Federal Court  Cour fédérale

**Date: 20181002**

**Docket: T-624-17**

**Citation: 2018 FC 974**

**Ottawa, Ontario, October 2, 2018**

**PRESENT: The Honourable Mr. Justice Harrington**

**ADMIRALTY ACTION *IN REM***
**AGAINST THE SHIP "COSCO PACIFIC"**
**AND *IN PERSONAM***

**BETWEEN:**

**GRAYMAR EQUIPMENT (2008) INC.**
**FRASER RIVER PILE & DREDGE (GP) INC.**

**Plaintiffs**

**and**

**COSCO PACIFIC SHIPPING LTD.,**
**COSCO SHIPPING LINES CO. LTD. AND**
**THE OWNERS AND ALL OTHERS**
**INTERESTED IN THE SHIP**
**"COSCO PACIFIC"**
**AND WARREN JAGER**

**Defendants**

**JUDGMENT AND REASONS**

[1] During the morning hours of October 28, 2016, the *Cosco Pacific* misjudged the approach to her berth at the Fairview Container Terminal in Prince Rupert. She entered the zone

where a dock extension was being constructed. She struck the plaintiffs' scow the *FRPD Rupert* which in turn pushed their derrick the *T.L. Sharpe* under the dock face. The *T.L. Sharpe*'s spuds had been in the lowered position to secure her to the sea bed. They were damaged. It took 8 days to repair them.

[2] The plaintiffs have taken action *in rem* against the ship and *in personam* against her owners and her pilot Warren Jager. The claim is for the cost of repair, business interruption and for other expenses which would not otherwise have been incurred. Following a round of examinations for discovery, Mr. Jager admitted liability. A Consent Judgment was entered against him on June 8, 2018, for $1,000, his limitation of liability under the *Pilotage Act*, with interest and costs.

[3] On June 29, 2018, the plaintiffs moved for judgment following summary trial against the remaining defendants (the Cosco defendants) both on liability and on quantum. The principal amount claimed was $513,955.53.

[4] The evidence led on quantum consisted of the affidavits of Michael Logan, who was the Marine Works Manager at the Fairview Container Terminal Project, and Todd Braconnier, a marine engineer who surveyed the damage, and reviewed repair invoices.

[5] On July 31, 2018, the Cosco defendants filed their motion record. In it they admitted liability. They took no position with respect to the cost of repairs other than their allegation that

part of the claim had been duplicated. With respect to the business interruption and additional expense portions of the claim, they submitted that the plaintiffs had not met their onus of proof.

[6] Then in turn the plaintiffs reduced their claim by $31,320.

[7] These reasons break down as follows:

(a) is a summary trial appropriate?;

(b) the nature of the claim;

(c) the parties;

(d) analysis and disposition;

(e) interest; and

(f) costs.

## I. Is a Summary Trial Appropriate?

[8] Our Rules contemplate both summary judgments and summary trials. Summary judgments go back to 1978, while Rule 216, dealing with summary trials, was only added in 2009. The party moving for summary trial must file a record containing all the evidence upon which it seeks to rely. Evidence is usually advanced in the form of affidavits. However, the Court has the power to require an affiant to attend at Court for cross-examination. An adverse inference may be drawn if a party fails to cross-examine on an affidavit or file rebuttal evidence.

[9] Rule 216, as drafted and interpreted by our Court, provides for different recourses depending on whether summary trial is appropriate.

[10] The Court may dismiss the motion if satisfied that the issues raised are not suitable for summary trial or that such a trial would not assist in the efficient resolution of the action.

[11] On the other hand, if there is sufficient evidence to render a decision, the Court may grant judgment following the summary trial either in whole or on a particular issue. Questions not disposed of in the summary trial judgment may be ordered to proceed to a full trial. The Court may also order a reference under Rule 153 to determine the quantum of damages.

