

Federal Court



Cour fédérale

Date: 20170509

Docket: T-1226-10

Citation: 2017 FC 478

Ottawa, Ontario, May 9, 2017

PRESENT: The Honourable Mr. Justice Phelan

**ADMIRALTY ACTION *IN REM* AGAINST THE VESSEL "QE014226C010"
AND *IN PERSONAM***

BETWEEN:

OFFSHORE INTERIORS INC.

Plaintiff

and

**WORLDSPAN MARINE INC., CRESCENT
CUSTOM YACHTS INC., THE OWNERS AND
ALL OTHERS INTERESTED IN THE
VESSEL "QE014226C010" and THE VESSEL
"QE014226C010"**

Defendants

and

**WOLRIGE MAHON LIMITED in its capacity
as appointed Vessel Construction Officer of the
Defendant Vessel "QE014226C010", HARRY
SARGEANT III, MOHAMMAD ANWAR
FARID AL-SALEH, and 642385 B.C. LTD.**

Interveners

ORDER AND REASONS

I. Introduction

[1] This is the first of two motions heard by the Court on this litigation on March 16, 2017. This motion is for the payment out of sale proceeds of the ship “QE014226C010” [Vessel], sold by Court order for USD \$5 million on June 30, 2014.

The action was commenced by Offshore Interiors Inc. [Offshore], a supplier to the Vessel.

[2] The moving party, the Intervener Harry Sargeant III [Sargeant], seeks an order for payment out of the sale proceeds less the amount required to secure statutory *in rem* claims advanced by trade creditors for goods and services supplied to the Vessel (approximately \$3.1 million).

Sargeant holds a builder’s mortgage against the Vessel. That mortgage has been assigned to Comerica Bank [Comerica], also an Intervener, who consents to this motion.

[3] The statutory *in rem* claimants [*in rem* claimants] have not yet had their claims adjudicated, but these claims would arguably rank behind Sargeant’s claim. However, for the purposes of this motion, Sargeant is prepared to assume that the *in rem* claimants would rank ahead of his claim – therefore, he proposes to hold back the amount of \$3.1 million in trust to secure these claims.

[4] Sargeant wants the balance paid out, firstly to Comerica and the remainder to Sargeant.

Worldspan Marine Inc. [Worldspan], the designer/builder of the Vessel, opposes the motion principally on the grounds that the liabilities, particularly of Sargeant, have not yet been resolved.

II. Facts

[5] The dispute has a tortured history involving multiple proceedings in several jurisdictions, including in this Court and the Supreme Court of British Columbia [BCSC]. The following is a thumb-nail sketch of the core dispute.

[6] Under a Vessel Construction Agreement [VCA] dated February 29, 2008, Sargeant commissioned Worldspan to design, construct, outfit, launch, complete, sell, and deliver a 142-foot custom built luxury yacht to Sargeant. Sargeant had a continuing first priority interest in the Vessel to secure the sums advanced or paid to Worldspan. Sargeant was required to keep Worldspan in a positive cash flow position.

[7] In May 2008, Worldspan granted Sargeant a builder's mortgage duly registered in the Vancouver Ship Registry.

[8] By August 2009, payments made by or on behalf of Sargeant to Worldspan totalled USD \$11,064,525.38.

[9] On August 14, 2009, Sargeant entered into a Construction Loan Agreement [CLA] with Comerica for a further USD \$9,400,000 in order to finance the completion of the Vessel. By way

of an Assignment of Security Agreement and Mortgage (also dated August 14, 2009), Sargeant assigned his interest in the VCA, the Vessel, and the Builder's Mortgage to Comerica in exchange for the advanced funds.

[10] From August 2009 to March 2010, Comerica paid Worldspan USD \$9,387,398.67, on Sargeant's behalf, on account of invoices issued by Worldspan pursuant to the terms of the VCA.

[11] Around April or May of 2010, a dispute arose between Sargeant and Worldspan regarding project costs and construction. By that time, a total of USD \$20,651,924.05 had been paid to Worldspan by Sargeant, or by Comerica on his behalf, in connection with the construction of the Vessel.

[12] On July 28, 2010, Offshore commenced the underlying action against Worldspan, Crescent Custom Yachts Inc., Sargeant and Comerica, all others interested in the Vessel, and the Vessel itself for unpaid invoices for services and materials rendered in connection with the Vessel.

