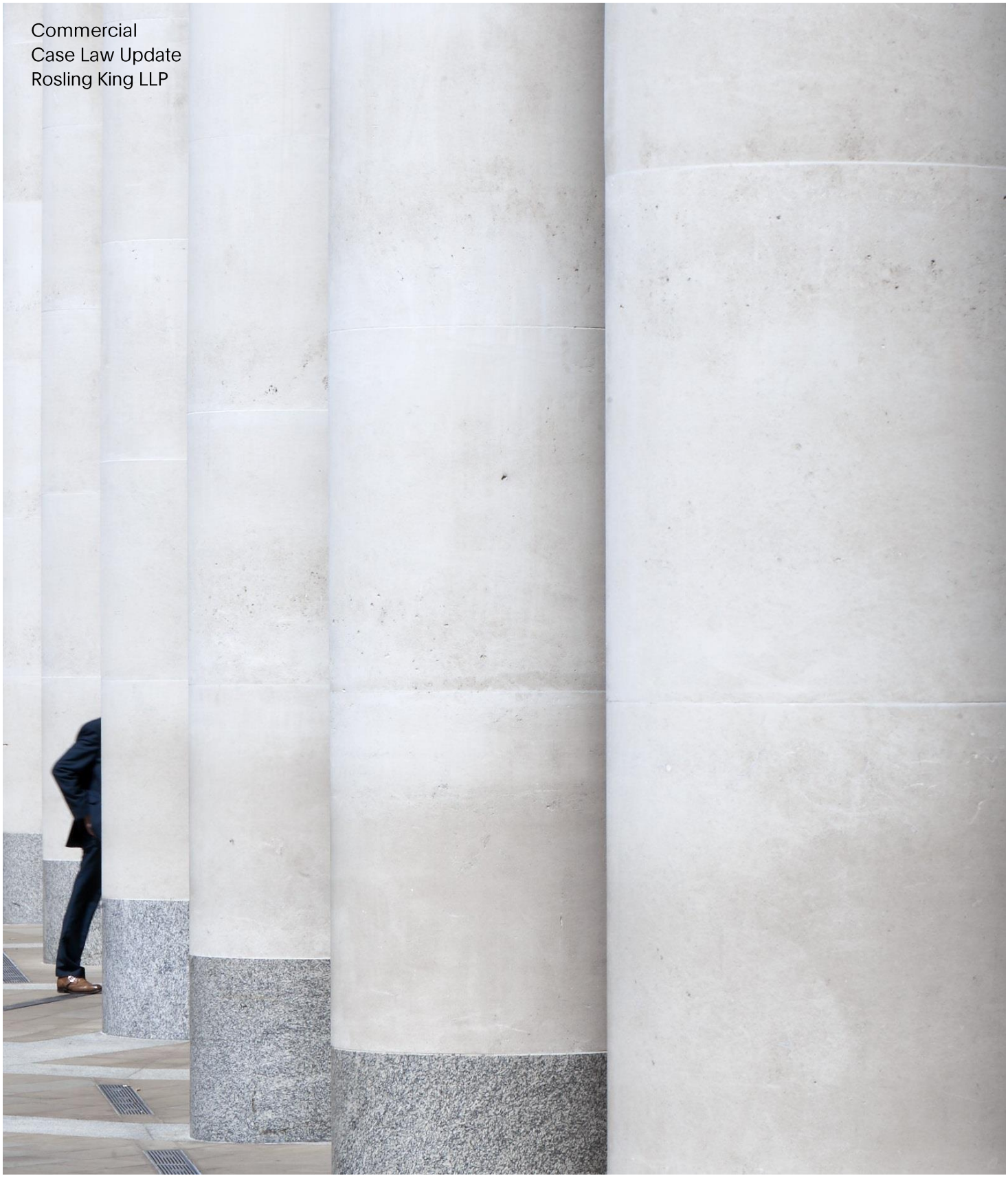
Commercial
Case Law Update
Rosling King LLP



Executive Summary

The Commercial Court has ruled in favour of the Claimants who sought a number of declarations against extra-judicial notices issued in Greece. The Defendants were ordered to pay costs on an indemnity basis as they issued applications which caused 'chaos' for other parties.

Case Background

The case concerned a dispute between shipowners Angeliki Frangou ("**AF**") and her brother, John Frangou ("**JF**"). Their joint business activity was carried on in part through Maritime Investments Holdings Limited ("**MIHL**"), the First Defendant in the case. JF had experienced financial difficulties and relied on financial support from AF since at least 2012.

AF and JF both owned their interest in MIHL via companies which they respectively controlled. In the case of AF, she owned her interest through Ferand Business Corporation ("**FBC**"),
JF retained his share in MIHL through Kolen International S.A. ("**Kolen**"). AF also owned Maritime Enterprises Management S.A. ("**MEM**"), which provided management services to MIHL. JF was the ultimate owner and operator of an entity called First Lines Company S.A. ("**FL**") who acted as ship manager for ships hired out by MIHL until 2017. MIHL also had a third shareholder, Oscaleta Limited ("**Oscaleta**") which owned 5% of MIHL. FBC, Kolen and Oscaleta agreed to manage MIHL through a Stockholder Agreement dated 8 September 2014 (the "**SHA**") which was governed by English law.

In 2016, MIHL acquired the vessel MV Christine B (the "**Boat**") with the aid of a loan from Commerzbank, with the bank's interest secured by a charge against the Boat. By late 2016, Commerzbank withdrew from the ship finance market and offered MIHL a 10% discount of the amount of the loan outstanding in return for prompt repayment. An alternative lender, ABN Amro, was willing to provide a new loan of $9m, however, MIHL did not have sufficient funding to make up the difference. Therefore, MIHL sold the Boat to Plous Shiptrade Company SA ("**Plous**"), with AF funding the balance to discharge the loan to Commerzbank. Plous was wholly owned by Maritime Enterprise Holdings SA, which in turn was wholly owned by AF.

