

Federal Court



Cour fédérale

Date: 20130529

Docket: T-774-13

Citation: 2013 FC 575

Montréal, Quebec, May 29, 2013

PRESENT: The Honourable Mr. Justice Harrington

**ADMIRALTY ACTION *IN REM*
AGAINST THE SHIP M/V "BROADBILL I"
ADMIRALTY ACTION *IN PERSONAM* AGAINST
WILLIAM KEVIN ANDREWS AND LEONA MARY ANDREWS**

BETWEEN:

QUIN-SEA FISHERIES LIMITED

Plaintiff

and

**THE SHIP "BROADBILL I",
WILLIAM KEVIN ANDREWS AND
LEONA MARY ANDREWS AND
ALL OTHERS INTERESTED IN THE SHIP**

Defendants

REASONS FOR ORDER AND ORDER

[1] The ship MV Broadbill I is under arrest in this Court. Bail was fixed by Prothonotary Morneau in the amount of \$100,000. Bail has not been furnished. The delays to appeal his order have not expired.

[2] The defendants now move for an order staying the Federal Court action in favour of a parallel action in the Supreme Court of Newfoundland and Labrador, and that the arrest of the Broadbill I be vacated. Although the written motion seeks these remedies in the alternative, during oral argument it became clear that both remedies are being sought. The plaintiff and Mr. and Mrs. Andrews had entered into an agreement entitled "Loan Agreement" wherein the Andrews, in consideration of the loan, granted a mortgage over the Broadbill I, and undertook to make available to Quin-Sea its fish catch for a minimum of one full fishing season following the year in which the loan was repaid. The loan was paid earlier this year, but the Andrews are selling to another company.

[3] The plaintiff, Quin-Sea, first took action in the Supreme Court of Newfoundland and Labrador in which it sought interlocutory relief in the form of a mandatory injunction requiring the Andrews to sell their fish to it. The motion was dismissed on the grounds that there was no irreparable harm as damages would be an adequate remedy should the case be well founded.

[4] Quin-Sea then took action in this Court. The only difference is that this action is framed both *in rem* and *in personam* and the ship has been arrested.

[5] There are a number of remedies available to a shipowner whose ship has been arrested. One, if commercially feasible, is to post bail, without prejudice to subsequently arguing that the arrest was without merit.

[6] In terms of setting aside an arrest, the shipowner might assert:

- a. the claim is beyond the scope of the legislative class of subject of navigation and shipping, so that the Federal Court is without jurisdiction;
- b. the property arrested is not the subject of the action;
- c. it is not personally liable;
- d. the arrest should be set aside and the action either dismissed under rule 221 of the *Federal Courts Rules* as disclosing no reasonable cause of action, or because it is frivolous or vexatious;
- e. the action should be stayed on the grounds of *forum non conveniens*.

[7] The defendants have been proceeding in stages. They first moved to have bail set. Counsel seemed to assume, for the purpose of that motion, that the plaintiff had a reasonable cause of action. It should come as no surprise that Prothonotary Morneau held, based on jurisprudence of this Court, that a plaintiff is entitled to security on its best reasonably arguable case in principal, interest and costs up to the value of the ship. He fixed bail at \$100,000.

[8] In the motion before me, the defendants deplore the plaintiff's actions. They claim that the Federal Court proceedings are vexatious, in that it is inappropriate to arrest the ship after their motion in the Supreme Court of Newfoundland and Labrador for an interlocutory injunction was dismissed. The plaintiff, having chosen that forum, should be required to live with it.

[9] They also argue that there is no need to arrest the ship because their claim is already secured by a mortgage. I can dismiss this point out of hand. A mortgage creditor is entitled to arrest the ship

for alleged breach of the mortgage agreement. The defendants cannot dictate to the plaintiff how it should run its case.

[10] Another inchoate argument, inconsistent with their pretension that the mortgage, without arrest, is adequate security, which just seems to have percolated to the surface is that the mortgage only covered the loan, and not the covenant to sell the catch. This submission cannot be considered at this stage because inadequate notice was given.

DECISION

[11] While the dispute cannot proceed to trial in two jurisdictions, it would be inappropriate to stay the Federal Court proceedings at this time.

[12] The defendants argue that the Newfoundland and Labrador Supreme Court has concurrent jurisdiction in admiralty and *in rem* jurisdiction which would have allowed for the arrest of the Broadbill I.

[13] The plaintiff does not dispute that the Supreme Court of Newfoundland and Labrador has concurrent jurisdiction in admiralty matters. Indeed, section 22 of the *Federal Courts Act* makes that perfectly clear. The question, however, is whether that Court has *in rem* jurisdiction. I am told by counsel for both parties there are no specific admiralty rules of practice; not a whiff of an “affidavit to lead warrant”, “warrant for arrest”, “bail” and the like, as set forth in Part 13 of the

Federal Courts Rules. However, there are general rules dealing with the seizure and sale of property.