[13] On July 28, 2010, Offshore arrested the Vessel. It remained under arrest until June 30, 2014, when it was sold by the Federal Court, free and clear of any and all claims, liens, and encumbrances, for the sum of USD \$5,000,000.00.

[14] On May 27, 2011, Worldspan, and its related entities, filed a Petition under the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 [CCAA] in the BCSC. The petition

resulted in a Claims Process Order which required all creditors to deliver proof of their claims against Worldspan to the BCSC on or before September 9, 2011, failing which the creditor would be forever barred from making or enforcing a claim against Worldspan. The Order also provided that any creditor asserting an *in rem* claim against the Vessel could pursue its claim outside the CCAA process in the Federal Court.

[15] On August 29, 2011, Prothonotary Lafrenière issued a Claims Process Order for all creditors asserting an *in rem* claim against the Vessel. This Claims Process Order gave notice to all creditors of the requirement to file an affidavit in support of their claim against the Vessel. The Order specified that affidavits should describe the nature of the claim and provide any supporting particulars, thereby allowing the Federal Court to determine if the claim constituted an *in rem* claim against the Vessel and, if so, its priority.

[16] On October 14, 2011, Sargeant filed an affidavit in support of his claim against the Vessel. According to this affidavit, his claim derived from payments in excess of USD \$20 million made by him, or on his behalf, to Worldspan for the construction of the Vessel and from the security interest in the Vessel granted to him by Worldspan to secure those payments.

[17] Several other parties have also asserted claims against the Vessel, including Worldspan, Comerica, Mr. Farid Al-Saleh, Supreme Fuels Trading FZE, and the *in rem* claimants, Offshore, Arrow Transportation Systems Inc, CCY Holdings, Cascade Raider Holdings Ltd., Continental Hardwood Co., Paynes Marine Group, Restaurant Designs and Sales LCC, and Capri Insurance Services Ltd. Two of the claims have been eliminated.

[18] The Federal Court of Appeal has, in two separate decisions, a) confirmed that the mortgage secures advances exceeding \$20 million and b) upheld the decision dismissing Worldspan's priority over the claim and dismissing Sargeant's motion for the *in personam* claims to proceed in the BCSC.

[19] This motion is governed by Rule 491 of the *Federal Courts Rules*, SOR/98-106:

491 On a motion for payment out of any money paid into court under subsection 490(4), the Court may

(a) determine the rights of all claimants thereto;

(b) order payment of all or part of the money to any claimant; and

(c) order immediate payment of any fees or costs of the sheriff in connection with the arrest, custody, appraisal or sale of property, including expenses incurred in maintaining the property between the time of arrest and the sale of the property.

491 Lorsqu'une requête est présentée en vue du versement de la somme consignée à la Cour aux termes du paragraphe 490(4), la Cour peut :

a) déterminer les droits de toutes les personnes qui réclament un droit sur cette somme;

b) ordonner le versement de tout ou partie de la somme aux réclamants;

c) ordonner le paiement immédiat des frais d'exécution et des honoraires du shérif se rapportant à la saisie, à la garde, à l'évaluation ou à la vente des biens, y compris les frais engagés pour la conservation des biens entre la saisie et la vente.

[20] I note particularly that this is a matter of discretion and that such discretion may involve the determination of the rights of claimants.

The issue before me is whether to exercise judicial discretion to order partial payment out of Court.

III. Analysis

[21] A central point of Worldspan's argument is that Sargeant's relief cannot be granted until there is a conclusion that Worldspan is in breach of the VCA and monies are owing to Sargeant/Comerica – no such conclusion had been made. Worldspan contends that Sargeant breached the VCA and that Sargeant owes Worldspan approximately USD \$6.2 million.

[22] It would seem that Worldspan claims that the equities are in its favour. It suggests that Sargeant deliberately breached the VCA obligation to keep Worldspan in a positive cash position, which caused Worldspan to go into creditor protection. It is suggested that as part of the "plan", Sargeant and Comerica intended to buy the Vessel in a "credit bid" process for only a fraction of its cost and to complete the Vessel at a shipyard in Richmond, BC, which was created for this purpose. However, the sale of the Vessel allegedly derailed this plan.

[23] These allegations have not been proven, but they are the subtext to Worldspan's argument that payment out of court is not justified.

