

Date: 20070911

Docket: T-2033-06

Citation: 2007 FC 897

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 11, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

CARAPEC NO. 1

Defendant

REASONS FOR ORDER AND ORDER

OVERVIEW

[1] The seriousness of the situation requires that the Court act within its jurisdiction and thus proceed with the pre-trial sale of the vessel. This is due to the specified physical condition of the vessel and, thus, the serious danger that it represents for the environment and other vessels, the continuous serious financial depreciation of the vessel, and the owner's lack of equity, combined with the fact that the owner has no financial resources.

INTRODUCTION

[2] The vessel, Carapec No. 1, constitutes a nuisance and a risk to the environment and marine safety in the Port of Matane and, because it has not been maintained for many years, its condition is rapidly deteriorating, raising fears of an incident involving it.

[3] It is therefore essential that the vessel be sold and dismantled *pendente lite* and quickly to end the risk that it represents to the port facilities and marine safety, to end the increasing mooring fees owed by the vessel and so the plaintiff can stop covering the costs to keep it moored at dock.

[4] The decision by the prothonotary on July 19, 2007, to order the sale is well-founded in fact and in law.

JUDICIAL PROCEEDING

[5] This is a motion by the defendant, Carapec No. 1, dated July 30, 2007, appealing an order made on July 19, 2006 by Prothonotary Richard Morneau.

The standard of review applicable to the appeal of the prothonotary's order

[6] Before examining the prothonotary's order, the standard of review applicable to an appeal of that order must first be determined.

[7] The order was made by the prothonotary under Rule 490 of the *Federal Courts Rules*, SOR/98-106 (the Rules).

[8] It is discretionary in nature, as Rule 490 states:

Disposition of arrested property

Sort des biens saisis

490. (1) On motion, the Court may order, in respect of property under arrest, that

490. (1) La Cour peut, sur requête, ordonner que les biens saisis, selon le cas :

(a) the property be appraised and sold, or sold without appraisal, by public auction or private contract;

a) soient évalués et vendus, ou soient vendus sans avoir été évalués, soit aux enchères publiques, soit par contrat privé;

(b) the property be advertised for sale in accordance with such directions as may be set out in the order, which may include a direction that

b) soient mis en vente par des avis publics conformes aux directives données dans l'ordonnance, laquelle peut prescrire notamment :

(i) offers to purchase be under seal and addressed to the sheriff,

(i) que les offres d'achat doivent être scellées et adressées au shérif,

(ii) offers to purchase all be opened at the same time in open court, that the parties be notified of that time and that the sale be made pursuant to an order of the Court made at that time or after the parties have had an opportunity to be heard,

(ii) que les offres d'achat doivent être toutes décachetées au même moment à une audience publique, que les parties doivent être avisées de ce moment et que la vente doit être faite en vertu d'une ordonnance de la Cour rendue à cette occasion ou après que les parties ont eu l'occasion de se faire entendre,

(iii) the sale not

(iii) qu'il n'est pas

necessarily be to the highest or any other bidder, or

obligatoire de vendre les biens au plus haut enchérisseur ou autre enchérisseur,

(iv) after the opening of the offers and after hearing from the parties, if it is doubtful that a fair price has been offered, the amount of the highest offer be communicated to the other persons who made offers or to some other class of persons or that other steps be taken to obtain a higher offer;

(iv) que, après l'ouverture des offres d'achat et audition des parties, s'il y a un doute sur la justesse du prix offert, le montant de l'offre la plus élevée doit être communiqué aux autres personnes qui ont fait des offres ou à une autre classe de personnes, ou d'autres dispositions doivent être prises pour qu'on obtienne une offre plus élevée;

(c) the property be sold without advertisement;

c) soient vendus sans préavis de vente;

(d) an agent be employed to sell the property, subject to such conditions as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent as may be stipulated in the order;

d) soient vendus, sous réserve des conditions précisées dans l'ordonnance ou de l'approbation subséquente de la Cour, par l'entremise d'un agent ou courtier rémunéré au taux fixé dans l'ordonnance;

(e) any steps be taken for the safety and preservation of the property;

e) fassent l'objet de mesures assurant leur sécurité et leur conservation;

(f) where the property is deteriorating in value, it be sold forthwith;

f) s'ils perdent de leur valeur, soient vendus immédiatement;

(g) where the property is on

g) s'ils sont à bord d'un

board a ship, it be removed or discharged;

navire, en soient enlevés ou déchargés;

(h) where the property is perishable, it be disposed of on such terms as the Court may order; or

h) s'ils sont de nature périssable, soient aliénés de la manière qu'elle ordonne;

(i) the property be inspected in accordance with rule 249.

i) soient examinés aux termes de la règle 249.

