Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-1357-97

**ACTION *IN REM* AGAINST
THE VESSEL NECAT A AND *IN PERSONAM* AGAINST
THE OWNERS AND CHARTERERS OF THE VESSEL
NECAT A AND DENSAN SHIPPING CO. INC.**

BETWEEN:

AMICAN NAVIGATION INC.

Plaintiff

- and -

**DENSAN SHIPPING CO. INC. and
THE OWNERS AND ALL OTHERS INTERESTED
IN THE VESSEL NECAT A**

Defendants

REASONS FOR ORDER

LUTFY J.:

Within days after its arrest, the ship ~~NECTA~~ A was released upon the payment of $605,000 bail, subject to the right of its owner, the defendant Densan Shipping Co. Inc., to pursue this contestation of the amount of the security.

The plaintiff caused the arrest of the ship when instituting this action in damages for $590,261. The ship's arrest is an interim measure pending the

arbitration in London of this and other claims between the parties and pursuant to article 9 of the Schedule to the *Commercial Arbitration Act*, R.S.C. 1985, ch. C-34.6.[1] The statement of claim alleges the breach of the parties' charter party agreement when the defendant failed to direct the vessel to proceed to Eilat in Israel for the loading of a phosphate cargo shipment which the plaintiff had undertaken to transport to Vizakhapatnam in India.

Upon the defendant's motion pursuant to Rule 1005 (1.1) of the *Federal Court Rules*, prothonotary Richard Morneau reduced the bail to $124,387. He set aside the bail corresponding to two of the plaintiff's three claims. He did not alter the amount of bail for the plaintiff's third claim and ordered additional security of $10,000 for legal costs. Immediately prior to the hearing of the motion, the prothonotary allowed the production of the defendant's supplementary affidavit. By way of appeal from the prothonotary's substantive and procedural orders, the plaintiff now seeks the reinstatement of the full amount of bail. There is no cross-appeal from the defendant. The execution of the prothonotary's order was stayed pending this appeal.[2]

The Prothonotary's Decisions

In its statement of claim, the plaintiff seeks: (a) damages of $336,954 for loss of profit as a result of its inability to execute the cargo shipment from Eilat;

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1 During the hearing on this appeal, counsel for the plaintiff did not seriously question the jurisdiction of this Court concerning the defendant's motion to reduce the security. However, he did suggest that because article 17 of the Schedule provided concurrent jurisdiction for interim measures to the arbitral tribunal which was seized of these claims, the scope of this Court's intervention should be accordingly circumspect. Neither party suggested that it would be improper for the court to exercise its jurisdiction where the arrest was for the purpose of providing security with respect to arbitral proceedings in another jurisdiction.

2 The parties acknowledge that affidavits containing evidence not before the prothonotary should not have been produced in this appeal. These affidavits have not been considered.

(b) damages of $138,920 for toll fees incurred to transit the Suez Canal during the redelivery of the ship; and (c) the hire statement balance of $114,387 owing by the defendant owner.

Concerning the claim of $336,954 for loss of profits, the prothonotary weighed the affidavit of the plaintiff's president against that of one of the defendant's solicitors. He adopted the statement of the solicitor that an independent surveyor's report annexed to his affidavit "raises some serious doubts as to whether Plaintiff could have performed the Israel phosphate cargo shipment and confirms that had it been performed, it would have been at a loss, not a profit." On the basis of the report and the solicitor's interpretation of it, the prothonotary set aside the security to the extent of the amount of this claim in the following words:

> Je n'accorde donc à la demanderesse aucun montant quant à cette réclamation dans le cadre et pour les fins de la présente requête. Tel que mentionné plus avant, aux fins du mérite du litige, la dynamique pourrait être toute autre. [Emphasis added.]

The prothonotary further reduced the bail in an amount equivalent to the plaintiff's claim of $138,920 in Suez Canal transit charges because the plaintiff has yet to pay this disbursement. These toll fees are presently the subject matter of another action instituted in this Court by the plaintiff's shipping agents in Egypt against the two parties in this case.

