

Federal Court



Cour fédérale

Date: 20181101

Docket: T-1462-18

Citation: 2018 FC 1098

Ottawa, Ontario, November 1, 2018

PRESENT: The Honourable Madam Justice McDonald

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

**BBC CHARTERING CARRIERS GMBH
& CO. KG**

Plaintiff

and

**OPENHYDRO TECHNOLOGY CANADA
LIMITED, AND THE OWNERS AND ALL
OTHERS INTERESTED IN THE CARGO EX
THE SHIP BBC EMERALD, BEING AN
OTC03 TURBINE CONTROL CENTRE
PRESENTLY LOCATED AT CAPE SHARP
TIDAL IN THE MINAS PASSAGE OF NOVA
SCOTIA, *IN REM***

Defendants

JUDGMENT AND REASONS

[1] In this Motion, the Plaintiff, BBC Chartering Carriers GMBH & CO. KG (“BBC Chartering”) seeks default judgment pursuant to Rule 210 of the *Federal Courts Rules*, SOR/98-106 [the Rules] against the Defendant being an OTC03 Turbine Control Centre presently located

at Cape Sharp Tidal in the Minas Passage of Nova Scotia *in rem* (“TCC” or “the *in rem* Defendant”). They seek judgment in the amount of \$871,339.97 plus interest and costs. The Plaintiff also seeks an order for Commission of Sale of the TCC.

[2] The Defendants have not filed a Statement of Defence and no one appeared on their behalf at the hearing of this Motion on October 23, 2018.

[3] In advance of the Motion, the Court received communications from legal counsel on behalf of the Defendant, OpenHydro Technology Canada Limited (“OpenHydro”), requesting that the Court decline to consider this Motion as OpenHydro filed a Notice of Intention to make a proposal pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. In this communication, legal counsel asserts, that as a result of the stay of proceedings imposed by section 69(1) of the BIA, the Motion by BBC Chartering should not be considered by the Court.

[4] BBC Chartering concedes it cannot proceed against the *in personam* Defendant OpenHydro in light of the BIA proceedings and does not seek default judgment against OpenHydro. BBC Chartering does seek default judgment against the *in rem* Defendant, TCC.

[5] For the reasons that follow, I agree with BBC Chartering that it can proceed against the *in rem* Defendant, and I allow the Motion.

Background

[6] BBC Chartering is a German corporation engaged in the business of shipping and chartering vessels. At the relevant time, BBC Chartering was the charter and commercial operator of the vessel BBC Emerald (“Vessel”).

[7] According to the Statement of Claim, the *in personam* Defendant, OpenHydro, carries on business in Nova Scotia and on April 17, 2018 entered into Time Charter Party for Offshore service vessels agreement (“Charterparty Agreement”) with BBC Chartering. By this Charterparty Agreement, OpenHydro chartered the vessel from BBC Chartering for the carriage of the cargo, being the TCC, from Ireland to the Port of Saint John, New Brunswick.

[8] The Charterparty Agreement also provided that OpenHydro would be using the vessel and equipment for lift operations at the Port of Saint John, New Brunswick.

[9] The *in rem* Defendant is cargo which was loaded aboard the vessel and transported from Ireland to the Port of Saint John, New Brunswick.

[10] Upon delivery of the TCC by BBC Chartering and pursuant to the Charterparty Agreement, BBC Chartering invoiced OpenHydro for the agreed upon services and equipment as follows:

Invoice No.	Date Invoice Was Payable	Amount (In EUROS)
003741VREV	June 26, 2018	447,760.00
003745VREV	June 29, 2018	16,538.37
003857VREV	August 12, 2018	29,864.59
003867VREV	August 16, 2018	22,397.50
003866VREV	August 16, 2018	65,847.11
	TOTAL:	\$582,407.57

[11] To date, no payments have been made by OpenHydro on the invoices and the total amount outstanding is €582,407.57, which as of August 16, 2018 converts to \$871,339.97 Canadian based upon the Bank of Canada currency converter.

[12] Pursuant to the terms of the Charterparty Agreement, upon default in payment, BBC Chartering was entitled to assert a lien on the cargo. This right of lien is the basis of the *in rem* claim against the cargo, the TCC. Personal service on the cargo was impossible as the TCC is currently located on the seafloor in the Minas Passage. On September 11, 2018, by Order of Prothonotary Aalto, service on the *in rem* Defendant was validated effective August 14, 2018.

[13] The following dates are important in respect of the relief sought against the *in rem* Defendant:

- August 1, 2018 – Statement of Claim filed by BBC Chartering;
- August 2, 2018 – Statement of Claim, Affidavit to Lead Warrant, and Warrant served on the Defendant OpenHydro;

- August 14, 2018 – validation of service of the Statement of Claim, Affidavit to Lead Warrant, and Warrant on the *in rem* Defendant;
- September 14, 2018 – deadline for the *in rem* Defendant to file a Statement of Defence; and
- September 24, 2018 – OpenHydro files a Notice of Intention pursuant to section 50.4(1) of the *BIA*.

