Federal Court  Cour fédérale

Date: 20190430

Docket: T-1226-10

Citation: 2019 FC 546

St. John's, Newfoundland and Labrador, April 30, 2019

PRESENT: The Honourable Madam Justice Heneghan

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, MOHAMMED ANWAR FARID AL-SALEH, and 642385 B.C. LTD.

Interveners

REASONS FOR ORDER

I. INTRODUCTION

[1] These Reasons address three interlocutory motions relating to the determination of the priority of claims made against the proceeds of the sale of the Vessel "QE014226C010" (the "Vessel"), as well as the ranking of the priorities against those proceeds.

[2] By Notice of Motion dated August 1, 2017, Harry Sargeant III ("Sargeant"), seeks an Order declaring that determination of any breach of the Vessel Construction Agreement (the "VCA") is irrelevant and unnecessary for the final determination of priorities of the *in rem* claims against the Vessel. He also seeks costs fixed in the amount of $1500.00 against each party opposing the motion.

[3] The second motion, dated August 22, 2017 , filed by Worldspan Marine Inc. ("Worldspan"), seeks an Order that Sargeant or Comerica Bank ("Comerica") is in breach of the VCA as a result of their failure to pay claims certificates to Worldspan when due.

[4] The third motion, dated December 1, 2017, filed by Offshore Interiors Inc. ("Offshore"), Restaurant Design and Sales LLC ("Restaurant Design"), and Continental Hardwood Co. ("Continental") seeks a declaration that the claims filed by these trade creditors enjoy priority over the claim of Sargeant.

[5] These Motions were argued on October 16, 2017 and December 13 and December 14, 2017. On December 13, 2017, submissions were also made about the ranking of the priorities.

II. BACKGROUND

[6] This action arises from the construction of a luxury yacht, that is the Vessel, pursuant to the VCA dated February 29, 2008, made between Sargeant and Worldspan. Much litigation has ensued in respect of the VCA in this Court and in the British Columbia Supreme Court.

[7] Pursuant to the terms of the VCA, a builder's mortgage (the "Builder's Mortgage") was granted by Worldspan to Sargeant. The Builder's Mortgage was subsequently assigned by Sargeant to Comerica.

[8] Construction on the Vessel began in March 2008. Various trades were involved in that work, including Offshore Interiors Inc. ("Offshore"). Sargeant advanced some $20 million up to late April/May 2010 when construction ceased. The VCA was terminated in 2010.

[9] On July 28, 2010, Offshore commenced this action *in personam* and *in rem* against Worldspan, Crescent Custom Yachts Inc. ("Crescent") and the Vessel and her Owners. The Vessel was arrested on July 28, 2010 and security was later posted for her release from arrest.

[10] On May 31, 2011 default judgment was granted in favour of Offshore. An appeal from that Judgment was dismissed.

[11] On August 29, 2011, Prothonotary Lafrenière, as he then was, issued an Order for the assertion of *in rem* claims against the Vessel. This Order is referred to as the "Claims Order".

The Claims Order specifically limited claims against the sale proceeds to persons asserting *in rem* claims.

[12] On November 30, 2011, an Order was issued dismissing the *in rem* claim advanced by Worldspan. An appeal from that Order was dismissed on January 18, 2012.

[13] On June 27, 2014 an Order was issued for the sale of the Vessel. That Order was reviewed by Justice Mosely and by Order issued on July 4, 2014, the sale order was confirmed**.**

[14] In the within action, motions were brought about the status of the Builder's Mortgage between the Sargeant and Worldspan. In an Order dated March 5, 2013, Prothonotary Lafrenière, as he then was, decided that the Builder's Mortgage held by Sargeant did not create a lien or charge in the Vessel other than to secure delivery.

[15] Upon appeal to the Federal Court, Justice Strickland, by an Order dated December 19, 2013, allowed the appeal and decided that the Builder's Mortgage provided security for monies advanced by Sargeant and also security for delivery of the Vessel; see the decision in *Offshore Interiors Inc. v. Worldspan Marine Inc.*(2013), 444 F.T.R. 283.

[16] Upon appeal to the Federal Court of Appeal, in an Order dated February 16, 2015, the appeal was dismissed; see the decision in *Offshore Interiors Inc. v. Worldspan Marine Inc.*(2015), 467 N.R. 355 (F.C.A.).

[17] Worldspan subsequently filed a motion seeking a declaration that amounts that may be due and owing by Sargeant to Worldspan under the VCA have priority over any security interest held by Sargeant and Comerica, its assignee.

[18] In an Order dated January 8, 2016, that motion was dismissed by Justice Southcott who held that Sargeant was not obliged to pay Worldspan any amounts for which it may be found liable under the VCA as a condition to exercising his rights under the Builder's Mortgage; see the decision in *Offshore Interiors Inc. v. Worldspan Marine Inc.*, 2016 FC 27.

[19] Justice Southcott also found that section 12.1 of the VCA allows Worldspan to set-off any amounts owed to it by Sargeant from amounts claimed by Sargeant under the Builder's Mortgage.

[20] An appeal from the Order of Justice Southcott was dismissed by the Federal Court of Appeal on December 1, 2016; see the decision in *Worldspan Marine Inc. v. Sargeant*, 2016 FCA 307.

III. THE NOTICES OF MOTION

A. *Notice of Motion dated August 1, 2017 filed by Sargeant*

[21] In the Motion Record filed on behalf of Sargeant on August, 1, 2017, several supporting affidavits were filed.

[22] Sargeant filed the affidavit of Nadine Abram, a legal administrative assistant with the law firm Norton Rose. Ms. Abram outlined certain legal proceedings underway in the British Columbia Supreme Court taken by Sargeant against Worldspan. Attached to her affidavits as exhibits were copies of pleading filed in the British Columbia Supreme Court action.