The plaintiff objected to the introduction of the defendant's affidavit which included the independent surveyor's report, principally on the grounds that the affidavit was not filed within two clear days' notice pursuant to Rule 320 and that the surveyor's report was based on incomplete and hearsay information. The

prothonotary authorized the production of this affidavit and distinguished between its admission and the weight to be attached to it. The plaintiff's representations in appeal from this order of the prothonotary have not been persuasive. If the plaintiff was caused prejudice by the late introduction of the affidavit, it could have requested that the hearing be adjourned. No such request was made. It was within the discretion of the prothonotary to authorize the production of the defendant's affidavit. I see no reason to interfere with the exercise of his discretion and the plaintiff's appeal from his order will be dismissed.

The plaintiff's appeal from the prothonotary's order concerning the determination of bail will now be considered.

Issues and Analysis

Arrest is a powerful weapon.[3] The warrant of arrest in this action was issued by an officer of the registry upon review of the affidavit of lead warrant pursuant to Rule 1003(5). The arrest is the seizure before judgment of the ship pending the litigation and until its adjudication. Rule 1004 provides that the Court may withhold the release of any property under arrest until bail is provided. The plaintiff has the right to security for the full amount of the claim with interest and costs. Even where the value of the ship greatly exceeds the plaintiff's claim, the arrest will remain in force until appropriate security is provided. Section 22 of the *Federal Court Act*, R.S.C. 1985, c. F-7, and Division G of the *Federal Court Rules* incorporate the admiralty law on actions *in rem* and arrest. It is important, when considering a motion to alter the bail, to keep in mind the exceptional power the law has attached to arrest and the right to exact security for the full amount

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3 This is the opening statement of a useful analysis on arrest in chapter 15 of *Enforcement of Maritime Claims*, D.C. Jackson (London: LLP Limited, 1996).

of the claim. The proper balance must be struck. The power to arrest should not be exercised oppressively and yet the plaintiff has the right to sufficient security.[4]

The plaintiff must show that "... the arrest requested is necessary for the protection of its rights" and "... that the arrest was lawfully carried out."[5] In other words, the plaintiff must establish that the arrest complies with section 22 of the Act and the *Federal Court Rules*, particularly Rule 1003. On an application to set aside the arrest with no provision for bail, the defendant will have the burden of showing that the statement of claim discloses no reasonable cause of action or is frivolous or vexatious within the meaning of Rule 419. Where the ~~principle~~ principal issue is the amount of the bail, general principles will apply. In order to satisfy the right to security in accordance with the criteria discussed below, "... the burden of proof required of the plaintiff should [not] be very exacting" and, depending on the circumstances, the onus may shift.[6]

The relative paucity of Canadian cases[7] on the determination of bail in the maritime law of arrest has generally followed the English decision in *The "Moschanthy"*, [1971] 1 Lloyd's Rep. 37 (Q.B.), a judgment which was referred

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4 *The "Polo II"*, [1977] 1 Lloyd's Rep. 115 at 199 (Q.B.).

5 *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.*, [1995] 1 F.C. 3 at 20 (F.C.A.), overruled on other grounds (1997), 213 N.R. 228 (S.C.C.).

6 *Atlantic Lines and Navigation Company Inc. v. The "Didymi"*, [1985] 1 F.C. 240 at 251 (F.C.T.D.). See also *False Creek Tugboats Ltd. v. Mary Mackin (The)*, [1991] 2 F.C. D-30 (F.C.T.D.). Circumstances where a court set bail for less than the amount claimed are considered, *infra*, at note 15.

7 See *Mount Royal Walsh Inc. v. The Ship "Jensen Star"*, (September 10, 1984), T-1654-84 (F.C.T.D.); *Lundberg v. Manitou III (The)*, [1988] F.C.J. No. 1124 (F.C.T.D.); *Argosy Seafoods Ltd. v. Ship "Atlantic Bounty" et al.* (1991), 45 F.T.R. 114; *Joint Stock Society Oceangeotechnology v. Ship 1201 et al.* (1994), 72 F.T.R. 211 (F.C.T.D.); *Brotchie v. Ship Karey T* (1994), 77 F.T.R. 71 (F.C.T.D.); *Pictou Industries Ltd. v. Secunda Marine Services Ltd.* (1994), 78 F.T.R. 78 (F.C.T.D.); *North Saskatchewan Riverboat Co. Ltd. v. 573475 Alberta Ltd. (The "Edmonton Queen")*, [1995] F.C.J. no. 809 (QL); and *Atlantic Shipping (London) Ltd. v. Ship Captain Forever et al.* (1995), 97 F.T.R. 32 (F.C.T.D.). This is not an exhaustive list.

