Federal Court  Cour fédérale

Date: 20131113

Docket: T-1625-12

Citation: 2013 FC 899

Vancouver, British Columbia, November 13, 2013

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

ADMIRALTY ACTION *IN REM* AGAINST
THE SAILING VESSEL "AESTIVAL" AND *IN PERSONAM*

BETWEEN:

0871768 B.C. LTD.

Plaintiff

and

THE OWNERS AND
ALL OTHERS INTERESTED IN
THE SAILING VESSEL "AESTIVAL",
THE VESSEL "AESTIVAL",
ISLAND-SEA MARINE LTD.,
KENNETH W. HIGGS,
EXECUTIVE YACHT SERVICES LTD.
AND MICHAEL GUY COLBECK,
DOING BUSINESS AS
EXECUTIVE YACHT SERVICES AND/OR
EXECUTIVE YACHT SERVICES LTD.

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion on behalf of Island-Sea Marine Ltd. (Island-Sea), its president, Kenneth W. Higgs, and the sailing vessel "Aestival" (collectively "the Moving Defendants") for an order pursuant to Rule 488 of the *Federal Courts Rules* setting aside the arrest of the

"Aestival" on the grounds that the Plaintiff's claim does not disclose an *in rem* cause of action. In the alternative, the Moving Defendants seek an order pursuant to Rule 485 setting a nominal amount of bail to be given for the release of the arrested vessel.

[2] The Plaintiff, 0871768 B.C. Ltd., submits that the "Aestival" was properly and validly arrested and that the arrest should not be set aside. The Plaintiff further submits that if the Court decides to fix the amount of bail for the release of the vessel, the security should be fixed in an amount not less than $58,000.00. The Defendants, Executive Yacht Services Ltd. (Executive Yacht) and Michael Guy Colbeck, take no position on the motion.

Claim against the Defendants

[3] The Plaintiff is the owner of the sailing vessel "Ain't Life Grand". In July 2012, the Plaintiff's vessel was hauled out onto land for maintenance at Lynnwood Marina in North Vancouver, British Columbia.

[4] Based on the allegations made in the Statement of Claim and in the Affidavit to Lead Warrant, on or about July 27, 2012, grinding work was performed on the "Aestival" while the "Aestival" was situated next to the Plaintiff's vessel. The work caused particulate matter, including metal particles, paint and rust, to emanate from the "Aestival" and settle onto the Plaintiff's vessel. The Plaintiff claims that it suffered damage as a result of the Defendants' negligence, including the cost of cleaning the hull, deck and sails, and loss of use of its vessel.

[5] The Plaintiff filed its Statement of Claim on August 31, 2012 seeking damages in the amount of $50,000.00. The "Aestival" was arrested in September 2012. None of the Defendants have posted bail and the "Aestival" remains under arrest.

[6] On August 2, 2013, the Moving Defendants brought the present motion for an order setting aside the arrest of the "Aestival".

Evidence on the Motion

[7] The Moving Defendants filed the affidavit of Mr. Higgs in support of their motion to set aside the arrest of the "Aestival". According to Mr. Higgs, the "Aestival" was brought to the Lynnwood Marina in order that work could be undertaken by Mr. Colbeck of Executive Yacht, to refinish the exterior hull of the vessel. Mr. Higgs boarded the "Aestival" on July 26, 2012. While Mr. Colbeck was called away on another matter, Mr. Higgs used a hand-held grinder "for 11 minutes" to assist in the proper fitting of the hull. Mr. Higgs denies that there was any damage to the Plaintiff's vessel as a result of the grinding work. Mr. Higgs states that if there was any damage to the Plaintiff's vessel, it was caused by the actions of Mr. Colbeck, who did not erect the required framing or maintain tarping of the work area on the "Aestival".

[8] The Plaintiff submits that the certain portions of the affidavit of Mr. Higgs should be struck out because it consists of personal opinion. By way of example, at paragraph 7 of his affidavit, Mr. Higgs states that: "I verily believe that the alleged damage to the Plaintiff's vessel did not occur." In addition, at paragraph 11, Mr, Higgs declares that: "I

very believe that it is impossible for there to be any connection to this allegation", in reference to the allegation by the Plaintiff that rust damage was viewed aboard the stern of the Plaintiff's vessel nearly two months after the grinding work was performed.

[9] Counsel for the Moving Defendants conceded at the hearing of the motion that Mr. Higgs' statements constitute inadmissible opinion evidence and should be disregarded. I agree. The impugned statements clearly lack objectivity and impartiality.

[10] The Plaintiff filed three affidavits in response to the Moving Defendants' motion. The first affidavit is by Mr. Philip O'Donoghue, one of the owners and a director of Fraser Fibreglass Ltd. (Fraser). The second affidavit is by Mr. F.I. Hopkinson, a marine surveyor. The third is by Mr. Matt Neilson, a director of the Plaintiff.