[23] Ms. Abram also included, as an exhibit, the written representations filed on behalf of Worldspan in the present action, responding to a Notice of Motion dated February 20, 2017 filed by Sargeant seeking the payment out of Court of the proceeds of the sale of the Vessel, less the sum of $3 million to be held as security for the *in rem* claims against the proceeds.

[24] The Motion Record filed on August 1, 2017 also included the affidavits of Sargeant, Ms. Cynthia Jones and Mr. Michael Nesbit.

[25] In his affidavit, sworn on October 13, 2011, Sargeant set out the basis of his *in rem* claim, pursuant to the Order of Prothonotary Lafrenière, as he then was, issued on August 29, 2011. Sargeant claims USD$20,945,924.05, together with the sum of $20,000.00 CDN. Several exhibits were attached to his affidavit, including a copy of the VCA and a copy of the Builder's Mortgage, as exhibits "A" and "C" respectively.

[26] Ms. Cynthia Jones is Vice President, Special Assets Group with Comerica. She provided details about a Construction Loan Agreement entered into between Sargeant and Comerica to fund the construction of the Vessel. She deposed that Sargeant provided security for the

Construction Loan Agreement by assignment of the VCA and of the Builder's Mortgage. She deposed that Worldspan consented to the assignment which is dated August 14, 2009.

[27] Ms. Jones also referred to the affidavit of Mr. Mervyn Monger, that was filed in the British Columbia Supreme Court proceedings on behalf of Sargeant.

[28] Mr. Michael Nesbit is a Chartered Accountant, acting on behalf of Worldspan and Offshore. Sargeant filed, as part of its Motion record, the affidavit sworn by Mr. Nesbit on June 7, 2017, on behalf of Worldspan in opposition to Sargeant's motion for partial payment of the sale proceeds.

[29] In that affidavit, Mr. Nesbit referred to Change Orders made during the construction of the Vessel. He also referred to the Notice of Termination dated October 28, 2010 given by Worldspan to Sargeant and a notice of Termination dated November 29, 2010 given by Sargeant to Worldspan.

[30] Worldspan filed a Motion record in response to the Sargeant Motion dated August 1, 2017. In its responding Motion record Worldspan filed the affidavit of Mr. Michael Nesbit, sworn on June 7, 2017, referred to above.

B. *Notice of Motion dated August 22, 2017 filed by Worldspan*

[31] Affidavits were also filed in support of the Notice of Motion filed by Worldspan on August 22, 2017.

[32] Worldspan included in its motion record two affidavits of Mr. Nesbit, Chartered Accountant. The first affidavit, sworn on October 14, 2011, sets out the claim of Worldspan and the Crescent Companies claim against Sargeant.

[33] In this affidavit, sworn on October 14, 2011, Mr. Nesbit deposed that Sargeant was delinquent in making payments and then failed to make payments. He states that a balance in the amount of USD $6,643,082.59 remains due and owing. Exhibits were attached to his affidavit providing details about the late payments and outstanding amounts.

[34] Worldspan also filed the affidavit sworn by Mr. Nesbitt on June 7, 2017, referred to above.

[35] As well, Worldspan included the affidavit of Ms. Cynthia Jones. That affidavit, sworn on October 7, 2011, was previously filed on behalf of Sargeant, further to the Order of August 29, 2011.

C. *Notice of Motion dated December 1, 2017 by Offshore and the in rem trade creditors*

[36] Several affidavits were filed in relation to the Notice of Motion dated December 1, 2017**.**

[37] Offshore filed the affidavits of Mr. Robert Ruzzi, President of Offshore, and of Mr. David Kelly, a partner in Offshore.

[38] In his affidavit sworn on May 17, 2011, Mr. Ruzzi set out details about the construction of the Vessel, in particular his understanding when Offshore engaged in discussions about providing services and material to Crescent was the owner of the Vessel.

[39] Mr. Ruzzi deposed that he subsequently learned that the Vessel was being built for Sargeant and that Worldspan, the parent company of Crescent, was the registered owner of the Vessel. Otherwise, Mr. Ruzzi set out some history of payments made under the agreement between Offshore and Crescent and the amount due, in May 2011, in the amount of $357,421.52.

[40] In his second affidavit, sworn on October 5, 2011, filed in support of the claim of Offshore against the proceeds of sale, Mr. Ruzzi deposed about the entry of Default judgment against certain Defendants, including the Vessel, in the amount of $273,754.58, plus a claim for unpaid work to date in the amount of $83,666.94, together with interest calculated and owing up to September 9, 2011 in the amount of $121,457.98 and future interest to be calculated at the rate of $235.02 per day.

[41] Offshore filed the affidavit of Mr. David Kelly sworn on October 5, 2011. In that affidavit, Mr. Kelly outlined future work on the Vessel and its cost, in the amount of $169,183.98. He calculated the total claim of Offshore to be $659,011.85.

[42] Offshore tendered a second affidavit from Mr. Kelly, sworn on November 29, 2017. Further to a Direction made on December 8, 2017, this affidavit was not accepted for filing on the grounds that it was submitted for filing outside the time-lines set out in the Claim Process

Order issued on August 29, 2011. Further, the affidavit did not add anything to the earlier affidavit evidence tendered from Mr. Kelly.

[43] Restaurant Design filed the affidavit of Mr. Fred Lillian sworn on October 3, 2011. Mr. Lillian is the General Manager and Director of Operations for Restaurant Design. He deposed to the services provided by Restaurant Design to the Vessel, that is galley design services pursuant to a contract dated January 22, 2009 with Crescent in its own right and as agent for Worldspan.

[44] Mr. Lillian also addressed Restaurant Design's claim for the provision of appliances, custom-made stainless steel fixtures, furnishings and equipment pursuant to an agreement dated September 14, 2009 with Crescent, again on its own behalf and as agent for Worldspan.