to with approval two decades later by the Court of Appeal in *The "Bazias 3"*, [1993] 1 Lloyd's Rep. 101 at 105.[8]

In *The "Moschanthy"*, the ship was arrested on behalf of the owner of the cargo which was the subject matter of the dispute. The ship was released for security virtually in the full amount of the claim. The ship's owners then sought to stay the action on the grounds that the plaintiff could not or was very unlikely to succeed. This challenge appears to be the equivalent of a motion to strike pursuant to Rule 419 of the *Federal Court Rules*.[9] Brandon J., as he then was, repeated the high threshold to stay a proceeding on the ground that it does not disclose a reasonable cause of action and added that it applied to an action *in rem* no less than to an action *in personam* (at page 42):

> The Court, however, should only stay an action on that ground when the hopelessness of the plaintiff's claim is beyond doubt. If it is not beyond doubt, but, on the contrary, the plaintiff has an arguable, even though difficult, case in fact and law, the action should be allowed to proceed to trial. ... This last principle applies, in my view, as much to an action *in rem* as to an action *in personam*, even though the former involves the defendant in providing security and maintaining it until the action is determined, while the latter does not. [Emphasis added]

He went on to recognize, at page 43, that in the action before him, "... the plaintiff may have difficulty in establishing his case and that the defendants may well succeed. ... [W]hile there are many difficulties, some of them serious, in the plaintiff's case, he has an arguable case on fact and in law which, subject to any other grounds for a stay, he is entitled in justice to have tried."

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8 See also *The "Gulf Venture"*, [1984] 2 Lloyd's Rep. 445 (Q.B.).

9 A similar challenge was made in *Joint Stock Society Oceangeotechnology, supra,* note 7, after an earlier bail decision by the approving officer setting the security for the full amount of the claim: [1994] 2 F.C. D-29. See also *Margem Chartering Co. Inc. v. Bosca (The),* [1997] 2 F.C. 1001.

The Court then considered the defendants' alternative remedy to reduce the security. Almost one-half of the claim represented anticipated profit on the resale of the cargo of second-hand machinery. The plaintiff's evidence was limited to his own uncorroborated assertion that he reasonably expected to earn 100% profit on resale. Despite his reservations concerning the seriousness of the plaintiff's claim, Mr. Justice Brandon concluded that the security was neither excessive nor so high as to warrant a reduction. In his words at pages 44 and 45:

> The principle to be applied is, in my view, as follows: The plaintiff is entitled to sufficient security to cover the amount of his claim with interest and costs on the basis of his *reasonably arguable best case.* ...
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> ... these are interlocutory proceedings and the Court cannot try the case in them. It may be that the plaintiff could, at a trial, produce independent evidence to corroborate his figure, and the fact that he has not done so at this stage ought not to result in his being denied the opportunity later. Apart from this, the defendants adduced no evidence to contradict the plaintiff's evidence as to value, and Counsel for them did not adopt my suggestion that, if he challenged the plaintiff's estimate as wholly excessive, he should cross-examine the plaintiff on his affidavits. [Emphasis added.]

The principles of *The "Moschanthy"* will now be applied to the facts in this case.

(i) The Claim for Loss of Profit

The defendant did not cross-examine the plaintiff's affiant and relied substantially on the report of its surveyor. In preparing his report, the surveyor used information he obtained from various shipping and port officials in Israel and India. This information is not, in my view, the kind of hearsay evidence which should be used to challenge the plaintiff's assertions.