Issue

[14] The only issue for determination is if default judgment should be granted against the *in rem* Defendant, the TCC.

Analysis

[15] On a motion for default judgment, the moving party must produce evidence which proves, on a balance of probabilities, the claims made in the Statement of claim and establishes its right to the relief claimed (*Teavana Corporation v. Teayama Inc*, 2014 FC 372)

[16] In support of its motion, BBC Chartering relies upon the following evidence:

- Affidavit of Andrei Kharchenko affirmed on October 11, 2018;
- Affidavit of Brian Peters sworn August 3, 2018;
- Affidavit of Deanna Logan sworn August 8, 2018; and
- Affidavit of Michelle Staples affirmed October 1, 2018.

[17] Pursuant to section 22(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*], the Federal Court has concurrent original jurisdiction over matters of navigation and shipping. Of particular relevance is paragraph 22(2)(i) which states that the Federal Court has jurisdiction with respect to “any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise”.

[18] Further to this, section 43(2) of the *FCA* states that:

43(2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court.

[19] The scope of section 43(2) of the *FCA* was addressed by the Supreme Court of Canada in *Phoenix Bulk Carriers Ltd. v Kremikovtzi Trade*, 2007 SCC 13 at paragraph 4 as follows:

For the reasons given by Nadon J.A. [at the Federal Court of Appeal], we agree that the narrow “physical nexus” interpretation of s. 43(2) should be rejected, in favour of an “identifiability” test that asks whether the cargo is the cargo designated in the contract of affreightment alleged to be breached.

[20] In the Federal Court of Appeal decision of Justice Nadon, referred to by the Supreme Court above (*Kremikovtzi Trade v Swift Fortune (The)* 2006 FCA 1 at para 47), Justice Nadon stated as follows:

I am therefore of the view that subsection 43(2) does not require a physical nexus between the cargo and the vessel in order to give rise to *in rem* rights. Rather, subsection 43(2) proposes identifiability of the property as the controlling factor so as to ensure that the scope of the *in rem* proceedings is not unduly enlarged. In other words, the action *in rem* must relate to the specific property contemplated in the contract at issue.

[21] In this case, although the cargo is no longer on the chartered vessel and is in fact located on the seafloor, I am satisfied based on the above authorities that there is a clear nexus between the cargo and the vessel. The cargo over which BBC Chartering seeks default judgment is the very subject matter of the Charterparty Agreement between the parties and is, therefore, within this Court's maritime law jurisdiction.

[22] For its claim against the *in rem* defendant the TCC, BBC Chartering relies upon clause 19 of the Charterparty Agreement which states:

The Owners shall have a lien upon all cargoes and equipment for all claims against the Charterers under this Charter Party and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned.

[23] Service of the *in rem* proceedings and the Warrant were validated pursuant to the September 11, 2018 Order of Prothonotary Aalto as follows:

Service of *in rem* proceedings of the Statement of Claim, Affidavit to Lead Warrant and the Warrant issued on August 1, 2018 on the *in rem* Defendant, being the cargo ex the ship *BBC EMERALD*, described as and consisting of an OTC03 Turbine Control Centre presently located at the Cape Sharp Tidal Energy Project, in the Minas Passage of Nova Scotia, be and herby [sic] is validated with an effective date of August 14, 2018.

[24] As service on the *in rem* Defendant has been established and as no defence has been filed, I am satisfied that the *in rem* Defendant is in default (See: *249387 B.C. Ltd. v Edith Cavell (The)*, 2002 FCT 798).

[25] With respect to the status of the claim against the *in personam* Defendant, OpenHydro, and the *BIA* proceedings, BBC Chartering does not dispute that the bankruptcy proceedings initiated by OpenHydro stays any action against them pursuant to section 69(1) of the *BIA*.

[26] However, BBC Chartering relies upon *Antwerp Bulkcarriers, NV (Re)*, 2001 SCC 91 [*Antwerp*] and *Holt Cargo Systems Inc v ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 to argue that the *BIA* proceedings do not stay the *in rem* proceedings. In *Antwerp*, the Supreme Court of Canada stated as follows:

39 The appellant Trustees do not contest the statutory authority of the Federal Court under s. 22 of the *Federal Court Act*, R.S.C. 1985, c. F-7, and relevant rules, to do what it did in terms of maritime law. Their argument is that the supervening bankruptcy of the shipowner transformed a maritime law action into a bankruptcy matter, and this overrode the powers of the Federal Court which has no bankruptcy jurisdiction. This proposition is rejected for the reasons set out in the companion appeal of *Holt Cargo Systems Inc.*, *supra*.

40 The Federal Court's maritime jurisdiction, once properly engaged by the commencement of the *in rem* action and the arrest of the Ship on March 30, 1996, was never lost. The *subsequent* bankruptcy of the shipowner in Antwerp, initiated after Holt had taken steps in Canada to realize on its security, did not have that effect. All of the proceedings taken thereafter in the Federal Court were usual and normal maritime law proceedings against a ship. Moreover, all of the orders of the bankruptcy court (with the brief aberration of the *ex parte* order of June 11, 1996) contained the secured creditors provision, which expressly made the Trustees' claim to possession "subject however, to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided".