The Boat was later sold at a gross profit of c.$4.3m for Plous. After the sale, JF demanded half of the profits, claiming there was an agreement in place whereby MIHL would be entitled to all of the profits from any subsequent sale of the Boat. AF believed that there was no agreement in place and, as such, JF was not entitled to anything from the proceeds of sale.

From 2017 to 2019, JF continued to experience financial difficulties, relying on an allowance from MIHL and AF, and by 2019 there was an accumulated deficit of $4m from JF to AF. JF was warned that if he did not meet with a restructuring specialist any further payments may be stopped.

In response, JF (in the name of Kolen) issued a number of Extra Judicial Notices ("**EJNs**") against AF and her related companies. EJNs are Greek law instructions, a precursor to commencement of proceedings in Greece. The EJNs related to four claims:

- Claim in respect of monies owed to MIHL and management of the vessel "MV HOPE I" ("**EJN1**");
- Claim for approximately $1.1m owed to FL by AF and MEM (and others) in respect of management fees ("**EJN2**");
- Claim in respect of the purported improper management of several vessels owned by MIHL by MEM ("**EJN3**"); and
- Claim for profits made from the sale of the Boat in 2017 ("**EJN4**").

In response, FBC, AF and MEM (the "**Claimants**") sought a suite of declarations against Kolen in respect of the allegations made out in the EJNs.

The Decision

In respect of the EJNs, HHJ Pelling QC (the "**Judge**") stated that "Generally, English Courts will refuse to grant declarations that are intended to influence or are likely to have the effect of influencing the outcome of proceedings before the Courts of other sovereign states". The Judge noted the existing legal principles that a Court should apply when considering whether to grant declarations:

- The Court has jurisdiction to grant declaratory relief, whether or not any other remedy is claimed.
- Although claims for declarations are generally sought and granted together with other forms of relief the absence of any claim for any other remedy will generally not deter a Court from granting declarations that it is otherwise appropriate to grant.
- The power to grant declaratory relief is discretionary.
- When considering the exercise of the discretion, in broad terms, the Court should take into account justice to the Claimant, justice to the Defendant, whether the declaration would serve a useful purpose and whether there are other special reasons why or why not the Court should grant the declaration.
- There must, in general, be a real and present dispute between the parties before the Court as to the existence or extent of a legal right between them before a

declaration will be granted concerning the existence or extent of that legal right. However, the Claimant does not need to have a present cause of action against the Defendant.

- Each party must, in general, be affected by the Court's determination of the issues concerning the legal right in question.
- The fact that the Claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration, provided that the Claimant is directly affected by the issue.
- The Court must be satisfied that all sides of the argument will be fully and properly put and ensure that all those affected are either before it or will have their arguments put before the Court.
- Assuming that the other tests are satisfied, the Court must ask: is this the most effective way of resolving the issues raised? In answering that question, it must consider the other options for resolving this issue.
- If otherwise it is appropriate to do so as a matter of discretion, there is no reason why a Court should not grant a negative declaration [a written statement describing that a party has not done something/is not liable for a particular activity].

The Judge ruled in favour of the Claimants in respect of a number of declarations that it sought, granting declarations in relation to ENJ1, ENJ3 and ENJ4. Even in the case of ENJ2, where a declaration was not made, the Judge noted that no claim had been made against the Claimants and "*In truth MEM will on its case be vindicated in any jurisdiction where a claim is in fact made against it if ever it is".* The Judge was particularly scathing in respect of ENJ4, where he stated "*The onus of proving the agreement that Kolen relied on rested squarely on Kolen. In my judgment it has manifestly failed to prove it*".

In a separate judgment on costs (*Ferand Business Corporation and others v Kolen Intenational S.A. and others [2021 EWHC 197 (Comm),* the Judge ordered Kolen to pay the Claimants' and MIHL's costs on an indemnity basis in respect of certain aspects of the proceedings. Kolen made very late and ultimately successful applications to re-amend its defence and rely on further witness statements. As such, Kolen was ordered to pay the Claimants' and MIHL's costs of re-submitting their amended defences as well as the Claimants' costs between the service of the re-amended defence and the end of trial. Kolen was also liable for MIHL's costs of trial.

The factors which influenced the Judge's decisions included the fact that Kolen's applications (estimated to require 20 minutes) took up the entire first day of a four-day trial. The Judge ruled that Kolen offered no good reason for not making the applications earlier, which caused disruption to the Claimants' trail preparation. Further, the re-amended

defence *"did not come close"* to satisfying the requirements of a proper pleading, as per *Swain-Mason and others v Mills and Reeve [2011].*

The effect of the applications was to "create chaos" for the Claimants in the run-up to trial. In various respects, Kolen went beyond advancing a weak case and strayed into positions that were inherently implausible, indefensible or abandoned during trial.

Commentary

The case is a useful reminder of the rules concerning the grant of declaratory relief, giving a clear indication to Claimants of the threshold they must reach.

The Judge's ruling on costs illustrates how conduct which creates 'chaos' for other parties may attract indemnity costs. Parties should be careful when making applications and ensure that they are necessary, adhere to the Court's requirements and crucially are made in time. If not, they may well be liable for the other parties' costs on an indemnity basis. The Court indicated that a fundamentally weak case would not necessarily give rise to an indemnity costs order being made, but frivolous applications and behaviour would be taken into account.

For further information, please contact Hannah Sharp or the Partner with whom you usually deal.