[12] There is a great deal of jurisprudence on point, as motions for summary judgments and summary trials are frequently filed not only in this Court but also in the Superior Courts of the provinces. Most, but not all, the jurisprudence relates to summary judgments.

[13] The leading case is undoubtedly *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87. That case, on appeal from the Court of Appeal for Ontario, dealt with summary judgments. The Court emphasized the principle of proportionality in order to secure the just, most expeditious and least expensive determination of a proceeding on its merits. Our Rule 3 is to the same effect.

[14] The nature and the complexity of the action must be taken into consideration.

[15] In speaking for the Court, Madam Justice Karakatsanis, stated at paragraphs 31 and 32:

> [31] Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and

> complexity of the litigation": *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53.
>
> [32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[16] A recent helpful decision of this Court, rendered by Mr. Justice Zinn, is *Kaska Dena Council v Canada*, 2018 FC 218, which also dealt with a motion for summary judgment. In citing a great deal of authority including *Hryniak*, above, he pointed out that under our Rules the Court shall grant summary judgment if satisfied that there is no genuine issue for trial. These authorities stand for the proposition that there is no genuine issue for trial if the motion allows the judge to make the necessary findings of fact, allows him or her to apply the law to the facts, and that this is a proportionate, expeditious and less expensive way to proceed.

[17] To allow the judge to make findings necessary for adjudication, both parties are required on a summary judgment or summary trial motion to put their best foot forward in terms of evidence.

[18] In this case, when the plaintiffs moved for summary trial liability was in issue. Liability has now been admitted. In view of the principles above, I am satisfied that quantum should proceed by way of summary trial, not by reference. Indeed, the defendants embrace that concept.

They submit strenuously that the plaintiffs have not met their burden of proof, except with respect to the cost of repair.

## II. The Nature of the Claim

[19] The claim has four components. The first is for the cost of repair in the amount of $187,865.51.

[20] The second is for business interruption. The claim is not for loss of use of the *T.L. Sharpe*, but rather for lost business of another marine derrick belonging to the plaintiffs, the *Peter D. Anderson*. This derrick had different capacities. Once the *T.L. Sharpe*'s preparatory work would be done, the *Peter D. Anderson* was to do her own work.

[21] Pending repairs, the *Peter D. Anderson* was said to be idle for 8 days or 80 hours. The evidence is that she had business in hand in the province's Lower Mainland. During those 80 hours her drill compressors and drill equipment would have been in use. Likewise, another scow would have been working. Finally, the *Peter D. Anderson*'s operator and deck engineer could not be reassigned and were paid during the 8 days in question. The claim for this equipment is advanced at a standby rate, rather than the full working rate.

[22] The total claim under this heading was $217,864, but now must be reduced by $31,320, as explained below, for a total of $186,544.

[23] The third item is for supervisory, construction and administrative staff who had to remain on site 8 days longer than they otherwise would have. The claimed amount is $75,812.01 for payments to these individuals, plus overhead costs of 15%, for a total of $87,183.82.

[24] Finally, $21,042 is claimed as indirect costs incurred in maintaining facilities, access roads, offices and project security for an additional 8 days.

## III. The Parties

[25] The scows, the marine derricks, and indeed all equipment used in the marine portion of the construction project were owned by Graymar, a wholly owned subsidiary of the other plaintiff Fraser River. This equipment was leased (or bare-boat chartered if you will) by Graymar to Fraser River. Fraser River as a bailee in possession is entitled to sue for both the cost of repair and business interruption (*Oceanex Inc v Praxair Canada Inc*, 2014 FC 6 at para 8; *The Winkfield*, [1902] P 42, 9 Asp MLC 259, [1900-3] All ER Rep 346).

[26] Graymar, as owner, also has standing to sue for the cost of repair. The leases continued and it suffered no actual loss. Had it recovered it would have been required to account to Fraser River. See *The Winkfield* above. The solution is simply to declare it had standing.