Commission

Commission

(2) The appraisal or sale of property under arrest shall be effected under the authority of a commission addressed to the sheriff in Form 490.

(2) L'évaluation et la vente de biens s'effectuent en vertu d'une commission adressée au shérif selon la formule 490.

Sale free from liens

Produit de la vente

(3) Property sold under subsection (1) is free of any liens under Canadian maritime law.

(3) Les biens vendus aux termes du paragraphe (1) sont libres de toute charge imposée selon le droit maritime canadien.

Execution of commission

Exécution de la commission

(4) As soon as possible after the execution of a commission referred to in subsection (2), the sheriff shall

(4) Dès que possible après l'exécution d'une commission visée au paragraphe (2), le shérif :

(a) file the commission with a return setting out the manner in which it was executed;

a) dépose celle-ci avec un procès-verbal expliquant la façon dont elle a été exécutée;

(b) pay into court the proceeds of the sale; and

b) consigne à la Cour le produit de la vente;

(c) file the sheriff's accounts and vouchers in support thereof.

c) dépose ses comptes et justificatifs à l'appui.

Sheriff's accounts

(5) An assessment officer shall assess the sheriff's accounts and report the amount that the assessment officer considers should be allowed.

Assessment

(6) Any party or caveator who is interested in the proceeds of sale referred to in subsection (4) may be heard on an assessment under subsection (5).

Review of assessment

(7) On motion, the Court may review an assessment done under subsection (5).

Taxation des comptes du shérif

(5) Un officier taxateur taxe les comptes du shérif et fait rapport du montant qui, selon lui, devrait être accordé.

Audience

(6) Toute partie ou toute personne ayant déposé un *caveat* qui a un droit sur le produit de la vente visé au paragraphe (4) peut se faire entendre lors de la taxation des comptes du shérif.

Révision

(7) La Cour peut, sur requête, réviser la taxation des comptes du shérif.

[9] In *Canada v. Aqua-Gem Investment Ltd.*, [1993] 2 F.C. 425 (C.A.), [1993] F.C.J. No. 103

(QL), the Court defined the standard of review applicable to discretionary orders by prothonotaries as follows:

[94] [...] Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, Lacourcière, J.A., in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

- (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
- (b) they raise questions vital to the final issue of the case.

[95] Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

[10] More recently, in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2003] F.C.J. No. 1925 (QL), the Federal Court of Appeal slightly modified the test set out in *Canada v. Aqua-Gem Investment Ltd.*, stating the following:

[17] [...] discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

- (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
- (b) they raise questions vital to the final issue of the case.

[11] Thus, to determine the standard of review applicable to the discretionary order by the prothonotary that is the subject of this motion, it must first be determined whether that order raises a question vital to the final issue of the case

[12] The prothonotary ordered the sale of the vessel *Carapec No.1*.

[13] That order raises a question vital to the final issue of the case and, as such, the judge hearing this motion can exercise his own discretion by analyzing the issue *de novo*.

ANALYSIS

The prothonotary correctly analyzed the elements to determine whether he should exercise his discretion to order the sale of the vessel *pendete lite*

[14] The prothonotary had before him a motion by the plaintiff, under Rule 490, which gives the tribunal broad authority to order the sale of a vessel even when the determination of merits is not complete.

[15] That rule does not set out the factors and elements that must be considered by the Court in its analysis of a motion seeking its application.

[16] Without providing strict requirements, jurisprudence has identified certain elements that can be considered by the Court in deciding if a motion to sell a vessel should be allowed. (*Brotchie v. Karey T* (1994), 83 F.T.R. 262, [1994] F.C.J. No. 1266 (QL); *Canada (Minister of Supply and Services) v. Horizons Unbound Rehabilitation and Training Society* (1996), 125 F.T.R. 81, [1996] F.C.J. No. 1496 (QL); also: *Banco Do Brasil S.A. v. Alexandros G. Tsavlis (The)* (1987), 12 F.T.R. 278, [1987] F.C.J. No. 610 (QL); *Franklin Lumber Ltd. v. Essington II (The)*, 2005 FC 95, [2005] F.C.J. No. 125 (QL); *The Myrto*, [1977] 2 Lloyd's Rep. 243, set aside due to a factor unrelated to the sale, [1978] 1 Lloyd's Rep. 1 (C.A.).)

[17] In *Karey T*, above, Prothonotary John A. Hargrave summarized the elements considered by Brandon J. in *The Myrto* and Justice Frank U. Collier in *Alexandros Tsavlis* to determine whether or not a sale during a trial is appropriate:

[14] [...]

