Federal Court  Cour fédérale

Date: 20120319

Docket: T-484-11

Reference: 2012 FC 324

Ottawa, Ontario, March 19, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

CAMECO CORPORATION

Plaintiff

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD., FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD.

Defendants

and

THE CONTAINER GUY LTD.

Third Party

REASONS FOR ORDER AND ORDER

[1] The saga of the MCP Altona's disastrous last voyage has generated a great deal of activity in this Court with just about each and every party in this action, and in other actions, pointing the finger of blame at someone else.

[2] In December 2010, the MCP Altona, owned by MS MCP Altona GmbH & Co. KG and managed by Hartmann Schiffahrts GmbH & Co. KG, set sail from Vancouver bound for China and Australia with two cargos on board. The Chinese cargo, shipped by Cameco, consisted of uranium ore concentrates in drums which were stowed within containers. The Australian cargo consisted of an oil rig. During the voyage, in circumstances not yet known to the Court, the containers collapsed in stow, and some of the uranium spilled. Uranium is a radioactive cargo, and the situation had become dangerous. The ship had to return to Vancouver.

[3] The Canadian Nuclear Safety Commission was alerted. The uranium cargo had to be discharged in safety, and the ship decontaminated. The task fell upon the shipper Cameco who had the specialized knowledge necessary to carry out this work. The work would take several months.

[4] It was inevitable that the MCP Altona would be arrested. She was, and later sold by the court. Those interested in the uranium blamed those interested in the ship. Those interested in the oil rig blamed those interested in the ship and in the uranium. On the other hand, those interested in the ship, apart from also pleading perils of the sea, blamed those interested in the uranium.

[5] With a view of securing their claim against Cameco without the need of actually arresting its cargo on or lately on board their ship, the owners of the MCP Altona, through their managers, allegedly instructed counsel in Vancouver, Borden Ladner Gervais, to endeavour to obtain security on a voluntary basis. They did, to the tune of $4,600,000. The trouble is that unbeknownst to counsel, and to Cameco and its counsel, by the time the security was in place, the shipowners had gone bankrupt in Germany. The truth did not come out in Canada until some months later.

[6] Cameco now moves for the return of its security. It submits that the contract was void as there was no party in existence with whom it could contract; owners' counsel had no mandate as their principal was no longer in existence; the trustee in bankruptcy did not and could not ratify the contract, which in any event is tainted with mutual mistake.

[7] In the alternative, Cameco submits that the security was given under the superintending power of this Court, that the amount thereof is excessive, and should be reduced.

[8] Were it not for the intervening bankruptcy, the arrangements between the parties were fairly common and enforceable. Security is often given in order to avoid the arrest of maritime property, be it ship, cargo or freight. A claimant who could otherwise arrest may demand security on its reasonably arguable best case in principal, interest and costs up to the value of the property in question (*The "Moschanthy"*, [1971] 1 Lloyd's Rep 37 and *Amican Navigation Inc v Densan Shipping Co* (1997), 137 FTR 132, [1997] FCJ No 1538 (QL)).

DECISION

[9] There is simply not enough evidence on the record to allow me to set aside the security arrangements at this time. Although the amount of security demanded and obtained at the outset, $4,600,000, was not at that time unreasonable, in the circumstances, it has now become excessive. I order that the security be reduced to $1,500,000, and that the balance currently held in trust by Cameco's solicitors together with accumulated interest thereon be released and returned to it.

DISCUSSION

[10] There were two components to the security demanded by the shipowners. The first was that the MCP Altona, a revenue earning chattel, could earn no income while she was being remediated. The security sought and obtained was $1,500,000 inclusive of principal, interest and costs. The other component was that the owners anticipated that they would be facing a claim by those interested in the oil rig. They demanded security, excluding interest and costs, of $2,600,000 to cover their potential indemnity claim against Cameco. Since the total amount ultimately furnished was $4,600,000, I consider that $3,100,000 was given with respect to the oil rig. Indeed, those allegedly interested in the oil rig, Saxon Energy Services Inc. and Saxon Energy Services Australia Pty Ltd., have taken action in this Court under docket no. T-2081-11 for general and special damages in excess of $2,000,000, and ITAC Services (Aust) Pty Ltd. have taken proceedings under docket no. T-2082-11 for an amount in excess of $1,000,000. Although both say that the security arrangements were in part entered into for their benefit and

that they are entitled to enforce same, neither appeared on Cameco's motion, notwithstanding that they were on notice.

[11] In my opinion, the oil rig portion of the security only benefited the shipowners in the event that they were condemned in proceedings taken by Saxon and ITAC and were entitled to be indemnified by Cameco. Saxon and ITAC arrested neither Cameco's cargo nor the ship. Their actions are *in personam* only. Should they obtain judgment against the owners in this Court, or file a claim in the bankruptcy proceedings, they will obtain nothing. The report from the trustee in bankruptcy shows that liabilities far exceed assets. Since no dividend will ever be paid to Saxon and ITAC, there is no point in the trustee trying to enforce the security. Consequently, the oil rig portion of the security falls.