[14] There is no need for me to get into a fascinating discussion of what Newfoundland and Labrador brought into Confederation in 1949 through the *Colonial Courts of Admiralty Act*. The fact of the matter is that an injunction, and the action *in rem*, are two separate procedures (*Armada Lines Ltd v Chaleur Fertilizers Ltd*, [1997] 2 SCR 617, [1997] SCJ No 67 (QL)).

[15] Nevertheless, I cannot resist raising the possibility that the action *in rem* is not a mere matter of procedure, but rather is a matter of substance which goes to the very essence of admiralty law. Distinctions among claimants to the proceeds of the sale of a ship in an admiralty court, such as ranking based on maritime liens, possessory liens, mortgages and ordinary rights *in rem* are at the very essence of admiralty law. A fundamental distinction between the sale of maritime property by an admiralty court, and a sale in a common law court is that an admiralty sale gives title free and clear while the sale in a common law court is only a sale of the defendant's interest in the *res*. See *The Development of Admiralty Jurisdiction and Practice since 1800* by F.L. Wiswall Jr. (Cambridge: Cambridge University Press, 1970), especially chapter 6: "The Evolution of the Action in Rem [an example of the effect of the historical development of the Court upon the substantive Law of Admiralty]".

[16] The question therefore is whether the action *in rem* is part of the ordinary law of the province, which can be altered by the province, or part of "navigation and shipping", a legislative class of subject over which Parliament has exclusive authority in virtue of section 91(10) of the

Constitution Act, 1867. See *Associated Metals & Minerals Corporation, et al. v The Ship Evie W Aris Steamship Company, Inc. and Worldwide Carriers Limited*, [1978] 2 FC 710, affirmed [1980] 2 SCR 322 and favourably referred in the seminal decision dealing with the jurisdiction of the Federal Court, *ITO Terminal Operators Ltd v Miida Electronics Inc.*, [1986] 1 SCR 752, [1986] SCJ No 38 (QL) (Buenos Aires Maru).

[17] Suffice it to say, for present purposes, that the plaintiff did not seek to arrest the Broadbill I in Newfoundland and Labrador. I do not consider that it was acting in a vexatious manner by arresting the ship after it failed to obtain the injunction. Obviously, it could not have obtained an injunction and then arrested the ship so as to prevent the plaintiff from making any catch.

[18] An interesting case, which is distinguishable, is *Alpha Trading Monaco SAM v Sarah Desgagnés (The)*, 2010 FC 695, [2010] FCJ No 833 (QL). The plaintiff had arrested the Sarah Desgagnés in Canada and had agreed to accept security here. It then withdrew its claim in order to arrest in a forum considered more convenient. Having agreed to accept security, it made its election and was bound by it.

[19] As aforesaid, neither Prothonotary Morneau's decision with respect to bail nor this decision deals with the argument that the mortgage does not cover the covenants in the loan agreement other than the repayment of money.

[20] At some point in time either this action or the proceedings in the Supreme Court of Newfoundland and Labrador will have to be stayed. Given the volatility of the moment, and the fact

that the defendants may not have exhausted their recourses to have the arrest set aside, I will not grant a stay at this time.

[21] However, it is not unusual for a party to take action in this Court simply to obtain security, while the matter proceeds on the merits in another jurisdiction. This is specifically contemplated in the *Commercial Arbitration Act*. In addition, depending on the language of the contract of affreightment, and whether a bill of lading was issued, the maritime property, or hopefully bail in lieu thereof, will remain under this Court's control while the merits are dealt with elsewhere.

ORDER

FOR REASONS GIVEN, THIS COURT ORDERS that:

1. The motion is dismissed.
2. Costs in the cause.

“Sean Harrington”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-774-13

STYLE OF CAUSE: QUIN-SEA FISHERIES LIMITED v
THE SHIP "BROADBILL I" ET AL

**MOTION HELD VIA TELECONFERENCE ON MAY 27, 2013 FROM MONTRÉAL,
QUEBEC, ST. JOHN'S, NEWFOUNDLAND AND MARYSTOWN, NEWFOUNDLAND**

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

DATED: MAY 29, 2013

ORAL AND WRITTEN REPRESENTATIONS BY:

John Mate FOR THE PLAINTIFF

Donald A. MacBeath, Q.C. FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Nauticor Legal FOR THE PLAINTIFF
St. John's, Newfoundland

MacBeath & Associates FOR THE DEFENDANTS
Marystown, Newfoundland