1. The value of the vessel compared with the amount of the claim;

2. Whether there is an arguable defence;
3. Can the owner carry on: is it reasonable to assume that there must be a sale of the vessel at some point;
4. Whether there will be any diminution in the value of the vessel or of the sale price by the delay, including the cost of keeping a man or a crew aboard the vessel the cost of maintaining the vessel and the cost of insuring the vessel;
5. Whether the vessel will depreciate by further delay;
6. Whether there is any good reason for a sale before trial?

[18] In his reasons for decision, Prothonotary Morneau concluded by summarizing as follows the main factors for which he ordered the sale of the vessel:

[19] In sum, the **mooring and maintenance fees** that will still be incurred if nothing is done with the vessel, the established risk that the Vessel poses to the port facilities and maritime safety, and the fact that the Vessel is not maintained are all good reasons to authorize the sale of the Vessel at this time. (See, *inter alia*, *Brotchie v. Ship Karey T* (1994), 83 F.T.R. 262 and *Canada v. Horizons Unbound Rehabilitation & Training Society*) (1996), 125 F.T.R. 81). Moreover, the Vessel's lack of market value fully justifies the process suggested by the plaintiff.

[19] The prothonotary was therefore correct in law and studied the appropriate elements to determine if he should exercise his discretion to order the sale.

Summary of elements justifying the sale of the vessel *pendete lite*

[20] Following is a summary of the elements that justify the sale of the vessel, studied in the order suggested by Prothonotary Hargrave in *Karey T*, above. (Also, Prothonotary Hargrave in Action *in rem* against the vessel "Nel" and personal action between The Governor and Company of the Bank of Scotland and The Owners and All others interested in the Ship "Nel" and Ocean Profile Maritime Limited, *Governor and Company of the Bank of Scotland v. Nel*, [2000] F.C.J. No. 1305 (QL), Federal Court Docket No. T-2416-97.)

I - What is the value of the vessel compared with the amount of the claim?

[21] The vessel has no commercial value, while the amount of the claim by the plaintiff increases each day due to accumulating mooring fees, interest on those fees and costs to the plaintiff to keep the Carapec No. 1 moored at the dock in Matane. (Note: also Report No. 10668/RB M/V Carapec No. 1 – Condition and Valuation August 16, 2006 by Hayes Stuart Inc., Experts Maritimes – Marine Surveyors, showing the condition of the vessel, with photos – see the Court record for the original colour photos, show the serious deterioration in the condition of the vessel.)

2 - Is there an arguable defence?

[22] The defendant therefore does not submit any arguable and credible defence against the plaintiff's action.

3 - Can the owner carry on: is it reasonable to assume that there must be a sale of the vessel at some point?

[23] The vessel has not been in operation for several years and, according to the conclusion in the report by Richard Breton, it could not operate without major repairs being made.

[24] The defendant did not provide bail, under Rule 486, to obtain release of the arrested vessel, thus suggesting that its owner does not have the financial means needed to repair and operate the vessel or to pay its mooring and maintenance costs.

[25] It is therefore reasonable to assume that the vessel must be sold at some point.

4 - Will there be any diminution in the value of the vessel or the sale price by the delay, including the cost of keeping a man or a crew aboard the vessel, to cost of maintaining the vessel and the cost of ensuring the vessel?

[26] The value of the vessel diminishes each day due to the accumulation of mooring fees, interest on those fees and costs to the plaintiff to keep the Carapec No.1 moored at the dock in Matane.

5 - Will the vessel depreciate by further delay?

[27] As it is not being maintained by the plaintiff, the vessel will continue to depreciate if the sale is postponed.

6 - Is there any good reason for a sale before trial?

[28] There are several good reasons to sell the vessel *pendente lite*.

[29] These include the fact that the mooring fees and maintenance costs will continue to accumulate if nothing is done with the vessel, the established risk that the vessel poses to the port facilities and maritime safety, and the fact that the vessel is not maintained

[30] For all these reasons, this Court is justified in exercising its discretion and ordering the sale of the vessel *pendente lite*.

1 - Hearing of the motion before Prothonotary Morneau

[31] The defendant first alleges that the motion was heard by conference call and was based on the motion and response records produced by the parties. No submissions by the parties, or by experts, were heard.

[32] Regarding these allegations by the defendant, Rule 363 states that a party shall present its evidence in an affidavit relating all facts on which the motion is based that are not in the Court record.

[33] Thus, in accordance with the Rules, the respondent had to provide evidence in support of its claims in an affidavit and the prothonotary was not required to hear witnesses as part of the hearing for this motion.

[34] For its part, Rule 371 states that, in special circumstances, the Court may, on motion, authorize a witness to testify at the hearing in relation to an issue of fact raised on a motion.

[35] However, the defendant never expressed a desire or asked the Court in a motion to authorize testimony by a regular or expert witness at the hearing on the motion.

[36] None of the parties objected to the motion being heard by conference call and all parties had an opportunity to argue their submissions to the prothonotary.