[45] Mr. Lillian deposed that although some payments were made, a balance remains in the amount of USD $259,574.78 in respect of both the contract and the agreement.

[46] Restaurant Design tendered a second affidavit sworn by Mr. Lillian, sworn on November 30, 2017. By Direction issued on December 8, 2017, that affidavit was not accepted for filing on the grounds that this affidavit was submitted outside the timelines set by the Claim Process Order issued on August 29, 2011 and added nothing new to the evidentiary record.

[47] Continental Hardwood filed the affidavit of Mr. Mikael Virta, sworn on September 30, 2011. Mr. Virta is employed with Continental Hardwood as a salesperson. In that capacity, he was knowledgeable about certain matters relating to the construction of the Vessel and the

provision of lumber and sheet wood to be used for furniture, wall coverings, cabinetry and various wood finishes on the Vessel.

[48] Mr. Virta deposed that he handled the account and dealt with a Mr. Roberson of Crescent; Mr. Roberson "endorsed" the Sales Agreement with Continental Hardwood. As of the date of his affidavit, a balance in the amount of USD $15,933.66, including interest, remained outstanding and unpaid.

[49] Cascade Raider filed the affidavit of Mr. Dennis Brown, Co-President and Chief Operating Office of that company. In his affidavit, sworn on September 22, 2011, he deposed to the facts about the involvement of Cascade Raider in the construction of the Vessel.

[50] Cascade Raider supplied industrial tools and parts to the value of $62,511.04. That account was not paid and an action was commenced in the Federal Court for recovery of same.

[51] Capri also filed an affidavit of claim, that is the affidavit of Mr. Timothy Miller, Chief Financial Officer and Director. In his affidavit, sworn on September 27, 2011, he deposed that Capri arranged insurance coverage for the Vessel between 2008 and 2012 for Crescent and affiliated companies, including Worldspan. He deposed that as of the date of his affidavit, the unpaid balance on insurance policies was $108,850.90.

[52] This amount is broken down into a claim relating specifically to the construction of the Vessel in the amount of $41,366.46 which Mr. Miller calls the “Maritime Claim Amount”. The amount of $71,314.85 is called the “Unsecured Claim Amount”.

[53] Sargeant responded to the December 1, 2017 motion filed on behalf of Offshore, Restaurant Design and Continental. That responding motion record included affidavits and in the written submissions, referred to affidavits previously filed.

[54] Sargeant filed an affidavit of Mr. Nesbit sworn on May 24, 2011. In this affidavit, Mr. Nesbit outlined amounts due by Sargeant to Worldspan in connection with the construction of the Vessel. He said that Sargeant was late in paying invoices almost from the beginning of the construction.

[55] Sargeant also filed the affidavit of Mr. Jim Hawkins, sworn on May 25, 2011. Mr. Hawkins is a Manager with Queenship Marine Industries (“Queenship”). He deposed that Queenship built the Vessel “to the extent that the Vessel has been completed”. He said that Crescent is a wholly owned subsidiary of Worldspan and that Worldspan owns the Vessel.

[56] Sargeant also referred to and relies upon other affidavits filed in this action, including the affidavit of Ms. Jones dated October 7, 2011; the affidavit of Ms. Adams dated August 1, 2017; the affidavit of Mr. Mervyn Monger dated November 27, 2017; and his own affidavit dated October 13, 2011.

[57] Sargeant filed the affidavit of Mr. Mervyn Monger. In that affidavit, sworn on November 27, 2017, Mr. Monger referred to two other affidavits that he had sworn for use in proceedings before the British Columbia Supreme Court concerning Sargeant and Worldspan.

[58] Sargeant, in his responding motion record, also referred to the affidavits submitted on behalf of Arrow Transportation Systems Inc. ("Arrow") and CCY Holdings Inc. ("CCY"), and on behalf of Paynes Marine Group ("Paynes").

[59] Arrow and CCY submitted the affidavits of Mr. Tim Charles sworn on October 3, 2011 and of Mr. Archie Campbell sworn on October 3, 2011. Arrow and CCY claim for the alleged failure of Worldspan and Crescent to pay a contracted royalty for their use of the hull mold in constructing the hull of the Vessel. The claim for royalty payments was alleged to apply to the period of August 28, 2006 and August 31, 2011.

[60] Paynes filed the affidavit of Mr. Blair Jason Chapman sworn on September 30, 2011. Paynes claims for payment of certain goods and supplies, together for interest on the unpaid invoices.

IV. SUBMISSIONS

A. *Submissions of Sargeant and Commercia about breach of the VCA and its relevance to determination of the priorities*

[61] Sargeant and Comerica argue that determination of any breach of the VCA is irrelevant to determining the priorities of the claims against the proceeds of sale of the Vessel.

[62] They submit that the issue of a breach of the VCA, or otherwise, is irrelevant to determination of the priority of claims against the proceeds of sale.

[63] They argue that Sargeant asserts the priority of his claim, pursuant to the Builder's Mortgage. They note that the validity of the Builder's Mortgage has been adjudicated and that the decision of Justice Strickland, finding that the Builder's Mortgage secured the loan of $20 million advanced by Sargeant to Worldspan for the construction of the Vessel, was upheld by the Federal Court of Appeal.

[64] Sargeant and Comerica also submit that Justice Southcott found that the Builder's Mortgage allowed a set-off between Sargeant and Worldspan for monies claimed relative to the construction of the Vessel and that this determination was likewise upheld by the Federal Court of Appeal.

[65] In these circumstances, both Sargeant and Comerica argue that the prior judicial findings are binding and there is no avenue available by which the Court, as presently constituted, can depart from those findings. They submit that the only remaining question is that of the priority of claims against the sale proceeds and that Sargeant asserts a valid *in rem* claim, based on the Builder's Mortgage.