[27] The remaining *in personam* defendants are Cosco Pacific Shipping Ltd., the admitted registered owner of the *Cosco Pacific*, and Cosco Shipping Lines Co. Ltd. alleged in the Statement of Claim and admitted in the Statement of Defence as being her beneficial owner. However, no particulars were given as to what this beneficial ownership means in context. I was

informed that bail was given for both. In the circumstances, it is appropriate that the Cosco defendants be found jointly and severally liable.

## IV. Analysis and Disposition

[28] The defendants did not cross-examine Mr. Logan or Mr. Braconnier on their affidavits. However, they did file the earlier examination for discovery of Mr. Logan. The defendants learned through that examination that the *Peter D. Anderson* assisted in completing part of the repairs, and so it was not idle for 8 days. This led to a reduction of the claim for business interruption by $31,320.

[29] The repair invoices are all listed in Mr. Braconnier's affidavit and, according to Mr. Logan, were all provided to the defendants. They are not before the Court. The summary of these invoices by Mr. Braconnier indicates that a fair amount of the repair work was done by Fraser River. The record does not indicate whether it was charging standard rates or simply its out of pocket costs.

[30] It is well-established that a party may carry out its own repairs and claim the cost of labour, including workers' compensation, unemployment insurance, vacation pay and the like, as well as a reasonable mark-up for overhead. However, the party cannot make a profit (*Bell Telephone Co v Montreal Dual Mixed Concrete Ltd* (1960), 23 DLR (3d) 346, [1959] RL 425 (Québec CA); *Air Canada v Canada* (1989), 28 FTR 148; *Société Telus Communications v Peracomo Inc*, 2011 FC 494, 389 FTR 196). Although, this latter case was affirmed in appeal

2012 FCA 199, 433 NR 152, and varied by the Supreme Court 2014 SCC 29, [2014] 1 SCR 621, this particular point was only considered at first instance.

[31] In their memorandum, the defendants state that they take no position on the cost of repairs. We are in an adversarial system, not an inquisitorial one. The Court will not delve into the matter on its own motion and so accepts the cost of repairs of the *T.L. Sharpe* as being $187,865.51.

[32] The real controversy relates to the remaining three heads of damage. The starting point is that, absent a statute to the contrary, the onus is on a plaintiff to prove its case on the balance of probabilities (*F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41).

[33] The defendants have cited a great number of cases which hold that a plaintiff claiming business interruption and additional expenses in a shipping context must prove its case with reasonable certainty: See for instance *Canada v Saint John Tug Boat Co*, 1946 SCR 466 and the *Soya* [1956] 1 WLR 714 affirmed by the English Court of Appeal, [1956] 2 All ER 393. Reference was also made to Waddams, *The Law of Damages*, loose leaf edition at paragraphs 1.1950 and following, which deal with loss of profits from use of a revenue earning chattel. In broad terms, the defendants submit that the plaintiffs did not prove what business the *Peter D. Anderson* would have had, and at what rate. Another point is that in his examination for discovery, Mr. Logan may have indicated that the payments to supervisory construction and administrative staff included a margin of profit, to which an overhead charge of 15% was added.

[34] The claim calculations were set out in a spreadsheet attached to Mr. Logan's affidavit. There is no indication that he prepared that spreadsheet. The defendants made reference to Rule 81 of the *Federal Courts Rules*. Although affidavits leading to the final disposition of a case should be confined to facts within the affiant's personal knowledge, Rule 81 specifically carves out an exception with respect to motions for summary judgments and summary trials. In this context, statements as to the affiant's belief are allowed.

[35] According to Mr. Logan the *Peter D. Anderson* was claimed at the standard hourly standby rate of $558.75 rather than the normal charge-out rate of $745. Likewise, standby rates were charged for the drill compressor and drill equipment. His testimony that the *Peter D. Anderson* had business in hand was not contradicted. I allow the claimed amount of $217,834 less the $31,320 referred to above for a total of $186,544.