2 - The situation of Gaston Langlais

[37] Second, the defendant alleges that the Court should have given more weight to Gaston Langlais's commitment to leave the Port of Matane no later than September 30, 2007.

[38] The plaintiff argues that the prothonotary correctly assessed the situation as analyzed in the statement by Mr. Langlais.

[39] The plaintiff notes the following facts that justify the prothonotary's conclusion:

- Authorities at Transport Canada ordered the representatives and owners of the vessel several times to move it outside the Port of Matane;
- Despite numerous commitments by Mr. Langlais to move the Carapec No. 1 outside the Port of Matane, it is still moored at the Port of Matane at this time.

[40] Moreover, in the affidavit that Mr. Langlais filed in support of his response record, he stated the following at paragraph 3(d):

[TRANSLATION]

As well, **I have received an offer to purchase from a firm in Cape Canaveral, East Coast Marine Brokers Inc., in the amount of \$100,000 to \$125,000, with whom I am regularly in discussion, having spoken to them just recently regarding the purchase of the Carapec No. 1 on July 10. (Emphasis added.)**

[41] Mr. Langlais therefore states in his affidavit that he has received an offer to purchase the vessel.

[42] However, the plaintiff's representative, Serge Bélanger, contacted East Coast Marine Brokers Inc. and their representative told him that their firm had not made any offer to purchase the Carapec No. 1. (In this regard, see paragraph 6 of the affidavit by Serge Bélanger dated July 18, 2007, and Exhibit 1 filed in support of that affidavit.)

[43] Given the inaccuracy of the facts alleged in the affidavit by Mr. Langlais, the prothonotary had no choice but to give no weight to the statement by Mr. that he would move the Carapec No. 1 no later than September 30.

3 - The document from the firm Roche is not a valid assessment of the market value of the Carapec No.1

[44] The defendant essentially claims that the prothonotary should have given more weight to the excerpt from a feasibility study prepared by the firm Roche that the defendant qualifies as an expert opinion and that, according to him, establishes a market value of \$400,000 for the vessel's hull.

[45] Regarding that document, the Court notes the 1st paragraph of section 7.1.2.1 [*translation*] *Assessment of the hull*, on page 102 of the document. That paragraph states:

[TRANSLATION]

This assessment is limited to the hull of the ship only and does not look at other components, such as mechanical, piping and electrical. **The assessment is therefore not an assessment of the market value of the Carapec No. 1**, but is instead an estimate of the value of its hull, **considering its capacity to become a solid and durable frame for the planned project.** (Emphasis added.)

[46] Thus, by the author's own admission (whose identity is not disclosed by the defendant), it is not an assessment of the market value of the ship, but simply an estimate of the value of the hull,

considering its capacity to become a solid and durable frame for the planned project (a ferry project).

[47] It is therefore incorrect to claim, as does the defendant, that the hull alone has a value of \$400,000.

[48] The plaintiff also brings to the Court's attention the following facts regarding that excerpt from the study:

- The defendant only filed excerpts from that document (6 of about 143 pages from the document according to an excerpt of its table of contents), depriving the Court and the plaintiff of the opportunity to read the entire report.
- That document clearly indicates that it is a preliminary report, not a final document.
- The document is dated November 14, 2003, and was therefore prepared almost **4 years** ago, and the condition of the vessel has clearly deteriorated since then, as it has not been maintained.
- The document contains no analysis or justification of the value assigned to the hull.

[49] As the document is not an assessment of the vessel's market value, the only valid market value assessment available to the Court within the meaning of Rule 490 is the one from Mr. Breton, who concludes that the Carapac No. 1 has no market value.

4 - The offer to purchase from the firm East Coast Marine Brokers Inc.

[50] Finally, the defendant alleges that the prothonotary should have considered the fact that the defendant's representative is in negotiations for the purchase of the vessel.

[51] In this regard, the plaintiff cites paragraph 6 of the affidavit by Serge Bélanger dated July 18, 2007.

[52] As indicated previously, the representative of East Coast Marine Brokers Inc. told Mr. Bélanger that no offer to purchase had been made by East Coast Marine Brokers Inc. for the vessel Carapec No. 1.

CONCLUSION

[53] For all these reasons, this Court dismisses the defendant's motion, with costs.

ORDER

THE COURT ORDERS that the defendant's motion be dismissed with costs.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2033-06

STYLE OF CAUSE: HER MAJESTY THE QUEEN IN RIGHT OF
CANADA
v. CARAPEC No. 1

PLACE OF HEARING: Québec City, Quebec

DATE OF HEARING: August 29, 2007

**REASONS FOR ORDER
AND ORDER:** SHORE J.

DATED: September 11, 2007

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