B. *Submissions of Worldspan about breach of the VCA and its relevance to determination of the priorities*

[66] Worldspan, on the other hand, argues that no "judgment" has been made relative to the Builder's Mortgage, that the Vessel remains available for delivery according to the Order of Prothonotary Lafrenière, as he then was, and that Sargeant cannot rely on his conduct that prevented the completion and delivery of the Vessel in support of his claim for priority to the proceeds.

[67] Worldspan refers to and relies upon the provisions of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410. It argues that the obligation to pay for goods does not arise until delivery of the goods in question.

[68] As well, Worldspan submits that it is settled law that a party cannot rely on its own breach in order to claim a remedy for breach of contract. It argues that the question of breach of the VCA should be decided prior to any decision about the order of priorities.

[69] Worldspan also argues that the proceeds of the sale of the Vessel "represent" the Vessel itself and that the Vessel is still capable of delivery.

C. *Reallocation of the Priorities*

[70] Offshore, Continental, Restaurant Design, Capri and Cascade argue that the usual order of priorities should be changed, to allow them to share in the sale proceeds, on the grounds that the equities require such reallocation, when assessed against the conduct of Sargeant.

[71] These creditors point to the failure of Sargeant to pay claims certificates, thereby depriving Worldspan of the funds to pay their accounts. Each of these creditors submitted individual affidavits of claim and filed written submissions in support of the motion for reallocation of the priorities.

[72] Sargeant, supported by Comerica, argues that there is no basis for departure from the usual order of priorities. Sargeant and Commercia submit that there is no evidence of conduct that justifies reallocation of the sale proceeds on equitable grounds.

[73] Further, Sargeant argues that his *in rem* claim, based on the Builder's Mortgage, takes priority over all other claims. Since there are insufficient funds to answer all claims and no inequitable conduct on his part, he submits that the remaining balance of the sale proceeds should be paid to him.

V. DISCUSSION

A. *Is determination of a breach of the VCA relevant or necessary to determination of the priority of claims*

[74] I will first address the two Motions that question the need to determine a breach of the VCA before dealing with the issue of priority among the competing claims to the sale proceeds.

[75] In my opinion, such a determination is not necessary.

[76] The VCA is an agreement for the construction of the Vessel. The VCA allows for a Builder's Mortgage to be given by the builder, that is Worldspan, to the buyer, that is Sargeant.

[77] Sargeant availed of that opportunity. In subsequent litigation, Justice Strickland decided that the Builder's Mortgage was security for the monies, that is $20 million, advanced by Sargeant for the construction of the Vessel; her decision was upheld by the Federal Court of Appeal.

[78] That Builder's Mortgage, while authorized by the VCA, is independent of that contract. The Builder's Mortgage has been interpreted by two judges of the Federal Court and their decisions have been upheld by the Federal Court of Appeal.

[79] In a later motion concerning the VCA, Justice Southcott decided that pursuant to clause 12.1 of that agreement, there was a right of set-off between Worldspan and Sargeant respecting monies allegedly owing by Sargeant to Worldspan. That decision was also upheld by the Federal Court of Appeal.

[80] In his judgment, Justice Southcott dealt with specific aspects of the VCA and its relationship with the Builder's Mortgage that was made available under the VCA.

[81] In those decisions much attention was given to the interpretation of clauses 12 and 24 of the VCA. In the present motion, Worldspan focused on the nature of the present action, that is a "contractual case". It argues that failure to deliver the Vessel is a breach of the VCA but that

determining the ranking of priorities requires examination of the circumstances leading to that failure.

[82] Worldspan argues that clause 4.2 of the VCA still applies. It submits that Justice Strickland did not "provide" a "judgment", that the failure of delivery is a future anticipated event and that the Vessel remains available for delivery, notwithstanding the sale, as the result of the wording of the Order made on June 27, 2014 by Prothonotary Lafrenière, as he then was.

[83] In this regard, Worldspan relies on paragraph 7 of that Order which provides as follows:

> The Sale Proceeds or the Comerica Security, as the case may be, shall stand in place of the Vessel and all Claimants shall look to the Sale Proceeds or the Comerica Security, as the case may be, with the same status and priority as if the Sale or posting of Comerica Security had not taken place and the Vessel had remained under arrest.

[84] There is no merit in the submission that the decision of Justice Strickland is not a "judgment". It is for an appellate court and not a lateral judge of the Federal Court to interpret that decision, by which she decided that the Builder's Mortgage was security both for the monies advanced by Sargeant for the construction of the Vessel and to secure its delivery.

[85] According to the principles of *stare decisis*, a decision of an appellate court is binding upon a lower court; see the decision in *Allergan Inc. v. Canada (Minister of Health)* (2012), 440 N.R. 269 (F.C.A.).

[86] I refer, as well, to the recent decision of the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331at paragraph 44 where that Court said the following:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[87] Worldspan raises no new "legal issue" that would change the prior decisions of the Federal Court of Appeal. I am not satisfied that it has shown such a change in circumstances that "fundamentally shifts the parameters of the debate" about the status of the Builder's Mortgage or the rights of Sargeant, the mortgagee and Worldspan, the mortgagor.

[88] The effect of the decisions of Justice Strickland and Justice Southcott, as affirmed by the Federal Court of Appeal in each case, is to describe the position of Sargeant at law.

[89] Whether Justice Strickland "provided" a judgment or not is irrelevant, in my opinion.

[90] The Vessel has been sold by Order of the Court and not as a consequence, indirect or direct, of the decision of Justice Strickland.

[91] The Court has already determined that the Builder's Mortgage creates a charge in favour of Sargeant and a debt that must be repaid, with a right of set-off in favour of Worldspan.

[92] Sargeant was not obliged to enter into a Builder's Mortgage with Worldspan; it chose to exercise the option to do so.

