Federal Court  Cour fédérale

Date: 20240826

Docket: T-879-21

Citation: 2024 FC 1319

Ottawa, Ontario, August 26, 2024

PRESENT: The Honourable Mr. Justice Pamel

ADMIRALTY ACTION *IN REM* AGAINST THE SHIP "KINDNESS TO THE WORLD", THE SHIP "MYSTIQUE V" AKA THE "DESTINY" AND *IN PERSONAM*

BETWEEN:

INGA ZANE

Plaintiff

and

GREGORY ROHLAND, DESTINY YACHTS HOLDINGS LLC, BOUNDLASS HOLDINGS LLC, THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MYSTIQUE V" AKA THE "DESTINY", THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "KINDNESS TO THE WORLD", THE SHIP "MYSTIQUE V" AKA THE "DESTINY" ("MYSTIQUE V"), AND THE SHIP "KINDNESS TO THE WORLD" ("KINDNESS TO THE WORLD")

Defendants

ORDER AND REASONS

I. Overview

[1] This is a motion by the plaintiff, Inga Zane, to reopen her case to allow further evidence to be given in the trial that is currently underway in this matter.

[2] In this action, Ms. Zane is claiming payment from the defendants for services rendered to, and reimbursement for materials provided to and payments made for, the *in rem* defendant yachts *Destiny* and *Kindness to the World*. Both vessels are owned by the *in personam* defendant Destiny Yachts LLC [Destiny LLC]. In addition, Ms. Zane claims to be a 30% "profit-and-loss" share member of the defendant Boundlass Holdings LLC [Boundlass LLC] which, at the relevant times, was the managing member of Destiny LLC. Both Boundlass LLC and Destiny LLC are limited liability companies incorporated under the laws of Florida.

[3] Boundlass LLC was dissolved, it would seem, in September 2020 for failure to file its annual report; it has neither appeared in these proceedings nor filed a statement of defence. The possibility of the company being revived under Florida law is unclear, and default judgment has yet to be entered against it in these proceedings. However, back in 2016, Boundlass LLC was the registered owner of the vessel *Boundlass*. In August 2016, the *Boundlass* was destroyed by fire while at sea and Ms. Zane claims the insurance proceeds received by Boundlass LLC as a result of such loss [insurance proceeds], rather than being distributed to her in accordance with her percentage of share membership in Boundlass LLC, were, unbeknownst to her, diverted to allow Destiny LLC (which, as stated, was managed by Boundlass LLC) to purchase the *Kindness to the World* in May 2017. Through the mechanism of tracing, Ms. Zane claims an equity interest in the yacht *Kindness to the World* pursuant to a resulting or constructive trust, to the extent to which

her 30% membership share in Boundlass LLC would give her a fractional interest in the said insurance proceeds.

[4] Destiny LLC has given evidence by way of an affidavit by James H. Perry – a Florida attorney who is the lawyer for Michael Rohland, the brother of the defendant Greg Rohland – that it, Destiny LLC, indeed purchased the yacht *Kindness to the World*, but denies that the funds used for the purchase were the insurance proceeds received by Boundlass LLC following the loss of the *Boundlass*. Michael Rohland also controls Destiny LLC and, as was clarified before me by defendants' counsel during the hearing of this motion, instructions in these proceedings on behalf of Destiny LLC are being given by Greg Rohland, upon authorization provided by Michael Rohland. Consequently, it would appear that the directing mind of Destiny LLC is in fact Michael Rohland; that is not to say that Greg Rohland does not know what is going on!

[5] The trial of this matter was set down for three days commencing on May 7, 2024. It took the entire three days to complete the evidence portion and for the parties to close their respective case. At the end of the three days, the parties had not yet commenced oral arguments. Consequently, the trial is set to resume on October 7, 2024.

[6] Leading up to the commencement of trial, I directed the parties to exchange witness affidavits and will-say statements summarizing the evidence expected to be given in this matter. If a party elected not to cross-examine an affiant of the other party, the affidavit would be tendered and accepted as evidence at trial; otherwise, the affiant would need to appear at trial to

be cross-examined. The will-say statements were meant for the witnesses each party expected to call at trial to provide oral evidence.

[7] In accordance with my direction, the defendants provided, amongst other things, an affidavit from Mr. Perry, as well as a will-say statement from Michael Rohland, who now resides in Thailand and was expected to give evidence by videoconference. The parties also prepared a trial chart scheduling, amongst others, Michael Rohland as a witness for the defendants. In line with the timelines set out in my direction, prior to trial, Ms. Zane's counsel informed counsel for the defendants that they elected not to cross-examine Mr. Perry; confirmation was again made before me during the trial. Consequently, Mr. Perry's affidavit was therefore tendered and accepted as evidence at trial on behalf of the defendants – hence the evidence that Destiny LLC had purchased the *Kindness to the World*.