It is not necessary to rely on the surveyor's report to question the amount of the plaintiff's claim for loss of profit. The plaintiff asserts loss of revenues of

US$444,552 from the cancelled phosphate cargo shipment less US$200,000 in port expenses for an alleged loss of profit of $336,954 in Canadian currency. On the basis of information in the time charter agreement, the cargo shipment fixture and the plaintiff's affidavit in reply, one can speculate that the port expenses, hire charges and fuel costs for loading and discharging the phosphate and for the voyage from Eilat to Vizakhapatnam would be in excess of the plaintiff's projected revenues.[10]

This speculative calculation, while it may cast serious doubt concerning the plaintiff's claim for loss of profits, is not proof which necessarily negates the plaintiff's reasonably arguable best case. At this time, it is uncontested that the plaintiff was not able to load the shipment at Eilat and, as a result, re-delivered the ship to the defendant. This constitutes, on its face and with no evidence in response to the allegation, a reasonably arguable case. It is not "plain and obvious" or "beyond doubt" that the plaintiff has no case to assert in law.

The proper way, it seems to me, for the defendant to challenge the quantum aspect of the plaintiff's claim would have been the cross-examination of its affiant. He would have been required to respond to the speculative calculation

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10 The Description of Vessel provisions of the Time Charter and its clause 28 establish the vessel's steaming capacity at 13 knots and its consumption of oil at 26.5 metric tons per day. Clause 3 sets out the cost of fuel oil at US$115 per metric ton and diesel oil at US$220 per metric ton. A review of exhibits "A" and "B" of the plaintiff's affidavit makes clear that these same figures were used to calculate its claim. One can take judicial notice of the distance of approximately 4,000 nautical miles between Eilat and Vizakhapatnam. On the basis of these numbers, the voyage would require almost 13 days with a fuel cost in excess of US$40,000.

The plaintiff's shipment fixture (part of exhibit "F" of the defendant's supplementary affidavit) discloses that the phosphate would be loaded and discharged at the rate of 7,000 and 1,500 metric tons per weather working day respectively. On a conservative estimate of a shipment of 21,000 metric tons, both operations would require 17 days.

Clause 4 sets out the rate of hire at US$7,700 daily. The total hire charges, less commission, for 30 days would be approximately US$225,000.

In short, the total of hire of US$225,000, fuel costs of over US$40,000 and "port expenses" of US$200,000 would be in excess of the plaintiff's own projected revenues from a shipment of 27,500 metric tons at US$15 per metric ton.

that the cargo shipment could only have been completed with a financial loss and with no possibility for profit. With this cross-examination, the Court would be able to better assess if the plaintiff's reasonably arguable best case was something substantially different than the claim being asserted. Speculative calculations, attractive as they might appear to be at first glance, are not sufficient.

While the quantum aspect of the claim is far from certain on the present materials, "... these are interlocutory proceedings and the Court cannot try the case in them", as taught in *The "Moschanthy"*. There may exist evidence of a special business relationship between the plaintiff and its customer for the phosphate shipment or concerning the "port expenses estimated at US$200,000" and the stevedoring costs issue which may eventually support the claim for loss of profit.

It is on this very point that my approach appears to differ from that of the prothonotary. He preferred the conclusion drawn from the surveyor's report to the claim asserted by the plaintiff's president. Neither affiant was cross-examined. The speculative exercise in estimating the plaintiff's expenses, without cross-examining its representative, does not necessarily disprove the full amount of the plaintiff's claim for loss of profit. The uncertainty is apparent. The prothonotary himself allowed that the outcome before the arbitral tribunal might still favour the plaintiff with the disclosure of additional proof:

> ... les parties devant les arbitres pourront soumettre en vue de la détermination du mérite du litige toute autre preuve additionnelle qu'elles seront autorisées à produire.
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> ...
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> ... aux fins du mérite du litige, la dynamique pourrait être toute autre.

The prothonotary correctly noted that his determination on bail would not bind the arbitrator on the merits. This begs the issue of the plaintiff's security if it succeeds before the arbitrator. In my view, by acknowledging that with additional proof the plaintiff might have greater success before the arbitrator, the prothonotary was implicitly recognizing that the plaintiff had a reasonably arguable case. It was wrong, in my respectful opinion, for the prothonotary to reduce to zero the security for the claim for loss of profits unless he concluded definitively that the plaintiff's reasonably arguable best case was, in effect, no case at all.