[93] Judicial determinations have been made about the effect and consequences of the Builder's Mortgage as between Sargeant and Worldspan. The Order of sale was reviewed and upheld. The Vessel was sold on July 7, 2014.

[94] Personal claims are asserted by Worldspan in proceedings now under way in the British Columbia Supreme Court. Those claims allege breaches of the VCA, among other things. Personal claims arising in relation to the VCA are relevant for present purposes only to the extent that any party asserting an *in rem* claim must show personal liability on the part of any defendant to such claim.

[95] The arguments about the breach of the VCA relate solely to an *in personam* claim which is the subject of proceedings in the British Columbia Supreme Court. Only *in rem* claimants may claim against the proceeds of sale.

[96] With respect, I see no merit in the submissions of Worldspan as to the utility of construing individual clauses of the VCA, at this stage. The arrest of the Vessel by a third party on July 28, 2010, that is Offshore, triggered a chain of events beyond the scope of the VCA.

[97] In her decision, Justice Strickland commented on clauses 2.3, 4.1, 4.2, 5, 8.1, 12.1, 13.1, 13.5 and 24 of the VCA. She specifically referred to the formula, pursuant to clause 24, in the event of a sale of the Vessel in the event of a default by Sargeant, under the VCA.

[98] At paragraphs 72 and 74 of her decision, Justice Strickland said the following:

> Even if I had not found this I would have concluded that, interpreting the transaction as a whole to determine the intent of the parties and within the relevant factual matrix, the Builder's Mortgage and VCA implied an obligation to repay the unearned advances which created a potential debt that would, in effect, crystallize upon failure to deliver the Vessel in these circumstances. Although there was no actual "loan" there was a potential debt created by the provisions of the VCA and Sargeant secured the satisfaction of the potential debt by way of the Builder's Mortgage.
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> […]
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> Here, the potential debt was created by the advances that would not be earned until delivery. The satisfaction of that debt would have occurred by delivery of the Vessel. As that did not occur, and the VCA contractual terms that would have otherwise governed the parties upon default have no application in these circumstances, the debt crystallized and satisfaction would be achieved by repaying the advances, accounts of which were kept by both parties.

[99] At paragraph 99, Justice Strickland said the following:

> Given the factual matrix, Comerica's explanation is the most plausible one being that the Builder's Mortgage was intended to secure Sargeant's first priority rights in the Vessel as against third parties in circumstances, such as these, where the terms of the VCA do not govern the disposition of the Vessel as between Worldspan and Sargeant as it has been arrested by third parties and will be sold by the Court.

[100] In its decision upholding Justice Strickland, the Federal Court of Appeal said the following at paragraph 110:

> Likewise, under section 24 of the VCA, in the event that Sargeant sells the Vessel within three years of the delivery date (whether complete or not), four different formulas are used to determine the amount of money owing between Sargeant and Worldspan. As noted by the Judge, whenever the sale results in a profit, Sargeant is liable to pay a portion of that profit to Worldspan. However, whenever the sale results in a loss, Worldspan is liable to indemnify Sargeant for a portion of that loss. Moreover, under section 24.8, when making a payment under any of the section 24 formulas, each party is entitled to deduct from the amount due the other any amount owing to them under the VCA. In light of these formulas, I entirely agree with the Judge that the proceeds from the sale of the Vessel that are payable to Sargeant are, in effect, a repayment of the advances.

[101] The Federal Court of Appeal commented on clause 12.1 of the VCA at paragraph 113:

> Ultimately, Offshore, in my respectful view, confuses the means with the end when it asserts that the Mortgage was intended to secure delivery of the Vessel. Because the advances are paid "on account of" the Final Purchase Price, which as per section 24.2 takes into account all amounts paid, delivery of the Vessel will satisfy a return of the advances. However, nothing in the Builder's Mortgage or the VCA rebuts the general principle that, until foreclosure or sale, the mortgagor has the right to redeem the mortgaged vessel upon repayment of the debt, or that upon sale, the mortgagee has an obligation to return the excess to the mortgagor. Indeed, this principle is supported by the remedy provisions of the VCA and the sale formulas. In that light, I agree with Comerica and Sargeant that, on a full consideration of the factual matrix, section 12.1 of the VCA and the general terms of the Builder's Mortgage explicitly secure repayment of the advances as the "account current".

[102] It added the following observation at paragraph 120:

> Offshore's argument regarding delivery is premised on its assertion that Sargeant is indebted to Worldspan due to his failure to pay his advances. Consequently, following Offshore's reasoning,

> Worldspan had no obligation to deliver the Vessel. However, this assertion is disputed by Sargeant. He argues that he was over-billed by Worldspan. In any event, the issue of whether Sargeant or Worldspan or both of them were in breach of the VCA is one that has yet to be determined by a court. It is clear, however, that the VCA does not address the situation where the Vessel has been arrested by a third-party creditor before either Sargeant or Comerica could ask for delivery and subsequently has been sold by the Court. While it is true that the VCA imposes upon Worldspan the obligation to deliver the Vessel, such an obligation is not mentioned in the Builder's Mortgage nor in that part of the VCA which provides that Worldspan, upon demand of Sargeant, will execute a mortgage in his favour. Therefore, it can hardly be said that the Builder's Mortgage was intended solely to secure delivery of the Vessel.

[103] For his part, Justice Southcott set out his conclusion about the right of set-off between Sargeant and Worldspan in paragraph 64 of his reasons:

> Section 24.8 expressly provides that, when making any payments under Section 24, each party will be entitled to set-off and deduct from the amount due to the other party any amount then owing by that party under the VCA. Particularly compelling is the fact that Section 13.5 applies in the situation where Sargeant has defaulted in making payments due to Worldspan. The formula that then applies does not preclude Sargeant from obtaining refund of its advances until it has paid Worldspan, but rather provides for refund of those advances subject to prescribed adjustments. It is difficult to reconcile these contractually prescribed mechanisms with Worldspan's proposed interpretation of Section 12.1. However, they can be reconciled with Sargeant's interpretation that Section 12.1 creates a right by Worldspan to deduct amounts owed to it pursuant to the VCA from any Mortgage claim by Sargeant.

