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UNPAID SELLER'S ABILITY TO CLAIM THE PRICE FOR GOODS IT RETAINS TITLE TO BUT HAS DELIVERED - CE ENERGY DMCC V ULTIMATE OIL AND GAS DMCC AND MR BASHAR [2025] EWHC 297 (COMM)

In a judgment handed down on two summary judgment applications earlier this year in *CE Energy DMCC v Ultimate Oil and Gas DMCC and Mr Bashar* [2025] EWHC 297 (Comm) the English Commercial Court analysed in detail the current state of law on an unpaid seller's ability claim for price where it has delivered the goods, but retains title to them under a retention of title clause. Whilst the Court gave judgment in favour of the unpaid seller, having given leave to appeal to the Court of Appeal it highlighted various issues with the present state of the law, which the Judge said is ripe for some guidance from higher courts. The Judgment also contains important observations on the construction of guarantees as well as the application of the concept of contractual estoppel.

FACTS

Between 2022 and 2023 CE Energy DMCC ("**CEE**"), as sellers, supplied Ultimate Oil and Gas DMCC ("**Ultimate**") with several cargoes of gasoil and a cargo of jetoil pursuant to five spot contracts (the "**Spot Contracts**") and a term contract (the "**Term Contract**"). Whilst CEE sold product to Ultimate on open credit basis, payment security for all the contracts was provided by way of collateral management, pursuant to which cargo, which was delivered and then stored in tanks in Nigeria, was only released following receipt of payment by CEE and upon CEE giving the necessary release orders to the collateral manager. All of the sale contracts also contained retention of title clauses, providing that title to the product was to remain with CEE until CEE was paid for the product in full.



Whilst Ultimate had made some payments to CEE, various amounts remained outstanding and in January 2024 Ultimate and CEE entered into a payment agreement (the "**Payment Agreement**"), which set out a mechanism for Ultimate to clear the outstanding amounts relating to demurrage and interest relating to the Spot Contracts, and principal amounts, along with demurrage and interest relating to the two cargoes sold under the Term Contract, and which was entered into without prejudice to the Parties' rights under the underlying sale contracts. Further, provided that certain conditions were met, the Payment Agreement set out a framework for CEE to supply Ultimate with two further cargoes. The Payment Agreement, *inter alia*, set out details of the outstanding amounts under various contracts and recorded that Ultimate "*irrevocably admitted*" that those amounts were due to CEE. The Payment Agreement also required additional security to be given to CEE, by way of undated cheques and personal guarantee from Mr Bashar, Ultimate's ultimate beneficial owner.

Ultimate complied with its initial obligations under the Payment Agreement, and CEE supplied to it the first of the two cargoes (the "**New Spot Contract**" and the "**New Spot Cargo**") that it had agreed to supply. The structure for the New Spot Contract was the same as for the previous cargoes CEE had sold to Ultimate, with security being provided by way of collateral management, as well as a security cheque being provided.

The first tranche of payments under the Payment Agreement, and payment for the New Spot Cargo was due after NOR + 45 days, with the relevant NOR being the daughter vessel NOR at Lagos. This meant that Ultimate had to make the required payments by 19 March 2024.

However, whilst some payments had been made, Ultimate failed to make payment of the New Spot Cargo, as well as the other amounts that were required to be paid by 19 March 2024 in their entirety, as a result of which CEE demanded payment of the outstanding sums, which at that point totalled around USD 34.7m from not just Ultimate, but also from Mr Bashar pursuant to the Personal Guarantee. As no payment was made by either Ultimate or Mr Bashar, CEE, *inter alia*, commenced proceedings against Mr Bashar

personally under the Personal Guarantee and took steps under the underlying sale contracts to obtain recovery of the amounts owed to it. Whilst the Term Contract was subject to LCIA arbitration proceedings and the Spot Contracts subject to DIAC arbitration proceedings, both the claim in respect of the New Spot Contract and the Personal Guarantee proceeded before the English High Court.

After Mr Bashar and Ultimate had served their defences, CEE applied for summary judgments to be entered into in both proceedings and given the overlap in facts and issues, successfully sought for the applications to be dealt with together at a single hearing. At the time the summary judgment applications were heard, CEE had not obtained arbitration awards or a judgment against Ultimate.

COMMERCIAL COURT DECISION

Main questions for the Court

The three key questions the Court had to decide on hearing the summary judgment applications were as follows:

1. Whether, to establish Mr Bashar's liability under the Personal Guarantee, CEE had to show (a) a demand made in good faith, (b) an actual liability of Ultimate to CEE, or (c) that a Tribunal or Court has held Ultimate liable?
2. If CEE had to show that Ultimate is liable, were admissions of liability by Ultimate in the Payment Agreement conclusive against Mr Bashar?
3. As much of CEE's claim was for price for the unpaid product delivered under the Term Contract and the New Spot Contract, if Ultimate's liability matters, could CEE claim the price at all in circumstances where it retained title to the oil that was delivered and has not been paid for?

