IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 37

Civil Appeal No 123 of 2020

Between

(1) Brian Ihaea Toki
(2) Stacey Oscar Phua Chunming
(3) Vessel Offshore Management Pte Ltd

… *Appellants*

And

(1) Betty Lena Rewi
(2) Pitone Leauga

… *Respondents*

In the matter of HC/Suit No 913 of 2018

Between

(1) Betty Lena Rewi
(2) Pitone Leauga

… *Plaintiffs*

And

(1) Brian Ihaea Toki
(2) Stacey Oscar Phua Chunming
(3) Vessel Offshore Management Pte Ltd

… *Defendants*

EX TEMPORE JUDGMENT

[Partnership] — [Dissolution] — [Effect]

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v
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13 April 2021

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Andrew Phang Boon Leong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Betty Lena Rewi and another v Brian Ihaea Toki and others* [2020] SGHC 226.

Facts

2 The brief facts of the case are as follows. The appellants are Mr Toki, his wife Ms Phua and a Singapore-incorporated security consultancy and ship management company of which they are the only directors and shareholders, Vessel Offshore Management Pte Ltd, which we shall refer to hereinafter as "VOM". The respondents are Ms Rewi and her husband, Mr Leauga. On 1 August 2010, Mr Toki, Ms Phua and the respondents entered into a

partnership with Mr Toki and Ms Phua having a 60% share therein and the respondents the remaining 40%. Pursuant to the partnership agreement, the partnership purchased a vessel, the MV *Ngati Haka*, which we shall refer to hereinafter as the "Vessel".

3 It is not disputed that the partners agreed to have VOM manage the Vessel for a fee and to charter out the Vessel for profit. The relationship between Mr Toki and Ms Phua on the one hand, and Ms Rewi and Mr Leauga on the other, broke down subsequently. This culminated in the dissolution of the partnership by mutual agreement on 8 October 2013. The partners agreed to place the Vessel for sale on the open market. On 31 January 2014, VOM obtained a valuation report from Industrial & Maritime Surveyors Limited, a Kenyan ship and boat valuation firm, which valued the Vessel at US$845,000. We shall hereinafter refer to this valuation as the "IMSL Valuation".

4 On 17 September 2014, Mr Toki's shipbroker, Mr John Hughes ("Mr Hughes") of John Hughes Associates, informed Mr Daniel Tan ("Mr Tan") of VOM of "enquiries from West Africa" to purchase the Vessel, expressing concerns that Mr Toki's asking price of US$2.2m was too high. Mr Tan asked Mr Hughes to advise if a reduction of the asking price of US$0.2m to US$0.3m would suffice. On 22 September 2014, Mr Hughes responded that the enquirers were Nigerian, and that they had offered US$1.2m for the Vessel. Mr Tan then informed Mr Hughes that he had reported the offer to Mr Toki and asked Mr Hughes to identify the Nigerian enquirers. Mr Hughes responded on 23 September 2014 that he was working with Mr Anthony Okonkwo ("Mr Okonkwo") of Bastion Kinetics. That same day, Mr Toki rejected Mr Okonkwo's US$1.2m offer, informing Mr Hughes that it was "a bit steep off the mark" from his asking price of US$2.2m, and that he was willing

to lower his asking price to US$1.8m for serious negotiations to continue. The offer fell through.

5 The value of the Vessel continued to fall, and in September 2016, Mr Toki further reduced his asking price for the Vessel to US$1.5m in view of the adverse market conditions. On 14 June 2017, VOM obtained a valuation of the Vessel at US$280,000 from SingClass International Pte Ltd.

6 While the sale of the Vessel was being explored, and notwithstanding the dissolution of the partnership, VOM continued to manage and operate the Vessel and charter it out for profit.

7 On 1 September 2017, the Vessel was sold for US$790,000. Ms Rewi and Mr Leauga agreed to the sale but reserved their rights as to the price. They refused to accept a cheque from the Tokis dated 8 January 2018 for their share of the proceeds from the dissolution of the partnership and commenced legal action against Mr Toki and Ms Phua for breach of their partnership duties.