[104] The arrest led to the entry of judgment in favour of Offshore and ultimately, to an Order for the sale of the Vessel, pursuant to the Rules.

[105] The Order for Sale was made in the exercise of the Court's *in rem* jurisdiction and pursuant to well-known and established jurisprudence.

[106] Worldspan argues that the Vessel is still available for delivery, notwithstanding the sale, and relies on paragraph 7 in the Order made on June 27, 2014, that is the Order for the sale of the Vessel.

[107] There is no merit in this submission. At paragraph 66 of his Reasons, Justice Southcott said the following about the effect of the Order made on June 27, 2014:

> I have also considered Worldspan's argument that, as a result of the Sale Order, the sale proceeds have now replaced the vessel for purposes of the VCA, and that Sargeant is now entitled to delivery of the proceeds but only once it has paid Worldspan in full. I do not agree that this is a correct interpretation of the Sale Order. The effect of an order for judicial sale of a vessel is that the proceeds replace the vessel as the subject of the competing *in rem* claims. It is not intended to be read as supplementing the terms of the VCA as Worldspan argues.

[108] As a result of the sale, the Vessel now lies in the possession of another, free and clear of all liens and encumbrances, including the Builder's Mortgage. I refer to the decision in *Boudreau v. Registrar of Shipping*, [1984] 1 F.C. 990 at page 995 (F.C.T.D).

[109] The Vessel no longer "exists" for the purposes of the within proceeding. Instead, there is a monetary fund for distribution to qualified claimants.

[110] It is well-established law that upon the judicial sale of a vessel, the proceeds of such sale represent the vessel for the purpose of responding to claims upon that vessel.

[111] It is to be noted that the Vessel was sold under an Order of the Court and not under any provision of the Builder's Mortgage. Sargeant, as mortgagee, did not enter into possession of the Vessel. As noted above, upon motion by Offshore, Prothonotary Lafrenière, as he then was, issued an Order for the sale of the Vessel of June 27, 2014.

[112] It is not necessary to decide if the VCA was breached in order to determine the ranking of priorities in this case. In my opinion, the respective liabilities of Sargeant and Worldspan under the VCA are not relevant to the determination of the disposition of the proceeds of the sale of the Vessel.

[113] The VCA is a contract, as noted by Worldspan. That contract creates rights and responsibilities for the parties to it, that is Sargeant and Worldspan. The execution of that VCA, as a contract, had implications for other parties, including Offshore and other suppliers of goods and services.

[114] However, the question of claims against the proceeds of the sale of the Vessel involves only *in rem* claimants and not those with personal claims against either Sargeant or Worldspan. Those claims can be addressed in the proceedings that are now before the British Columbia Supreme Court, as referenced above.

[115] The Builder's Mortgage is also a contract. The scope and meaning of that contract has been reviewed many times by this Court and the Federal Court of Appeal. The Builder's Mortgage, while authorized by the VCA, is independent of that agreement.

[116] The benefit of the Builder's Mortgage lies with Sargeant. The Courts have determined that he is a secured creditor. In my opinion, his rights in that regard are independent of any claims arising against him under the VCA.

[117] The sale of the Vessel, pursuant to an Order of the Court and not under any clause of the Builder's Mortgage, has generated funds which are the subject of competing claims.

[118] Only *in rem* claims can be advanced against those funds, as set out in the Claims Order made on August 29, 2011.

[119] The VCA is not relevant to the ranking of claims advanced against the sales proceeds. Insofar as it was necessary for a Court to construe certain provisions of that agreement for the purpose of determining the validity of and meaning of the Builder's Mortgage, it is neither necessary nor appropriate for me to revisit those clauses nor the findings that have been made.

[120] In my opinion, the determination of any breach of the VCA is unnecessary and irrelevant to the determination of the competing claims to the sale proceeds.

B. *Should the Claims of in rem creditors take priority*

[121] A number of claims have been advanced against those funds, as outlined above and pursuant to the Claims Process Order made on August 29, 2011 by Prothonotary Lafrenière, as he then was.

[122] The claims can be divided into the claim to all the proceeds, made by Sargeant, and the claims of the *in rem* creditors, seeking reallocation of the sale proceeds in their favour, on the grounds the equity requires such reallocation.

[123] In the within matter, the *in rem* trade creditors seek reallocation of the priorities on the grounds that Offshore, Restaurant Design, Continental Hardwood, Capri and Raider seek reallocation of the priorities relative to distribution of the proceeds of sale. Affidavits of claim were filed by representatives of these parties, together with written submissions.

[124] I have reviewed the claims affidavits filed on behalf of Offshore, Restaurant Design, Continental Hardwood, Capri and Raider and considered the submissions, both written and oral, made on their behalf.

[125] The general tenor of those submissions is that Sargeant, by failing to pay the Claims Certificates, was responsible for the failure of Worldspan to pay its subcontractors and other suppliers, and benefitted from the work that was done on the Vessel, such that it would be inequitable for him to receive the total balance of the sale proceeds.

[126] Among other things, Worldspan argues that failure to reallocate the sale proceeds operates to create an unjust enrichment in favour of Sargeant. Worldspan also submits that Sargeant knowingly failed to maintain payment of claims certificates, thereby enhancing his position at the expense of trade creditors.

[127] The law is clear about the ranking of priorities.