[8] Ms. Zane now claims that, in electing not to cross-examine Mr. Perry, she relied on the defendants' representation that Michael Rohland, who had provided a will-say statement, would be testifying at the trial and would be able to give evidence as to how Mr. Perry, who had control of the insurance proceeds paid to Boundlass LLC following the loss of the vessel *Boundlass*, was instructed to disburse those funds; a document purporting to be a written resolution of Boundlass LLC specifies that the insurance proceeds, following settlement with the *Boundlass'* underwriters, would be used to pay attorney fees and disbursement, with the balance being transferred to "Foreign Exchange Inc. and Michael Rohland or as directed". I am lead to believe that Foreign Exchange Inc. is a company controlled by Michael Rohland.

[9] Ms. Zane has tendered in evidence what is purported to be a photocopy of a trust account ledger [trust ledger] from Mr. Perry's office – whose authenticity is not admitted by the defendants – which suggests that the insurance proceeds received by Boundlass LLC following the loss of the vessel *Boundlass* were used to purchase the yacht *Kindness to the World* – which as stated is actually owned by Destiny LLC – thus supporting Ms. Zane's contention regarding the improper use of the insurance proceeds and as to her interest in the *Kindness to the World*. How Ms. Zane came to be in possession of the trust ledger was the subject of considerable testimony during the trial, but not relevant for this motion. In any event, no evidence was tendered before me of Ms. Zane's pre-trial discovery of Greg Rohland on the issue of the use of the insurance proceeds or the trust ledger, nor, it would seem, did Ms. Zane see fit to serve a Notice to Admit in respect of that document. Nor, I might add, does the affidavit of Mr. Perry or the will-say statement of Michael Rohland refer in any way to the use made of the insurance proceeds , as seemingly reflected in the trust ledger.

[10] During the course of Ms. Zane's evidence at trial, the defendants informed the Court and Ms. Zane's counsel that they did not intend to call Michael Rohland to testify at the trial after all; no objection or caveat was expressed by Ms. Zane's counsel at the time. After Ms. Zane closed her case, the defendants called Greg Rohland, from whom Ms. Zane's counsel, in cross-examination, sought to extract an admission as to what the trust ledger seemed to confirm, i.e., use of the insurance proceeds emanating from the loss of the *Boundlass* to purchase the *Kindness to the World*; counsel was unsuccessful as Greg Rohland professed ignorance.

[11] After the defendants closed their case, Ms. Zane's counsel advised the Court that his client wished to reopen her case to call Mr. Perry – not Michael Rohland – as a witness by videoconference to give evidence regarding the purported receipt and disbursement by his law firm of the insurance proceeds and, in particular, regarding the receipts and payments listed in the trust ledger. I indicated to Ms. Zane's counsel that a formal motion would be required to reopen his client's case.

[12] Having now heard that motion, these are the reasons why I am granting Ms. Zane's request.

II. Analysis

[13] Reopening the evidence portion of a trial calls for the application of judicial policy. The timing of when, and at what stage, a party may seek to introduce new evidence may vary – for example the introduction of new evidence on appeal (*Barendregt v Grebliunas*, 2022 SCC 22; *Palmer v The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759); the reopening of the trial after reasons have been delivered, but before the entry of judgment (*671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983 [*Sagaz*]; *Iredale v Dougall*, 2021 ONSC 4572; *Scott et al v Cook et al*, 1970 CanLII 331 (ON SC) [*Scott*]); *Carpino v Carpino*, 2023 BCSC 1518; *Hansra v Hansra*, 2017 BCCA 199; *Moradkhan v Mofidi*, 2013 BCCA 132); *Risorto v State Farm Mutual Automobile Insurance Co.*, (2009), 70 CPC (6th) 390 (Ont Div Ct) [*Risorto*]; *McPherson v Scully*, 2005 CanLII 48317 [*McPherson*]); the reopening of trial after it has been concluded but where the decision is still under reserve with no reasons yet issued or judgment entered (*Varco Canada Limited v Pason Systems Corp.*, 2011 FC 467 [*Varco*]); or, as

is the case here, to reopen the evidence portion before the conclusion of trial but after the party has closed her case (*Smith Building And Development Ltd. v Western Financial Group (Network) Inc.*, 2021 SKQB 25 [*Smith Building*]).