[36] Turning to payments to the staff, according to the defendants, there should have been evidence from the payroll department and expert opinion as to appropriate accounting practice such as in the *Bell Telephone* case cited above and *Apotex Inc v H Lundbeck A/S*, 2013 FC 192, 111 CPR ($4^{th}$) 171. However, these cases were not on a motion for summary trial. Following *Hryniak*, I must say "the times they are a changing". The culture shift cannot be denied.

[37] Mr. Logan was the Project Director. He certainly knew the requirements of the job, the equipment to be used and the supervisory construction and administrative staff who stayed on the job for an additional 8 days. It would be excessive to require evidence from the payroll master.

[38] More to the point, I do not think expert evidence is required in order to support a claim for reasonable overhead. See *Société Telus* above. However, the plaintiffs provided no break down whatsoever as to how the figure claimed was arrived at and so I reduce the overhead from 15% to 10%.

[39] Thus on the claim for supervisory construction and administrative staff, I allow $83,393.21 rather than the claimed amount of $87,183.82 to account for the 5% decrease in overhead costs.

[40] Although there may have been some confusion in the examination for discovery on possible profit, Mr. Logan's subsequent affidavit makes it clear that amounts claimed before overhead were those actually owing to the employees. It was not necessary to produce paystubs unless challenged by way of cross-examination or other evidence tendered by the defendants.

[41] As Mr. Justice Binnie, speaking for the Supreme Court, in *Whirlpool Inc v Camco Inc*, 2000 SCC 67, [2000] 2 SCR 1067 at paragraphs 82 and 84 stated, it is not unreasonable for a Court to accept scanty evidence from one side against no evidence at all from the other:

> 82 The evidence of infringement is not very satisfactory. The appellants declined to call a witness to describe the drive means utilized in their accused machines, preferring to sit back and argue that the respondents had not made sufficient proof…
>
> [My emphasis]
>
> 84 The appellants' reliance on the onus of proof, while perhaps sound tactics, left the court in an awkward position. The respondents' evidence of infringement, while thin, was put into the balance against no evidence at all. The Federal Court of Appeal concluded that the videotaped evidence supported the inference of continuous drive as well as the observed continuous rotation. I

> conclude that in the absence of any GE evidence to the contrary, it was open to that court to use that inference to find, as a fact, infringement of the continuous drive claim.

[42] Finally the last item of $21,042 is for project security, maintenance of access roads, maintenance of facilities, and the contractor's office. According the record, the project was a Joint Venture Agreement between Fraser River and Bel Contracting. Bel was to carry out the land portion of the work and Fraser River the marine work. Fraser River's work began in June 2015. It is not clear when its portion of the work was completed. A Notice to Shipping regarding the safe working zone stated that the marine portion of the work was expected to last until July 2017. The *Peter D. Anderson* was on-site for approximately a year and half. There are far too many variables to say with any certainty that Fraser River's stay was extended by 8 days because of the *Cosco Pacific*. The item is disallowed.

[43] Consequently the claim as allowed is $457,802.72:

(a) cost of repair $187,865.51;

(b) loss of profit re: *Peter D. Anderson* $186,544;

(c) supervisory, construction and administrative staff $83,393.21; and

(d) extra facility costs $0.

## V. Interest

[44] The plaintiffs seek "admiralty interest at the prime rate compounded semi-annually". According to figures produced by the Toronto Dominion Bank, its prime lending rate at the date of the allision (an American term to cover contact between a moving object and a fixed object) was 2.70%. The rate had later worked itself up to 3.70%, but by trial was 3.45%.

[45] Based on the plaintiffs' calculations, vetted by the defendants, the accumulated interest on the principal sum of $457,802.72, calculated at the weighted bank prime rate compounded every six months up to September 12, 2018, is $26,838.77, with further daily interest thereafter of $43.27 until the day of judgment. Not all the damage was suffered on the date of the allision. However, it would be mind-numbing to carry out a whole series of calculations on different amounts starting at slightly different dates. All pre-judgment interest shall run from October 28, 2016.