[128] I refer to the decision in *Comeau's Sea Foods Ltd. v. The "Frank and Troy"*, [1971] 1 F.C. 556 (F.C.T.D.). At pages 557 and 558, the Court set out the classes of liens that may attach to a ship; these categories are important when a Court is responding to an application to determine the priorities to sharing in the proceeds of sale of a ship and said the following:

> The liens which may attach to a ship, cargo or freight under the principles of Admiralty law may be classified as:
>
> 1. Maritime Liens;
> 2. Possessory Liens;
> 3. Statutory Liens.
>
> A maritime lien may be defined as a privileged claim, upon maritime property, for services done to it or injury caused by it, arising from the moment when the claim attaches, travelling with the property unconditionally, and enforced by means of an action *in rem*.[…]

[129] At pages 559 and 560, the Court set out the order of ranking , as follows:

> Mortgages rank after maritime liens and possessory liens. I quote from Roscoe's Admiralty Practice, 5th ed., page 55:
>
> > A mortgage ranks after persons having either maritime or possessory liens, but before persons with only a right *in rem*. A mortgage is a valid charge on the vessel from the day it is given, but the rights of the plaintiff *in rem* only become operative when his suit is actually instituted.
>
> Priority between liens: The ranking of liens becomes important when the value of the *res* is insufficient to satisfy all the claims against it. Certain general rules have been laid down to determine priorities but these rules are subject to many exceptions.

> The order of preference between liens may be generally stated to be as follows:
>
> (i) Cost of rendering a fund available by the sale of the res: *The Immacolata Concezione* (1873) 9 P.D. 37;
>
> (ii) Maritime liens;
>
> (iii) Possessory liens;
>
> (iv) Mortgages;
>
> (v) Statutory liens.

[130] In *Fraser Shipyard and Industrial Centre Ltd. v. Atlantis Two (The)*, (11 June 1999),T-111-98 (F.C.T.D.), the late Prothonotary Hargrave decided a motion upon the claims of competing *in rem* claimants to the proceeds of a sale where a claimant sought reallocation of the usual priorities. At paragraphs 187 and 192 he said the following:

> In considering the special circumstances which might change ranking, in *The Edmonton Queen*, I began with the proposition, set out in Thomas on Maritime Liens, Stevens and Sons, 1980, at page 234, that maritime priorities have been built on considerations of equity, public policy and commercial expediency in order to produce a just result in the circumstances of each case:
>
> > There has to date been no attempt by the legislature, beyond giving a statutory priority to the maritime lien of the life salvor to lay down a precise scheme of priorities. Nor has the judiciary been attracted by such an approach. On the contrary, the Admiralty and Appellate Courts have adopted a broad discretionary approach with rival claims ranked by reference to considerations of equity, public policy and commercial expediency, with the ultimate aim of doing that which is just in the circumstances of each case. This is not however to suggest that the law is capricious, erratic or unpredictable. Arising from the "value" framework within which the Courts operate there have emerged various principles which are capable of providing reliable signposts to the likely attitude of the Courts.

> From this I conclude that a change to the usual ranking of maritime priorities, to do what is just in the circumstances, might be accomplished through the application of equitable principles, at that point observing that even now that the English Admiralty Court and our Court have regained a full equitable jurisdiction, few judges have ventured to upset the normal and expected priorities.
>
> …
>
> From these cases I synthesize the proposition that the equitable jurisdiction of the Court should only be used to upset longstanding priorities where it was necessary prevent an obvious injustice, in short, such powers might be used to prevent a plainly unjust result:
>
> > These two views, by Justices Rouleau and Brandon, are not particularly different. In *The Galaxias* it is that equitable powers should only be used to upset priorities long established in Canadian maritime law where it was necessary to prevent an obvious injustice and in *The Lyrma (No. 2)*, that established priorities ought not to be departed from "unless perhaps it could be shown that, on the special facts of the particular case, the application of the principle produced a plainly unjust result." However, both of these phrasings of the test and particularly that flowing from the facts in the *Galaxias*, point to a heavy onus on the part of Treasury Branches to upset the usual long-established priorities.
> >
> > [page 901 of the *Edmonton Queen*]

[131] In any event, the claims advanced in "The Atlantis Two" exceeded the funds available. The usual priories were re-ordered to allow a portion of the plaintiff's claim to rank *pari passu* with the claims of American necessaries suppliers. Prothonotary Hargrave commented on the role of the plaintiff in enhancing the value of the "Atlantis Two" and said the following at paragraph 204:

> The present unjust result is that, without the Fraser Shipyard work, the ship would, in all likelihood, have sold at scrap value plus an intrinsic value increment. Instead it sold for something more

> which, were no adjustment made to priorities, would go to the benefit of American necessaries suppliers, some of whom have slept on their claims for months or years and ABN-Amro which, while not displaying a culpable lack of action, might well have been more diligent in protecting itself in its overall dealings with its customers. […]As pointed out by Mr. Justice Anglin in *Montreal Dry Docks*, at page 369-70:
>
> > On the one hand the shipwright cannot be allowed to improve the plaintiffs out of whatever interest the acquired in the *res* by the arrest. Their right was to have it taken and sold for their benefit as it then stood and that right may not be prejudiced, as it well might be if full effect were given to the contention of Mr. Burchell that because the respondent had a contractual right, as against the owner, to retain the vessel and to complete the repairs to her which it had undertaken to make, the plaintiffs' security acquired by the arrest is subject to that right and the respondent is therefore entitled to priority over the plaintiffs for the full amount of its expenditure regardless of whether the selling value of the vessel was or was not thereby increased.

[132] In *Cameco Corporation v. Ship MCP Altona* (2013), 425 F.T.R. 80, Justice Harrington reviewed the general principles about the re-allocation or re-ranking of priorities in a case where competing claims were advanced against the proceeds of the sale of the "MCP Altona".