8 At the heart of the dispute in general and this appeal in particular is the question of whether Mr Toki and Ms Phua breached their duties as partners in failing to accept the US$1.2m offer for the Vessel so as to wind up the affairs of the partnership and distribute any surplus to the partners, and whether the final accounts of the partnership ought to have been drawn up on the basis that, first, the Vessel was sold for US$1.2m and not US$790,000, and second, that the Vessel was not chartered out after the dissolution of the partnership.

9 On this issue, the Judge found that Mr Toki and Ms Phua had indeed breached their duty to wind up the partnership by failing to accept the US$1.2m offer for the Vessel, because at the time the Vessel was valued at US$845,000

and there was no credible reason for Mr Toki and Ms Phua to hold out for a price closer to US$1.8m. They also had not consulted Ms Rewi and Mr Leauga before rejecting the US$1.2m offer and for insisting on a much higher price.

10 The Judge also took the view that the reason for Mr Toki's and Ms Phua's holding out for a high price of US$1.8m for the Vessel was their belief that they could personally stand to gain more from continuing to charter the Vessel out from the charter fees as well as from the management fees and fees for security services charged by VOM. However, they were not entitled to do so without the consent of Ms Rewi and Mr Leauga since the partners had agreed to dissolve the partnership and sell the Vessel. The Judge therefore ordered the final accounts of the partnership to be drawn up on the basis that the Vessel was sold for US$1.2m and that the Vessel was not chartered out after the partnership had been dissolved.

11 In this appeal, the appellants do not dispute the Judge's finding that they did not have the authority to charter the Vessel out after the partnership had been dissolved. There is therefore only one issue that we have to deal with, and that is the question of whether Mr Toki and Ms Phua had breached their duty to sell the Vessel by failing to accept the US$1.2m offer and the consequential adjustments to the final accounts of the partnership that would follow in such an eventuality.

Our decision

12 The appellants' case consists of two essential arguments. First, the appellants submit that the evidence for the existence of the US$1.2m offer, namely, the 22 September 2014 email, is hearsay evidence which is inadmissible or ought to be accorded reduced weight. Second, the appellants

submit that it was reasonable for them to hold out for a higher price than the offer price.

13 We turn first to the appellants' first argument on the admissibility or weight to be accorded to the 22 September 2014 email on the basis that it is hearsay. We are of the view that the appellants are not entitled to raise belated objections to the admissibility of the email on appeal. The email was admitted as evidence at trial without any objections from the appellants. Indeed, it was the appellants themselves who had admitted the email into evidence by exhibiting it in Mr Toki's Affidavit of evidence-in-chief. Furthermore, Mr Toki had accepted the email as a serious offer and responded to it on that basis. As this court observed in *Jet Holding and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 at [51], if one party seeks to admit evidence which in fact is inadmissible, and such evidence is in fact marked and admitted without any objection from the other party as to its admissibility being taken, that other party cannot object to the admission of the evidence later. This applies *a fortiori* to the present case since it was the appellants themselves who sought to have the 22 September 2014 email admitted and neither party objected to its admission before or during the trial.

14 In any case, we are of the view that the 22 September 2014 email would have been admissible under the business records exception to the rule against hearsay pursuant to s 32(1)(*b*)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") since it represents a record of a statement made in the ordinary course of business by Mr Hughes, a shipbroker, to his client, VOM, as regards the subject matter of his engagement, namely, an offer to purchase the Vessel.

15 We now turn to consider whether the court ought to have exercised its discretion under s 32(3) of the Evidence Act to exclude the 22 September 2014 email from evidence. We see no basis to so conclude as there is, in our view, no reason to think that Mr Hughes was not being truthful in communicating the US$1.2m offer particularly when his professional and business reputation was at stake and any duplicity on his part would have been revealed had VOM or Mr Toki chosen to engage in further negotiations on the offer. Furthermore, the offeror was clearly and specifically identified by Mr Hughes as Mr Okonkwo from Bastion Kinetics. As mentioned, Mr Toki himself had responded on the basis that it was a serious offer. For the same reasons, we do not think that there is any reason to accord reduced weight to the 22 September 2014 email as evidence of the US$1.2m offer to purchase the Vessel.