[46] Section 36 of the *Federal Courts Act* deals with pre-judgment interest but specifically does not apply with respect to matters arising under Canadian maritime law, as is the case here.

[47] This Court has often awarded pre-judgment compound interest. It has also awarded simple interest. In Canadian Maritime Law the pre-judgment interest function of damages is ultimately left to the appreciation of the Court (*Bell Telephone Co of Canada v Mar-Tirenno (The)*, [1974] 1 FC 294, *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303). I normally ascribe to the view that evidence must be led that compound interest is necessary to make the plaintiffs whole, as set out in such cases as *Alcan Aluminium Ltd v Unican International SA*, [1996] FCJ No 843, 113 FTR 81 and *Elders Grain Co v M/V Ralph Misener (The)*, 2004 FC 1285. However, if the plaintiffs had just asked for interest, I would have awarded simple interest at the legal rate of 5%, as set out in the *Interest Act*. Since the interest claimed is less than that, I will award the pre-judgment interest sought by the plaintiffs.

[48] As for post-judgment interest, if a cause of action wholly arose within one province, which appears to be the case, section 37(1) of the *Federal Courts Act* calls for the application of provincial law. Section 7 of the (British Columbia) *Court Order Interest Act*, provides for simple interest at a rate equal to the prime lending rate of a bank to the government. However, section 8 of that Act provides that the Court may vary that rate. I will use the rate of 3.45 %.

[49] Judgment shall be in the amount of $457,802.72 together with pre-judgment interest of $26,838.77 up to September 12, 2018 and further daily interest of $43.27. Post-judgment interest shall run on the damages and pre-judgment interest at the simple annual rate of 3.45%.

## VI. Costs

Both parties have requested that costs only be dealt with after delivery of these reasons and judgment. Either party may therefore move for directions under Rule 403 within 30 days hereof. Mr. Jager's counsel is to be put on notice as the judgment against him provides that the costs as against him are to be decided after this judgment, and without prejudice to his right to seek apportionment.

**JUDGMENT in T-624-17**

**FOR REASONS GIVEN THIS COURT'S JUDGMENT is that**:

1. It is declared that Graymar Equipment (2008) Inc. has a valid cause of action against the Defendants, but as it has suffered no damages the action is dismissed, without costs.
2. The ship *Cosco Pacific*, Cosco Shipping Ltd. and Cosco Shipping Lines Co. Ltd. are condemned jointly and separately to pay Fraser River Pile & Dredge (GP) Inc. the sum of $485,506.89 comprising damages in the amount of $457,802.72 and pre-judgment interest of $27,704.17.
3. Interest shall run on the judgment at the annual rate of 3.45% until payment.
4. Failing payment the ship *Cosco Pacific* is ordered to be sold and Fraser River Pile & Dredge (GP) Inc. paid out of the proceeds thereof.
5. Costs may be spoken to in accordance with paragraph 50 of the accompanying reasons.

"Sean Harrington"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-624-17 |
| **STYLE OF CAUSE:** | GRAYMAR EQUIPMENT (2008) INC. FRASER RIVER PILE & DREDGE (GP) INC. v COSCO PACIFIC SHIPPING LTD., COSCO SHIPPING LINES CO. LTD. AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "COSCO PACIFIC" AND WARREN JAGER |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | SEPTEMBER 12, 2018 |
| **JUDGMENT AND REASONS:** | HARRINGTON J. |
| **DATED:** | OCTOBER 2, 2018 |

**APPEARANCES:**

| | |
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| David F. McEwen, Q.C. | FOR THE PLAINTIFFS |
| Daniel H. Coles | FOR THE DEFENDANTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Alexander, Holburn, Beaudin + Lang LLP<br>Vancouver, British Columbia | FOR THE PLAINTIFFS |
| Owen Bird Law Corporation<br>Vancouver, British Columbia | FOR THE DEFENDANTS |