[133] At paragraph 59, Justice Harrington stated the problem with the prospect of reallocation of the priorities, as follows:

> This is the most difficult of Cameco's four submissions to assess. Ranking is not dictated by statute. In the interests of justice, the Court has varied the usual ranking from time to time. Cameco's main thrust is that it would be inequitable to allow the Bank to sit idly by while it spent more than $8 million in discharging its cargo and remediating the ship, and then reap the benefit of that work. Before Cameco stepped in, the ship had a negative value. She was a liability, not an asset.

[134] At paragraph 70, Justice Harrington further observed that the principle of unjust enrichment is critical to deciding upon reallocate of the usual priorities and concluded, in that case, the priorities should not be re-ordered:

> The thread which ties these cases together is that of unjust enrichment. There certainly are instances in which a mortgage creditor keeps throwing good money after bad in the faint hope that matters will right themselves out. It does so on the basis that this additional funding forms part of the mortgage, as indeed mentioned in the *Kinguk*, and thus may have the effect of defeating ordinary creditors.

[135] The common thread emerging from the authorities referred to above is that the ranking of priorities will be changed, generally, when the interests of justice and the consideration of equitable principles require a reallocation of the general rule about the order of priorities.

[136] I refer to the observations of Justice Harrington in *Ballantrae Holdings Inc v. "Phoenix Sun" (The)* (2016), 6 P.P.S.A.C.(4th) 48 at paragraphs 6, 7, and 12 as follows:

> When there are insufficient funds to meet the claims of all the creditors they must persuade the Court that their claims enjoy priority. Otherwise, valid claims rank *pari passu*.
>
> There is no statute or single case which establishes an exhaustive list of priorities. […]
>
> […]
>
> Furthermore, on occasion when the interests of justice so require, our court in the exercise of its admiralty and equitable jurisdiction may alter the traditional ranking.

[137] Offshore, supported by Continental and Restaurant Design, argues that Sargeant "could have" taken delivery of the Vessel in June of 2014 by posting security. This possibility was

addressed in the Sale Order of June 27, 2014. That Order was reviewed and upheld by Justice Mosley in an Order made on July 4, 2014.

[138] The Order of June 27, 2014 offered Sargeant and Comerica an alternative to the sale of the Vessel. Clause 6 of that Order provides as follows:

> In the event that either Harry Sargeant III or Comerica Bank posts security in accordance with Rule 485 of the *Federal Courts Rules*, or in such other form as the parties agree, by 12:00 p.m. PST on Monday, June 30, 2014, in the Canadian Dollar equivalent of USD$5,000,000.00 (the "Comerica Security"), the Vessel and the Scheduled Parts and Equipment shall not be sold to the Company as provided for in paragraph 1.

[139] Offshore submits that Sargeant somehow acted improperly by declining to post security against the completion and delivery of the Vessel because taking delivery would have satisfied the debt due from Worldspan, which debt was secured by the Builder's Mortgage.

[140] I see no evidence of improper conduct on the part of Sargeant. Rather the evidence suggest that he made a commercial decision, based on the facts that were known to him, including the commencement of litigation and the concurrent arrest of the Vessel by Offshore.

[141] I am not persuaded, on the basis of the evidence and of the submissions made, that there are grounds for the departure from the usual ranking of priorities.

[142] By Order made on November 30, 2011, the *in rem* claim advanced by Worldspan was dismissed by Order of Prothonotary Lafrenière, as he then was. An appeal from that Order was dismissed by Justice Lemieux by an Order made on January 18, 2012.

[143] It is not necessary to consider the *in rem* claims advanced by Offshore, Restaurant Design, Continental, Cascade, Raider and Capri. According to the principles outlined above, the claim of Sargeant, as a mortgagee, takes priority over the other asserted claims.

[144] There is no evidence that any one of the *in rem* creditors performed work that enhanced the value of the Vessel, which was still in a state of construction upon the sale, to justify a departure from the recognized order of priorities.

[145] I see nothing in the evidence submitted, that is in the claims affidavits filed, to show improper or underhanded behaviour on the part of Sargeant which would be a factor in considering whether to exercise the Court's equitable jurisdiction to reallocate the priority of claims.

[146] I am satisfied that Sargeant's claim enjoys priority over all the other *in rem* claims.

[147] In the result, the motion for reallocation of the sale proceeds is dismissed, with costs to Sargeant and Comerica.

VI. RANKING OF PRIORITIES

[148] Sargeant is the mortgagee. The Builder's Mortgage secured advances made to Worldspan, as has been found by this Court and the Federal Court of Appeal. He has established a claim in the amount of $20 million.

[149] It is admitted that the Vessel was sold for $5 million.

[150] Certain sums have been paid in respect of Sheriff's fees and the like that take priority over the claim of Sargeant.

[151] The funds remaining do not satisfy Sargeant's claim but in my opinion, he is entitled to those funds. There are no funds available for distribution to the other *in rem* claimants.

[152] In these circumstances, it follows that Sargeant is entitled to receipt of the balance of the proceeds of sale.

VII. CONCLUSION

[153] All the motions have been considered and the motion of Sargeant is allowed and the remaining motions are dismissed, with costs to Sargeant and Comerica. Orders will issue accordingly.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1226-10
STYLE OF CAUSE:	WORLDSPAN MARINE INC., CRESCENT CUSTOM YACHTS INC., THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL "QE01422C010" and THE VESSEL "QE014226C010" and WOLRIGE MAHON LIMITED in its capacity as appointed Vessel Construction Officer of the Defendant Vessel "QE014226C01" HARRY SARGEANT III, MOHAMMED ANWAR FARID AL-SALEH, and 642385 B.C. LTD.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARINGS:	OCTOBER 16, 2017 DECEMBER 13 AND 14, 2017
ORDER AND REASONS:	HENEGHAN J.
DATED:	APRIL 30, 2019

APPEARANCES:

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