Current state of case law relating to unpaid seller's ability to claim price



Much of the hearing and the Judgment focused on the third question and the evolution of and the current state of law on whether an unpaid seller, who has delivered goods, but retains title in them, is entitled to claim from the buyer the price, as opposed to having to sue the buyer for damages. The distinction matters in practice because a claim for price is a straightforward debt claim, whereas the usual rules regarding causation, remoteness and mitigation apply for a claim for damages, with the quantum of damages needing to be assessed in accordance with the usual principles.

Section 49 of the Sale of Goods Act 1979 (the "**Act**") sets out two instances where an unpaid seller can maintain an action for price and, in the relevant parts provides as follows:

- (1) *Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.*
- (2) *Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.*

The Judge recognised, albeit granting permission to appeal on this point, that as things currently stand s. 49 of the Act is a complete code and therefore CEE had to bring itself within its framework to maintain its claim for price. It was common ground that because title had not yet passed in the unpaid product, CEE would not be able to base its claim on s. 49(1) of the Act as property in the goods had not yet passed to Ultimate and therefore consideration had to be given as to whether CEE was able to bring itself within s. 49(2) of the Act. The Court had to grapple with the meaning of the words "*day certain irrespective of delivery*" and whether, they mean that the day must be defined in the contract in a way that is neither logically nor practically connected to delivery, as was submitted on behalf of Ultimate or whether they had a "broad"

meaning, as asserted by CEE, and that so long as the day was fixed by reference to something other than delivery as such, the subsection would be satisfied.

COMMERCIAL COURT'S DECISION

The Judge found for CEE and held that:

1. To establish Mr Bashar's liability under the Personal Guarantee, on its true construction CEE had to show that Ultimate had defaulted in its obligations, but CEE was not obliged to obtain an award or judgment against Ultimate first before being able to claim from Mr Bashar;
2. CEE was able to rely on the Payment Agreement as establishing contractually binding admissions of Ultimate's liability at the date of the Payment Agreement and those admissions bound Mr Bashar because they determined Ultimate's liability that he had guaranteed; and
3. Whilst the current state of the case law was in an unsatisfactory state, CEE was entitled to claim the price under the New Spot Contract. The Judge considered that the words "*day certain irrespective of delivery*" meant an ascertainable date including by reference to an uncertain event or something that one of the parties does (delivery and invoicing) or a third party does. Here the day was certain because it was ascertainable from the occurrence of an event defined in the contract (tendering of the NOR), though not specified as a fixed date and it was irrespective of delivery because it was not bound to coincide with delivery, and because (moreover) nothing in the contract made payment conditional upon delivery having occurred. As far as sums which were claimed under the Term Contract, because these were sought from Mr Bashar under the Personal Guarantee, the Court did not have to decide on the point as the combination of the Payment Agreement and the Personal Guarantee prevented Mr Bashar from challenging the sum due under the Term Contract, but the Court commented that if it had to it would have come to a same conclusion.



As a result of finding that none of Ultimate and Mr Bashar's defences had any realistic prospect of success, the Judge granted CEE's applications and handed down summary judgments in its favour, ordering Ultimate to pay CEE AED 27,857,586.81 and Mr Bashar to pay CEE AED 122,189,310, plus post-judgment interest and costs.

COMMENTS

The Judgment contains detailed history and analysis of s.49(2) of the Act and its application, and even though it recognises that the law is ripe for guidance from the Court of Appeal it provides a very helpful commentary on the section and highlights the fact that sellers who use retention of title clauses in their contracts would, as things currently stand, only be able to claim for the price if they can bring themselves within the confines of s. 49(2) of the Act, which is not necessarily straightforward, and may otherwise be left with having to pursue a counterparty in damages instead. Whilst permission to appeal was granted, and applications made, the legal community needs to wait for another matter to come along for the meaning of "*day certain irrespective of delivery*" to be fully argued, along with the role of section 49 more generally, and determined by the Court of Appeal as the appeals have subsequently been withdrawn.

The Judgment also provides useful commentary on the application of the principle of contractual estoppel and sets out useful guidance on construction of guarantees, although it recognises that whilst there may be so-called presumptions and notes various indications which would suggest that the guarantee is either a demand guarantee or one of suretyship (a see-to-it guarantee), it serves as an useful reminder for anyone giving or receiving guarantees that each document is construed on its own and what matters at the end of the day is the context and how the specific document is construed as a whole.

Stephenson Harwood, led by the Dubai-based partner Mark Lakin, acted for the successful claimants, CEE, in these proceedings.

Please click [here](#) for a copy of the full judgment.

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