

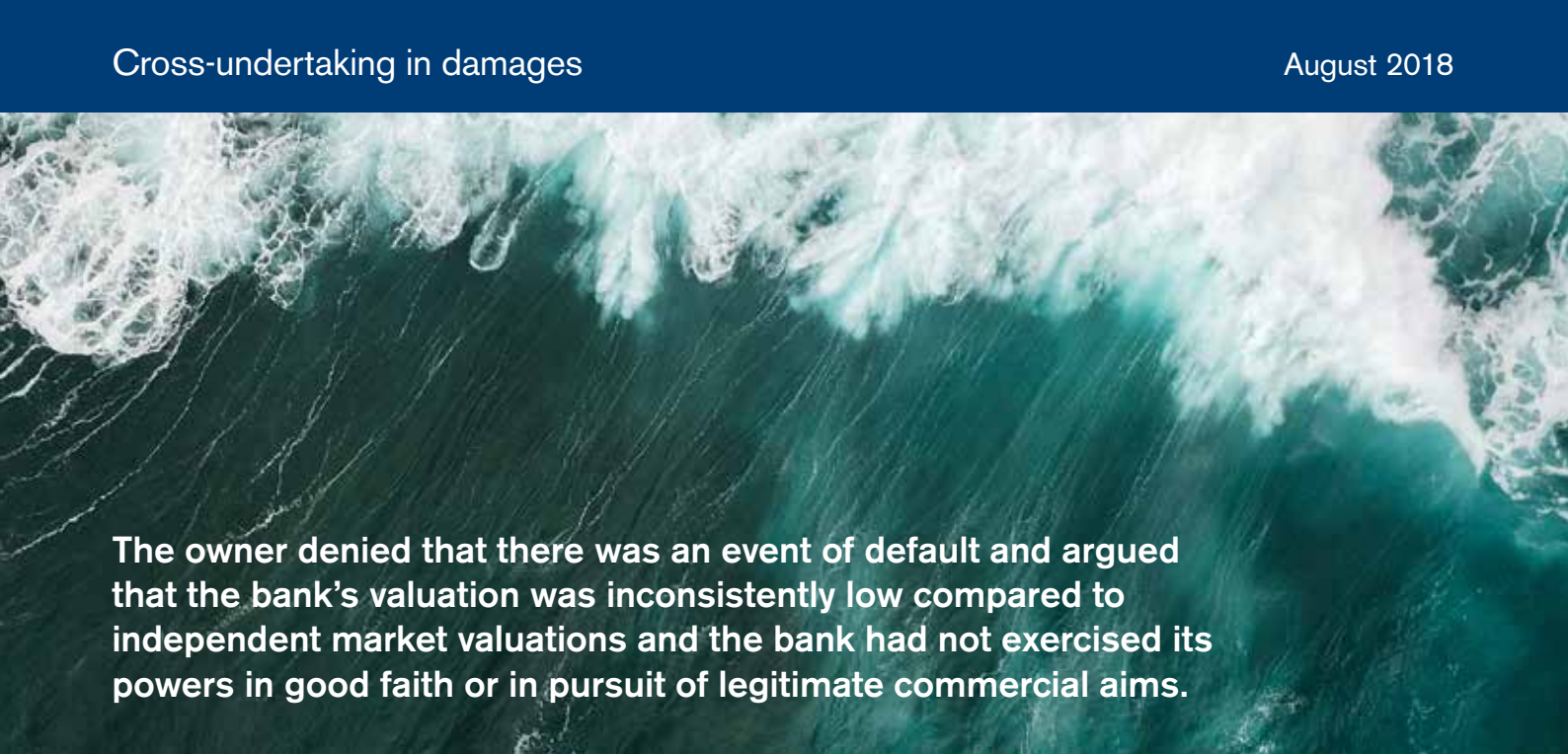
Soundings

English law: why does a party arresting a ship not have to provide a cross-undertaking in damages?

Cross-undertakings are routinely required for freezing injunctions. This however, is not the case for arrest of ships. Admiralty Court practice has been not to require such undertakings. In a recent case of the ALKYON, the English High Court was asked to review its existing practice.

By way of brief background, the claimant bank had notified the owner that the market value of the ship was below the aggregate amount of the loan outstanding and thus less than the required Value to Loan (“VTL”) ratio under the loan agreement. The bank demanded that additional security be provided by the owner to remedy the position. The owner disputed the valuation relied on by the bank and provided the bank with higher valuations.

The bank informed the owner that if the shortfall in security was not cured, the owner would be in default of the loan agreement. Further time to cure the shortfall was given. The shortfall was not met and the bank issued a Notice of Acceleration which declared the loan immediately due and payable. On the same day, the bank commenced an Admiralty action in rem against the ship and requested the Admiralty Marshall to effect the arrest of the ship.



The owner denied that there was an event of default and argued that the bank's valuation was inconsistently low compared to independent market valuations and the bank had not exercised its powers in good faith or in pursuit of legitimate commercial aims.

The Admiralty Marshall arrested the ALKYON upon her arrival at the Port of Tyne.

The owner requested the court to exercise its powers to order the release of the ship unless the bank provided a cross undertaking in damages in respect of any losses suffered by the owner as a result of the arrest, in the event that the court later found that the arrest was wrongful.

The owner denied that there was an event of default and argued that the bank's valuation was inconsistently low compared to independent market valuations and the bank had not exercised its powers in good faith or in pursuit of legitimate commercial aims.

In support of the application, the owner submitted that the current practice of the Admiralty Court, not to require a cross-undertaking in damages, was anomalous and unjustifiable by comparison to the usual practice of the English courts in relation to interim injunctions and freezing orders with which the remedy of arrest was broadly analogous. Furthermore, the owner contended that the application was consistent with the overriding objective of the court to deal with a case justly and ensuring that the parties were on an equal footing. Moreover, on the facts of the case, the requirement for a cross-undertaking in damages would not cause any prejudice to the bank but it would be an obvious way of maintaining the position between the parties in case the arrest turned out to be unwarranted.

Reference was made to various publications and articles which question the correctness of the court's current practice.

The bank did not challenge the inherent justice requirement but argued that to exercise the court's discretion to order release of the ship would circumvent the established law of wrongful arrest, would result in the ship being released without alternative security being put in place and would be contrary to the established practice of the court. It further contended that the change in practice sought by the owner should be a matter for Parliament, rather than the court. In addition, the proposed change would have significant implications for the shipping industry and for the relative attractions of the English jurisdiction for ship arrests.

The High Court referred to the *Bazias 3* and *Bazias 4* [1993] 1 Lloyd's Rep 101 where the Court of Appeal considered that it could not ignore the practice of the Admiralty Court in not requiring a cross undertaking in damages which had been in place for many years. Mr Justice Teare felt bound by this decision and commented that any change might be for Parliament or for the Courts' Rules Committee.

The owner has been given permission to appeal to the Court of Appeal.

The decision of Mr Justice Teare is presently the single direct consideration of an application for provision of a cross-undertaking in damages in over 20 years and provides a detailed commentary of the current position of the English Admiralty Court's arrest jurisdiction. It remains to be seen whether the decision will be overturned on appeal. Fairness for both parties does seem to warrant such an approach.

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