

Date: 20080813

Docket: T-2223-07

Citation: 2008 FC 947

Vancouver, British Columbia, August 13, 2008

**PRESENT: Roger R. Lafrenière, Esquire
Prothonotary**

BETWEEN:

SHIELDS FUELS INC.

Plaintiff

and

**MORE MARINE LTD., MORECORP HOLDINGS LTD.,
KERRY MORRIS, THE M.V. "GULF RANGER",
AND THE BARGE "MM ORCA"**

Defendants

REASONS FOR ORDER AND ORDER

LAFRENIÈRE P.

[1] The Plaintiff, Shields Fuels Inc. (Shields), moves for an Order pursuant to Rules 223(1), 226(1) and 227 of the *Federal Courts Rules* requiring the Defendants, More Marine Ltd. and Morecorp Holdings Ltd. (Corporate Defendants), to deliver Supplementary Affidavits of Documents listing the financial records of the two companies for 2007 and 2008, including the monthly income statements and balance sheets.

Background

[2] Shields is a company in the business of selling fuel products to various customers on the coast of British Columbia. It brought an action on December 20, 2007 seeking damages for breach of contract against the Corporate Defendants, their president, and the Barge “MM Orca” (Defendant Barge). Shields also requested a permanent injunction enjoining the Defendants from conversion of fuel allegedly owned by Shields being carried on board the Defendant Barge. The Defendant Barge was arrested shortly after the lawsuit was launched.

[3] The Defendants filed a Statement of Defence and Counterclaim on February 6, 2008 denying that the Defendant More Marine Ltd. entered into a contract of carriage with Shields, or that Shields suffered any damages. In their Counterclaim, the Defendants claim a lien against the inventory of fuel on board the Defendant Barge “MM Orca”, as well as damages for the wrongful and continued arrest of the Defendant Barge.

[4] Shortly after serving their Affidavit of Documents on May 1, 2008, the Defendants delivered a draft Amended Statement of Defence and Counterclaim (which has since been filed on consent of the parties). At subparagraph 14(e) of the Counterclaim, the Defendants allege that Shields caused the Defendant Barge to be arrested in order to take advantage of the Defendants “when the Plaintiff knew or ought to have known that the Corporate Defendants did not have the means to provide a bond”.

[5] At the examination for discovery held on May 8, 2008, the Defendants’ representative stated that More Marine Ltd. “did not have the funds”, and that it had insufficient financial capacity to

provide the required bond of \$10,000.00 for the release of the Defendant Barge. Shields subsequently requested production of the Corporate Defendants' financial records for 2007 and 2008 in order that the issue of their financial means could be explored on discovery.

[6] After several requests, the Defendants produced unedited balance sheets dated May 31, 2008. Shields considers the documents produced insufficient to allow it to examine the Defendants on their capacity to provide a bond. According to Shields' Finance Manager, in order to calculate whether the Corporate Defendants had the cash flow available, the Defendants would have to provide, at a minimum, monthly balance sheets and income statements for the period in question, or alternatively, account receivable and disbursement ledgers or an equivalent record of cash received and disbursed.

[7] On June 18, 2008, the Defendants provided satisfactory security to allow the Defendant Barge to be released from arrest.

[8] In his affidavit filed in opposition to the motion, Mr. Kerry Morris, President of the Corporate Defendants, states that the Defendants have produced all of the relevant financial records that are or were in their possession. Mr. Morris deposes that the reports produced are the only reports used by the Defendants. He explains that both the accounts payable and accounts receivable reports update on payments made and received "and then fall away". He declares that neither the Defendants' current employee nor himself have sufficient knowledge of the accounting system to produce different reports. In order to determine whether the specific reports requested by Shields

could be produced, the Defendants would have to engage a consultant, or a former employee who set up the Corporate Defendants' financial reporting system, at a cost of \$500.00 to \$750.00.

[9] At the hearing of the motion, counsel for Shields stated that his client had offered to send a technician at its own expense to retrieve the information from the Corporate Defendants' database. The Defendants declined the offer.

Analysis

[10] The only issue on this motion is whether the Defendants should be compelled to produce documents that do not currently exist.

[11] Counsel for the Defendants acknowledges that in the normal course, if a document in electronic format is relevant, it should be produced. While not disputing that the accounting information in the Defendants' possession is relevant, counsel argues that since reports in the form requested by Shields do not exist, the Defendants should not be required to expend time and resources to create tailor-made documents.

[12] Rules 222 to 226 contemplate the production of documents "in the possession, power or control" of a party. The most relevant electronic data and information in the "control" of a party will be that which can be accessed by the party's computer users in the ordinary course of business, otherwise known as the active data.

[13] The rules should not be interpreted, however, so narrowly as to prevent a party from obtaining other relevant information, such as archival data that is still readily accessible and not obsolete. In exercising its discretion whether to compel production, the Court should have regard to how onerous the request for a generated record may be when balanced against its relevance and probative value.

Conclusion

[14] On the evidence before me, I am not satisfied that the Defendants have made reasonable efforts to locate or generate the reports requested by Shields. The information requested by Shields consists of basic archival accounting records that would be available to a company in the usual course of business. The evidence of Mr. Morris is of little assistance since he is admittedly unfamiliar with the Defendants' accounting system and the different reports that could be created using available software. Since there appears to be an existing program that can print out a report in readable form at little cost to the Defendants, I conclude that the Plaintiff's motion should be granted.

ORDER

THIS COURT ORDERS that:

1. The Defendants on or before August 21, 2008 shall deliver to the Plaintiff a Supplementary Affidavit of Documents listing either monthly balance sheets for each of the Corporate Defendants for the end of each month from December 31, 2007 to July 31, 2008, or a list of all cash receipts and disbursements received and made by the Corporate Defendants from December 1, 2007 to July 31, 2008.
2. The Defendants shall on or before August 21, 2008 deliver copies of the documents listed in the Supplementary Affidavit of Documents to the solicitor for the Plaintiff.
3. If the Defendants fail to deliver a Supplementary Affidavit of Documents listing the documents described in paragraph 1 on or before August 21, 2008, the Defendants shall between August 21 and 31, 2008 provide full access and co-operation to an independent information technologist retained by the Plaintiff to allow that technologist to produce the records shown in paragraph 1 above.
4. All records produced by the independent information technologist shall be placed in a sealed envelope and delivered to the solicitor for the Defendants to list in a Supplementary Affidavit of Documents. The independent information technologist shall treat the information received as confidential except for the parties herein.

5. The cost of the independent information technologist shall be paid in the first instance by the Plaintiff but shall be costs in the cause.

6. The solicitor for the Defendants shall upon receipt of the documents promptly list them in a Supplementary Affidavit of Documents and deliver the Supplementary Affidavit of Documents and the new documents to the solicitor for the Plaintiff.

7. The costs of this motion shall be costs to the Plaintiff in the cause.

“Roger R. Lafrenière”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2223-07

STYLE OF CAUSE: SHIELDS FUELS INC. v.
MORE MARINE LTD., MORECORP HOLDINGS LTD.,
KERRY MORRIS, THE M.V. "GULF RANGER",
AND THE BARGE "MM ORCA"

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: August 11, 2008

REASONS FOR ORDER: LAFRENIÈRE P.

DATED: August 13, 2008

APPEARANCES:

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J. William Perrett FOR THE DEFENDANTS

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