[14] In *Sagaz*, the Supreme Court of Canada confirmed the two-part test articulated in *Scott* for the reopening of a trial for the purposes of introducing new evidence, *to wit*: (1) would the evidence, if presented at trial, probably have changed the result?; and (2) could the evidence have been obtained before trial by the exercise of reasonable diligence? (*Sagaz* at para 20; *McPherson* at para 4; *Smith Building* at para 13).

[15] But how are we to apply the two-prong test in situations were the trial is concluded without a decision yet having been made, or even more so when the trial itself has not yet concluded? In *Varco*, Mr. Justice Phelan noted that the decision in *Sagaz* may not be strictly applicable where, as was the situation before him, the matter was still under reserve following the conclusion of trial. It may be even less relevant in the matter before me, as trial itself has not yet concluded. In such situations, I agree with Justice Phelan that, as regards the first part of the *Sagaz* test, it is more appropriate in these circumstances to ask whether the evidence, had it been presented, could have any influence on the result, thus engaging an inquiry as to materiality and relevance (*Varco* at para 17).

[16] The second branch of the *Sagaz* test, often referred to as the “due diligence” aspect, would continue to be applicable. However, Mr. Justice Phelan added that, in addition to the two-prong test in *Sagaz*, the Court should consider whether exceptional circumstances would justify

setting aside the "due diligence" aspect of the test, or at least reducing its overall importance in the exercise of discretion, and that the "danger that a court would be misled is an aspect of the 'exceptional' circumstances consideration" (*Varco* at para 20; *Lo v Ho*, (2010), 86 CPC (6th) 370 (Ont SCJ) at paras 25–26).

[17] Finally, Justice Phelan commented as follows:

> In my view, when all of the various factors, tests and considerations are taken together, the importance of the integrity of the trial process – the search for the truth through evidence – is an overarching consideration. To some extent that consideration is addressed in the issue of whether a court would be misled.
>
> (*Varco* at para 22)

I wholeheartedly agree with my colleague, whether the situation is as it was before him in *Varco*, or as it is before me.

[18] Ms. Zane asserts, and the defendants do not dispute, that the test to be applied here is the one set out in *Varco*, which modified to the extent necessary to the two-prong test in *Sagaz*. For my part, I see no reason to disagree.

A. *Potential to influence the result*

[19] Ms. Zane has put forward a photocopy of what purports to be the trust ledger from Mr. Perry's law firm, which strongly suggests that the firm received the insurance proceeds from the loss of the *Boundlass* and disbursed a large portion of those funds, I must assume upon instructions from the client, for the purchase of the *Kindness to the World*. The defendants have not denied that the trust ledger is what it purports to be; they simply refuse to admit its veracity

or the truth of its contents. There is also, as stated, evidence that the *Kindness to the World* was purchased by Destiny LLC, a company controlled by Michael Rohland, and that Mr. Perry is Michael Rohland's lawyer.

[20] In their written submissions, the defendants do not address whether the evidence Ms. Zane is seeking to obtain from Mr. Perry would potentially influence the result in this matter.

[21] For my part, I raised with Ms. Zane's counsel the issue of the possible usefulness of such evidence given that no expert evidence on foreign law was proffered as to the rights of a member of an LLC to the funds of the LLC under Florida law. Ms. Zane's counsel conceded that there was no evidence of Florida law before me, but suggested that any rights of Ms. Zane to the funds would be established by other means, including the constituting documents of the LLC. That argument needs to be further developed, however at this stage, Ms. Zane should be afforded an opportunity to make it; I cannot at this stage say that such an argument is frivolous. If she is successfully able to make it, there is little doubt that the evidence of Mr. Perry would shed significant light on the case Ms. Zane is seeking to make in relation to her ownership interest in the *Kindness to the World*.

B. *Due diligence*

[22] In essence, Ms. Zane is saying that she was somehow misled to believe – given the exchange of the will-say statement of Michael Rohland and the trial chart – that Michael Rohland would be called by the defendants to testify, thus allowing her to cross-

examine him on the use that was made of the insurance proceeds. As stated, there is evidence suggesting that Michael Rohland was the client directing Mr. Perry regarding the distribution of such funds, as well as evidence connecting the insurance funds to the purchase of the *Kindness to the World*.