16 We are therefore of the view that the 22 September 2014 email is evidence of the existence of a US$1.2m offer to purchase the Vessel.

17 We now consider the second issue, which is whether Mr Toki and Ms Phua breached their duties to the partnership to sell the Vessel in failing to accept the US$1.2m offer for the Vessel. We note that the respondents have sought to run a different case on appeal that did not form part of their pleaded case, namely, that Mr Toki and Ms Phua owed the partnership a *fiduciary* duty of *good faith* and had breached that *fiduciary* duty by failing to sell the Vessel for US$1.2m. We do not think that the respondents are entitled to run such a case belatedly given that it was not pleaded.

18 Be that as it may, the appellants do not dispute that as part of their duty to sell the Vessel, Mr Toki and Ms Phua were also under a duty to use all possible diligence to secure the best price reasonably obtainable for the Vessel

in the circumstances. The question then is whether US$1.2m was the best price reasonably obtainable for the Vessel in the circumstances. We are of the view that it was. The US$1.2m offer was significantly higher than the IMSL Valuation which points to it being a more than reasonable price for the Vessel on the open market. There is also no reason to believe that had the offer been accepted, the Vessel would *not* have been sold for US$1.2m.

19 The appellants put forward various justifications for holding out for a higher price of US$1.8m, which we shall now deal with in turn.

20 Firstly, the appellants argue that the Vessel was being marketed with ongoing contracts. Secondly, fresh maintenance, new equipment and a new Class Survey would have increased its value. However, the fact that the Vessel was committed to a contract did not *ipso facto* increase its value to a potential buyer and in fact might *reduce* such value if a potential buyer wished to use the Vessel for a different purpose or for more profitable contracts. As for the fresh maintenance, new equipment and the new Class survey, there was insufficient objective evidence to show that these justified an increase of more than 50% from the IMSL Valuation. There was no reason to conclude that the Vessel, together with the ongoing contracts and/or fresh maintenance, new equipment and a new Class Survey, would be worth significantly more than US$1.2m since that price was already at a premium to the IMSL Valuation.

21 Thirdly, the appellants argued that the benchmark price for the Vessel in 2010 and 2011 was US$2.5m to US$2.6m and that they were therefore justified in holding out for a modest sum of US$1.8m for the Vessel. We do not accept this explanation. It is not clear how it was reasonable for the appellants to have held out for US$1.8m for the Vessel in 2014 on the basis of potentially

outdated 2010 and 2011 prices, particularly when the contemporaneous IMSL Valuation which they had themselves obtained was at hand. The IMSL Valuation made it clear that any expectation of obtaining US$2.5m to US$2.6m in 2014 was remote, to say the least. In any case, the prices of US$2.5m to US$2.6m relied on by the appellants were obtained from mere discussions regarding the potential sale of the Vessel with two entities called "HART" and "Compass Security". In our view, these were exploratory figures and did not reflect what a buyer would *actually* be willing to pay for the Vessel.

22 Furthermore, the Judge had made a factual finding that Mr Toki and Ms Phua were not keen to sell the Vessel for US$1.2m because they believed they could earn more from charter fees as well as management and security services fees. They did not show that the Judge's finding was against the weight of the evidence. We are therefore of the view that it was not reasonable for Mr Toki and Ms Phua to have acted on the basis that the Vessel was worth substantially more than US$1.2m based on the reasons they advanced. They have not established that the Judge erred in finding that in failing to accept the US$1.2m offer for the Vessel, Mr Toki and Ms Phua had breached their duty to the partnership to use all possible diligence to secure the best price reasonably obtainable for the Vessel in the circumstances. It follows that the Judge did not err in ordering the final accounts of the partnership to be drawn up on the basis that the Vessel was sold for US$1.2m.

Conclusion

23 For the reasons set out above, we dismiss this appeal and award costs of $40,000 (all-in) to be paid by the appellants to the respondents. There will be the usual consequential orders.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Gregory Vijayendran SC, Evelyn Chua Zhi Huei and Andrew Tan Jian Ming (Rajah & Tann Singapore LLP) for the appellants;
Yvette Loretta Anthony and Quek Yong Zhi Timothy (OC Queen Street LLC) for the respondents.