(ii) <u>The Claim for Suez Canal Toll Charges</u>

The shipping agents allege in their action that the invoice for the Suez Canal toll charges was issued to the plaintiff on May 19, 1997. As between the parties to this action, the plaintiff is responsible for canal charges pursuant to clause 2 of the charter party agreement. Presumably because of the ongoing dispute between the plaintiff and the defendant, this invoice has remained unpaid. The plaintiff has filed security to obtain the release of its own assets seized before judgment by the defendant in an action concerning related issues before the Superior Court of Quebec. This security covers, among other claims, the amount of the Suez Canal toll charges.

Again, my approach differs from that of the prothonotary. The plaintiff's allegation that it has "sustained further damages ... representing additional costs incurred" is not one that is misleading simply because the invoice has yet to be paid. ~~Similarly~~ Also, the action ~~instituted by~~ of the shipping agents was instituted on June 17, 1997, one week prior to the plaintiff issuing the proceedings in this case. In my view, the plaintiff has the right to claim over the toll charges against the

defendant. On the face of the record, the defendant has established a reasonably arguable case even with the invoice remaining unpaid as yet. The toll charges are $138,920. I see no justification to have reduced, particularly not to zero, the security for this portion of the claim.

Conclusion

In reducing to zero the security for the claims for loss of profit and the Suez Canal charges, the prothonotary implies that the arrest was unlawful and the security unnecessary for these two claims.[11] In my respectful view, his conclusions do not reflect a proper application of the reasonably arguable best case set out in *The "Moschanthy", supra.* In this sense, the prothonotary erred in that he exercised his discretion upon a wrong principle within the meaning of *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 at 463 (F.C.A.). On the basis of this finding, the discretion which resided with the prothonotary in the first instance ought now to be exercised by the reviewing judge.

The plaintiff's claim for loss of profit represents almost 60% of its projected revenues from the shipment. On its face, this is a healthy profit. With no further information, one might be somewhat sceptical but not necessarily reduce bail. Here, the plaintiff's documentary information indicates shipment costs which may approximate revenues.[12] Even though the plaintiff's representative was not cross-examined concerning this information, the claim for loss of profit takes on the appearance of being excessive. It is difficult to imagine, on the plaintiff's own information and calculations in asserting the claim, that its reasonably arguable best case can be as high as an amount equal to 60% of the

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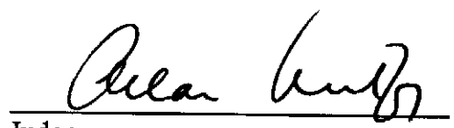
11 *Armada Lines Ltd. v. Chaleur Fertilizers Ltd., supra,* note 5 at 18 (F.C.A.).

12 *Supra,* note 10.

freight. This, in my view, is the kind of "special"[13] or "extraordinary"[14] circumstance which warrants intervention. In reducing the bail for this claim by half, I am satisfied that the amount of the security, representing a profit of almost 30% of revenues, is sufficient to protect the rights of the plaintiff.[15] If I have erred by determining bail for an amount substantially in excess of the real value of the claim, it will be within the discretion of the arbitrator to condemn the plaintiff for the whole or part of the expense of providing this security.[16]

Concerning the Suez Canal toll charges, there is no reason on the available evidence for security to be less than the full amount of this claim. Similarly, the security of $15,000 provided by the defendant in excess of the total amount of the claim should not be reduced. The plaintiff has sought no greater amount for interest and legal costs.

In result, bail is set in the amount of $436,784. As both parties achieved some success, costs will be in the cause. Oral representations were made in both official languages in this appeal. These reasons are in the language of the pleadings.



Judge

Ottawa, Ontario
October 21, 1997

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13 *Atlantic Shipping (London) Ltd. v. Ship Captain Forever et al., supra,* note 7 at 37.

14 *Argosy Seafoods Ltd. v. Ship "Atlantic Bounty" et al., supra,* note 7 at 120.

15 In *The "Gulf Venture", supra,* note 8 at 449 and *Lundberg, supra,* note 7, circumstances warranted the reduction of bail. Some degree of arbitrariness is inherent in setting the lower figure in cases such as these.

16 *The "Gulf Venture", supra,* note 8 at 449; and *Athens Sky Compania Naviera S.A. v. The Port Services Corporation Ltd. (The "Tribels"),* [1985] 1 Lloyd's Rep. 128 at 131 (Q.B.).