[23] The defendants make what they describe as a procedural fairness argument; they say that Ms. Zane had the opportunity to cross-examine Mr. Perry prior to closing her case, but elected not to do so. They also argue that Ms. Zane could have sought confirmation of the use of the insurance proceeds during the discovery of Greg Rohland, or by the issuance of a Notice to Admit given that Ms. Zane had the trust ledger in hand from the outset. It would therefore be unfair in the context of an adversarial system of law, argues the defendants, for the Court to intervene so as to save Ms. Zane from her own strategic decisions, missteps which could have been avoided by the reasonable exercise of due diligence.

[24] The defendants also raise the prospect of solicitor-client privilege, and, as asserted by Greg Rohland at paragraph 17 of his affidavit filed in opposition to the present motion: "Mr. Perry could not testify further <u>for his client, Michael Rohland</u>, about the issues as he informed me that his client has not waived privilege" [emphasis added]. Clearly, Greg Rohland, who is leading the defence in this matter, on authority of Michael Rohland as confirmed by defendants' counsel, is in communication with Mr. Perry in relation to the issues at hand.

[25] I am not convinced by the defendants' arguments. First of all, there is no question of procedural fairness here; what we do have is an issue of the application of judicial policy which

underscores the importance of an orderly system of litigation which requires that each party put his or her best foot forward (*Varco* at para 19, citing *Risorto* at para 35). The Ontario Division Court put it this way in *Risorto*:

> [35] The policy reasons for the adoption of the two-pronged test are well-known, and have been discussed in a number of the cases to which I have referred. An orderly system of litigation requires that each party put his or her best foot forward. It contemplates that judgment will be rendered after each party has done so. Litigation by instalments is not to be encouraged. There is a strong interest in finality, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions. At para. 14 of her judgment in *DeGroote*, *supra*, Lax J. quoted with approval the following statement by Wilkins J. in *Strategic Resources International Inc. v. Cimetrix Solutions Inc.* (1997), 1997 CanLII 12168 (ON SC), 34 O.R. (3d) 416, at p. 421:
>
> > After the trial is complete and judgment is rendered, it is always a simple matter, utilizing hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of being a loser.
>
> [36] In the same paragraph, Lax J. noted the observation of the Court of Appeal in *Becker Milk, supra*, at p. 556, that "An unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he was content to have the trial judge bring forward his judgment based on the record produced at a trial in which that litigant actively participated."
>
> [Emphasis added.]

[26] I agree with the defendants that there is little doubt that it is within a party's sole purview to muster their evidence and call, or not call, the witnesses necessary to make out their case. Consequently, a party generally bears the risk of having a void in the evidentiary record if they do not call a witness on the assumption that he or she will be called to give evidence by the other side, or that a witness which is called to testify by the other side is not in a position to provide the

evidence that party seeks. Ms. Zane's reliance on the defendants calling Michael Rohland to testify, or her assumption that Greg Rohland was in a position to address the use made of the insurance proceeds, or to confirm the entries in the trust ledger, may be, in hindsight, something her counsel – who in fairness, but only somewhat, Ms. Zane appointed late in the day – now regrets.

[27] Discovery of Greg Rohland on the use of the insurance proceeds would probably have been the most efficient way to extract that evidence. Even if he would not have been any wiser on the issue during oral discovery than he professed to be at trial, as the representative of the defendants, he nonetheless would have had an obligation under Rule 241 of the *Federal Courts Rules*, SOR/98-106, to inform himself by making inquiries relating to any question in the action. Such inquiries most definitely should have included Ms. Zane's claim regarding the use of the insurance proceeds. If Greg Rohland, nonetheless, persisted in professing ignorance, undertakings may have been given.

[28] Cross-examining Mr. Perry on his affidavit may also have offered an opportunity to extract the evidence Ms. Zane now seeks, although the defendants may well have played the solicitor-client privilege card that they are now showing me. In any event, the assumption that Michael Rohland would testify or that Greg Rohland had the answers sought may have been overly optimistic.

[29] As regards the possible issuance by Ms. Zane of a Notice to Admit the trust ledger, again, there is no reason to believe that the defendants would have taken a different position from the

one they take now, i.e. simply not admitting the authenticity of the document nor for the truth of its content. However, such a response well prior to the commencement of trial would presumably have alerted Ms. Zane to an evidentiary gap in her case, thereby allowing her to muster the evidence in other ways. All in all, I must agree with the defendants that Ms. Zane was in position, with the reasonable exercise of due diligence, to at least seek to obtain the evidence she is now seeking to extract from Mr. Perry.