[27] Here the arrest of the *in rem* Defendant took place on August 14, 2018. OpenHydro's Notice of Intention under the *BIA* was filed afterwards on September 24, 2018. Therefore, in accordance with *Antwerp*, the maritime jurisdiction of the Federal Court was engaged in advance of the *BIA* proceedings.

[28] Further, BBC Chartering asserts a lien against the *in rem* Defendant pursuant to the provisions of the Charterparty Agreement. BBC Chartering argues that this makes them a secured creditor within the *BIA* and therefore exempt from the imposition of a stay pursuant to paragraph 69(2)(a) of the *BIA*, which states:

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

[29] BBC Chartering argues that, as the cargo was taken into possession by the arrest, it was in possession of the secured asset before the *BIA* proceedings were initiated.

[30] In its October 22, 2018 letter, OpenHydro's legal counsel relies upon *LF Centennial Pte. Ltd. v TRLU7228664 et Al (Containers)*, 2015 FC 214 [*LF Centennial*] to argue that the *BIA* proceedings impose a stay of proceedings upon all claims. However, a review of *LF Centennial* demonstrates that the facts and circumstances in that case are distinguishable from this case. Most notably, in *LF Centennial*, the Court concluded that the claim asserted did not arise from a contract for the carriage of goods or for the use or hire of a ship but rather were commercial contracts with no maritime law component. Additionally, the Court in *LF Centennial* noted that the attempted arrest of the goods took place after the *BIA* proceedings.

[31] Unlike *LF Centennial*, the claim is advanced here is pursuant to the terms of the Charterparty Agreement and relates specifically to the cargo that is the subject of that agreement. Therefore this claim falls within the Court's maritime law jurisdiction. Furthermore, the cargo, being the *in rem* defendant, was arrested before the *BIA* proceedings were started.

Conclusion

[32] The Plaintiff BBC Chartering has provided evidence that it invoiced OpenHydro for the agreed upon services and equipment and that no payments have been made. The invoices issued to OpenHydro total €582,407.57, which as of August 16, 2018, being the date when payment on the last invoice was due, converts to \$871,339.97 Canadian.

[33] I am satisfied on the facts that the Plaintiff is entitled to default judgment against the *in rem* Defendant in the amounts invoiced along with the contractually agreed to pre-judgment and post-judgment interest rate of 5.25%.

[34] The plaintiff is also entitled to costs, which I fix at \$2000.00.

JUDGMENT in T-1462-18

THIS COURT'S DECLARES AND ADJUDGES that

1. The Plaintiff shall have judgment in the amount of \$871,339.97 against the Defendant
“The cargo ex the Ship BBC Emerald, being a OTC03 Turbine Control Centre
presently located at Cape Sharp Tidal in the Minas Passage of Nova Scotia, *in rem*”;
2. The Plaintiff shall also have pre-judgment and post-judgment interest at the contract
rate of 5.25% per annum from August 16, 2018 to the date of the payment;
3. No party may use, operate, move, alter or otherwise interfere with “The cargo ex the
Ship BBC Emerald, being a OTC03 Turbine Control Centre presently located at
Cape Sharp Tidal in the Minas Passage of Nova Scotia, *in rem*”;
4. A Commission of Sale of the “The cargo ex the Ship BBC Emerald, being a OTC03
Turbine Control Centre presently located at Cape Sharp Tidal in the Minas Passage of
Nova Scotia, *in rem*” shall be carried out pursuant to Rule 490 of the Rules by the
Sheriff of Cumberland County, Nova Scotia;
5. Any party with knowledge or information with respect to “the cargo ex the Ship
BBC Emerald, being a OTC03 Turbine Control Centre presently located at Cape
Sharp Tidal in the Minas Passage of Nova Scotia, *in rem*” shall provide such

information or knowledge to the Sheriff, as may be necessary, to carry out the
aforementioned Commission of Sale; and

6. The Plaintiff shall have costs in the amount of \$2000.00.

“Ann Marie McDonald”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1462-18

STYLE OF CAUSE: BBC CHARTERING CARRIERS GMBH & CO. KG v
OPENHYDRO TECHNOLOGY CANADA LIMITED,
AND THE OWNERS AND ALL OTHERS INTERESTED
IN THE CARGO EX THE SHIP BBC EMERALD,
BEING AN OTC03 TURBINE CONTROL CENTRE
PRESENTLY LOCATED AT CAPE SHARP TIDAL IN
THE MINAS PASSAGE OF NOVA SCOTIA, IN REM

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 23, 2018

JUDGMENT AND REASONS: MCDONALD J.

DATED: NOVEMBER 1, 2018

APPEARANCES:

Marc D. Isaacs

FOR THE PLAINTIFF

SOLICITORS OF RECORD:

Isaacs & Co.
Barristers and Solicitors
Toronto, Ontario

FOR THE PLAINTIFF

Cox & Palmer
Barristers and Solicitors
New Brunswick

FOR THE DEFENDANTS