[24] The Court can draw little from these allegations because, as pointed out by Prothonotary Hargrave in *Bank of Scotland v "Nel" (The)* (1998), 144 FTR 47, 77 ACWS (3d) 917 (FCTD) [*The Nel*], it is inappropriate to look at the merits of the claims in a motion such as this. However, the Court does note that Sargeant and Comerica's representative have an unexplained (or inadequately explained) reluctance to attend for cross-examinations in Vancouver. This matter is dealt with in the decision on the second motion.

[25] The difficulty for Worldspan is that a number of its arguments on the status of legal interests in and about the VCA, CLA, and mortgage have been dealt with and rejected by Justice Strickland in *Offshore Interiors Inc v Worldspan Marine Inc*, 2013 FC 1266, 444 FTR 283, aff'd 2015 FCA 46, and by Justice Southcott in *Offshore Interiors Inc v Worldspan Marine Inc*, 2016 FC 27, 262 ACWS (3d) 362, aff'd 2016 FCA 307. Those decisions are more than mere “interpretative exercises”, as Worldspan attempted to argue.

[26] However, I note that there is little precedent to guide the Court on the issue of partial payment out of Court. This is likely because such relief is unusual – the normal course being the resolution of the issues between the parties, followed by payment.

[27] In *The Nel* decision, the Court pointed out that no one would be prejudiced or jeopardized by the payment out of “surplus” funds. The issue of “prejudice” is a relevant matter for the exercise of discretion, although the facts in *The Nel* case are remarkably more tranquil than in this case.

[28] Sargeant and Comerica have not shown that no prejudice or disadvantage to any party will arise from payment out of the sale proceeds. In fact, they have not shown any real prejudice to themselves to maintaining the *status quo* and getting on with the litigation, particularly the setting of a priorities hearing.

[29] On the strength of the record before me, I cannot determine “the rights of all claimants hereto” as provided in Rule 491(a). Nor can I determine that Worldspan’s arguments are bereft of any chance of success.

[30] If it is the moving party’s contention that Worldspan’s position is not sustainable, it has other options, such as a motion to strike or a motion for summary judgment, to put that issue squarely before the Court. A motion for payment out of court is not a fitting forum for this multi-layered dispute.

[31] It would be premature and potentially prejudicial to make a partial payment out of Court.

IV. Conclusion

[32] This motion will be dismissed with costs. The parties will be directed to contact the case management judge within 30 days to deal with the next steps in the litigation, including the priorities hearing discussed on this motion.

ORDER in T-1226-10

THIS COURT ORDERS that this motion is dismissed with costs. The parties are directed to contact the case management judge within 30 days to deal with the next steps in the litigation, including the priorities hearing discussed on this motion.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1226-10

STYLE OF CAUSE: OFFSHORE INTERIORS INC. v WORLDSPAN MARINE INC., CRESCENT CUSTOM YACHTS INC., THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL "QE014226C010" and THE VESSEL "QE014226C010" AND WOLRIGE MAHON LIMITED in its capacity as Appointed Vessel Construction Officer of the Defendant Vessel "QE014226C010", HARRY SARGEANT III, MOHAMMAD ANWAR FARID AL-SALEH, and 642385 B.C. LTD.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MARCH 16, 2017

ORDER AND REASONS: PHELAN J.

DATED: MAY 9, 2017

APPEARANCES:

Gary Wharton

FOR THE PLAINTIFF
and FOR THE DEFENDANT
WORLDSPAN MARINE INC.

Keiran Siddall
Kaitlin Smiley

FOR THE INTERVENER
HARRY SARGEANT III

John McLean
Harban Bains

FOR THE INTERVENER
COMERICA BANK

SOLICITORS OF RECORD:

Bernard LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE PLAINTIFF

Bernard LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE DEFENDANTS

Norton Rose Fulbright Canada
LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE INTERVENER
HARRY SARGEANT III

Borden Ladner Gervais LLP
Barristers & Solicitors
Vancouver, British Columbia

FOR THE INTERVENER
MOHAMMAD ANWAR FARID AL-SALEH

Nathanson Schachter & Thompson
LLP
Barristers & Solicitors
Vancouver, British Columbia

FOR THE INTERVENER
642385 B.C. LTD

Gowling WLG (Canada) LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE INTERVENER
COMERICA BANK

Farris Vaughan Will & Murphy
LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR CASCADE RAIDER HOLDINGS LTD
(FORMERLY RAIDER-HANSEN INC) AND CAPRI
INSURANCE SERVICES LTD