[12] Both sides relied on the procedural niceties, and the burden of proof, to an excessive extent. Federal Courts Rule 3 requires that the rules be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. As Mr. Justice Pigeon said in *Hamel v Brunelle*, [1971] 1 SCR 147 at page 156 " … that procedure be the servant of justice not its mistress."

[13] The first issue is the effect of the bankruptcy. Under Canadian law, and German law has not been proven to differ, the assets of the bankrupt devolve to the trustee (*Bankrupcy and Insolvency Act*, s 71). Federal Courts Rule 117 provides that when an interest devolves upon another, i.e. the trustee, that person shall serve and file a notice accompanied by an affidavit setting out the basis of the devolution. That was not done in this case, according to "owners"

counsel, because the devolution took place before Cameco filed its action. However, Cameco was perfectly entitled to sue the owners as counsel purporting to act for the owners did not inform it of the bankruptcy. In fact, those solicitors themselves only found out some months later. At best, these are procedural points which can be corrected.

[14] The next issue is whether the trustee could have authorized the continuation of the proceedings. In my opinion, he could. The more important question is whether he did. The trustee, a Hamburg lawyer by the name of Burkhardt Reimer, has been very cautious in his dealings with this court. He only appeared by motion once in order to obtain an interlocutory stay pending the outcome of an application to the British Columbia Supreme Court in which he seeks recognition and enforcement of the terms of orders made by the Bankruptcy Court in Hamburg. That petition has yet to be heard on the merits.

[15] Nevertheless, his first reports have been filed in this Court, and various bits and pieces thereof have been relied upon both by Cameco and the “owners”. The “owners” point out that one cannot segregate the security given by Cameco from other steps that were taken in their name, subsequent to the bankruptcy, such as various consents, and court orders to move the ship while she was under arrest, and before she was sold. I agree.

[16] Cameco takes the position that the trustee had authorized the ship managers to carry out some steps, but not to accept security. In my view, too much is being read into the reports. It would have been far better if Mr. Reimer had filed an affidavit in reply to the motion, but he was under no obligation to do so. This is not a motion for summary judgment which requires a

respondent to put its best foot forward. If anything, this is more akin to a motion to strike. The Court will not drive a party from the judgment seat hastily.

[17] Borden Ladner Gervais say that the source of their mandate is a matter of solicitor-client privilege. In his report, the trustee refers to the fact that the owners had taken out loss of hire insurance. It may be, of course, that the underwriters are the real party at interest with respect to the $1,500,000 security. The normal rule in this Court is that the underwriter must use the name of the assured (*Simpson v Thomson* (1877), 3 App Cas 279 (HL)). However, this Court has also permitted underwriters to use their own name (*R v Nord-Deutsche Versicherungs-Gesellschaft*, [1971] SCR 849, 20 DLR (3d) 444 and *Switzerland General Insurance Co v Logistec Navigation Inc*, 7 FTR 196, [1986] FCJ No 750 (QL)). Consequently, I am not able to decide based on the current record the permutations and combinations of Borden Ladner Gervais' mandate.

[18] Nor do I find there is sufficient evidence to reach any conclusion on the submissions that the agreement falls on the basis of mutual mistake.

[19] However, the "owners" or "trustee" or "loss of hire underwriters" have been beating around the bush far too long. Unless the real party of interest takes proceedings in his or its own name within the next 45 days, in this Court, against Cameco for loss or damage allegedly sustained, the balance of the security shall be ordered released.

[20] Cameco has sought costs on a solicitor-client basis, against Borden Ladner Gervais personally. However, it has asked that that issue be deferred until these Reasons for Order and

Order are issued. I agree. In the circumstances, that issue shall be deferred until someone comes out or does not come out of the woodwork within the delays provided.

[21] Copy of these reasons is to be placed in the file bearing court docket number T-424-11.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. Plaintiff's motion for an order releasing the security it furnished is granted in part.

2. The security is reduced from $4,600,000 to $1,500,000. The sum of $3,100,000, with accumulated interest on that amount, currently held in plaintiff's solicitors special trust account, may be released to plaintiff.

3. Costs are reserved.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-484-11
STYLE OF CAUSE:	CAMECO CORPORATION v THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD., FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD.
PLACE OF HEARING:	OTTAWA, ONTARIO (Videoconference/teleconference among Ottawa/Toronto/Saskatoon and Vancouver)
DATE OF HEARING:	MARCH 7, 2012
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	MARCH 19, 2012

APPEARANCES:

William Sharpe Marc Isaacs	FOR THE PLAINTIFF
Graham Walker Dionysios Rossi	FOR THE DEFENDANTS MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO AND HARTMANN SHIPPING ASIA PTE LTD.
Bridget Gilbride	FOR THE DEFENDANTS FRASER SURREY DOCKS LTD. AND PACIFIC RIM STEVEDORING LTD.
Deidre Aldcorn	FOR THE THIRD PARTY THE CONTAINER GUY LTD.

SOLICITORS OF RECORD:

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