[30] That said, however, it should also be noted that the comments by the Court in *Risorto* that "there is a strong interest in finality, which should only be departed from in exceptional circumstances", were made in the context of a trial having been completed, and where the party seeking to reopen its case was aware of the Court's decision; here, trial is not over, a factor which I think should be taken into consideration in evaluating the severity to which the due diligence aspect of the *Sagaz* test is to be adhered to. It seems to me that there is no prejudice to the defendants if I were to grant Ms. Zane's request that cannot be rectified by the assessment of costs. In any event, the defendants will be able to cross-examine Mr. Perry in the event he is called as a witness by Ms. Zane.

[31] As to the argument that Mr. Perry will be called upon to give evidence for which Michael Rohland has not waived solicitor-client privilege, I am not convinced that such an argument militates against granting leave to reopen Ms. Zane's case. I can deal with any objection made by the defendants on the grounds of solicitor-client privilege at the time the objection is made during Mr. Perry's testimony, assuming it is made. We must bear in mind that Mr. Perry may have been acting for Boundlass LLC at the time the insurance proceeds were

received into his trust account – an account defendants' counsel seemed to concede before me during the hearing of this motion to be the trust account for Boundlass LLC and not Destiny LLC – and later disbursed. With Boundlass LLC now being defunct, the issue as to whom the privilege belongs, and to what extent it may be invoked, remains uncertain.

[32] In any event, reliance on solicitor-client privilege to mask a fraud has its own perils – more on this issue below.

C. *Special circumstances*

[33] Just as importantly, in this case, I find that special circumstances militate against taking a strict approach as to the due diligence aspect of the *Sagaz* test. The potential of misleading the Court falls under the category of special circumstances, as would, I would think, the prospect of the perpetuation of a fraud. As stated, Mr. Perry is Michael Rohland's lawyer; this was repeated to me during the trial as well as confirmed by Gregory Rohland in his affidavit filed in opposition to the present motion. If there was fraud committed against Ms. Zane, as she alleges, that would necessarily have related to the instructions given to Mr. Perry – presumably by Michael Rohland – in the use of the insurance proceeds belonging to Boundlass LLC (which, at the time, would have been Mr. Perry's client) for the purchase by Destiny LLC of the vessel *Kindness to the World*; a fraud which Mr. Perry may inadvertently have assisted in perpetrating. All this, of course, remains to be proven and there may be more pieces to this puzzle yet to be placed on the board; however, as stated, reliance on solicitor-client privilege to mask a fraud has its own challenges.

[34] The other important factor is that, and as I advised defendants' counsel during the hearing of this motion, the testimony of Greg Rohland at trial has left me seriously questioning his credibility; I have yet however to come to any conclusion as to the prospect of a little game of hide the pea being played out before this Court. As stated by Justice Phelan in *Varco*, the overarching consideration is a search for the truth so as to maintain the integrity of the trial process, and the danger of the Court possibly being misled must be taken into consideration in assessing whether to give leave to reopen a party's case. Here, at least at this stage, I continue to have concerns along these lines.

[35] Finally, much was made by both sides about whether an adverse inference should be drawn by the Court from the fact that Michael Rohland was not called to testify as he was initially scheduled to, or would be drawn by the Court in the event Mr. Perry does not testify should I grant leave to reopen Ms. Zane's case to allow for it. I leave those issues for another day.

[36] All in all, and under the circumstances of this case, I am compelled to exercise my discretion and grant leave to Ms. Zane to reopen her case so that Mr. Perry can appear and testify on the issue at hand. It is certainly in the interest of justice that I do so, in particular given the circumstances of this case.

ORDER in T-879-21

THIS COURT ORDERS that:

1. The present motion is granted.

2. Leave is given to Ms. Zane to reopen her case for the limited purpose of calling Mr. James Perry to appear by way of videoconference as a witness to give evidence as sought in the present motion upon the continuation of trial on October 7, 2024.

3. The parties may, with permission of the Court, seek another time for Mr. Perry to attend to give his evidence prior to the continuation of the trial, if more suitable to the parties and Mr. Perry, subject to the availability of the Court.

4. The defendants are to assist with compliance of this Order.

5. Costs on the present motion are reserved, to be dealt with at a later date.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-879-21
STYLE OF CAUSE:	INGA ZANE v GREGORY ROHLAND, DESTINY YACHTS HOLDINGS LLC, BOUNDLASS HOLDINGS LLC, et al
PLACE OF MOTION HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 20, 2024
ORDERS AND REASONS:	PAMEL J.
DATED:	AUGUST 26, 2024

APPEARANCES:

Jeffrey P. Scouten	FOR THE PLAINTIFF
George Douvelos	FOR THE DEFENDANTS

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