[11] Mr. O'Donoghue states that in July 2012 Fraser completed repair work on the Plaintiff's vessel. On July 26, 2012, the Plaintiff's vessel was clean, polished and in pristine condition and ready to be launched.

[12] In the afternoon of July 26, 2012, Mr. O'Donoghue was notified by his foreman that there was steel grinding being undertaken next to the Plaintiff's vessel and that grinding debris and sparks could be seen depositing onto the Plaintiff's vessel. Mr. O'Donoghue went to the yard work area and observed Mr. Colbeck standing on the forward port bow of the "Aestival" overseeing some grinding work by Mr. Higgs with a mini grinder.

[13] Mr. O'Donoghue observed a cloud of dust and debris settling on the Plaintiff's vessel, and noticed that there was no plastic, tarp or other precautionary measures put down to contain the grinding debris. He asked Mr. Colbeck to stop the grinding work, but his request was ignored. He then offered to give Mr. Colbeck a roll of plastic sheeting to protect the Plaintiff's vessel. Mr. Colbeck continued to ignore Mr. O'Donoghue. Mr. Higgs then responded that he would spray the Plaintiff's vessel down with water. Despite Mr. O'Donoghue's protest that this would only worsen the problem, Mr. Higgs kept on grinding.

[14] Mr. O'Donoghue left the work area and went to his office to retrieve a camera. Upon his return, he observed that grinding work was still underway on the "Aestival". He could also see dust and debris still landing on the Plaintiff's vessel. Mr. O'Donoghue heard Mr. Colbeck say: "The asshole has a camera". Apparently undeterred, Mr. Higgs and Mr. Colbeck continued with the grinding work, while Mr. O'Donoghue took some photographs.

[15] The following day, Mr. O'Donoghue witnessed employees of Executive Yacht onboard the "Aestival" sanding the top sides of the hull and observed dust and debris emanating from the "Aestival" onto the Plaintiff's vessel.

[16] On July 28, 2012, Mr. O'Donoghue conducted a thorough inspection of the hull and deck of the Plaintiff's vessel. He discovered damage to the vessel's gel coat on the

deck as well as other damage from the grinding debris. He subsequently recommended to Mr. Matt Neilson, a director of the Plaintiff, that the vessel be thoroughly cleaned.

[17] Mr. F.I. Hopkinson was retained by Navis Marine Insurance Brokers to prepare a report pertaining to the contamination of the decks, upper works and sails of the Plaintiff's vessel. By letter dated July 31, 2012, Mr. Hopkinson informed Mr. Higgs that he had recommended that remedial action be carried out as soon as possible to minimize the damage caused by the work carried out on the "Aestival", which resulted in metal particles and other debris contacting the Plaintiff's vessel. At page 2 of his letter, Mr. Hopkinson wrote: "We expect that the hull and machinery underwriters who we represent will hold you fully responsible for the costs involved in the clean up." Attached to Mr. Hopkinson's affidavit is a copy of his report of survey dated September 15, 2012 setting out the approved cost of repairs to the Plaintiff's vessel.

[18] Mr. Neilson states that repairs and cleaning of the Plaintiff's vessel were ultimately completed by Fraser on or about October 6, 2012, and the vessel was then re-launched. Attached to Mr. Neilson's affidavit are copies of the invoices pertaining to the repairs, survey and storage of the Vessel totalling $42,765.74. The Plaintiff also seeks damages for the loss of use of its vessel during the repair period.

[19] There was no cross-examination of the affidavits filed by the parties.

Argument and Analysis

[20] The warrant of arrest was issued based on the facts alleged in the Affidavit to Lead Warrant which purport to give rise to an *in rem* claim under section 22(2)(d) of the *Federal Courts Act*, RSC 1985, c. F-7 [the *Act*], which reads as follows:

22.(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	22.(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants:
. . .	. . .
(d) any claim for damage or for loss of life or personal injury caused by a ship other in collision or otherwise;	d) une demande d'indemnisation pour décès, dommages corporels ou matériels causés par un navire, notamment par collision;

[21] The Moving Defendants submit that, while the Plaintiff's claim may be subject to Canadian maritime law, it is not one that gives rise to an *in rem* claim. In support of their position, they rely on a recent decision of Mr. Justice Roger Hughes in *Wells Fargo Equipment Finance Company v Barge "MLT-3"*, 2012 FC 738 [*Wells Fargo*]. In determining whether there was an *in rem* claim against the defendant barge, Justice Hughes held that the phrase "damage caused by a ship" is a term of art in maritime law. At paragraph 65 of his decision, Justice Hughes concluded, based on a passage of Lord Diplock's reasons in the House of Lords decision in *The Eschersheim*, 1 [1976] WLR 430, that the damage "must be a direct result or natural consequence of something done

by those engaged in the navigation of the ship *but the ship itself must be the actual instrument by which the damage was done*."

[22] The Moving Defendants submit that section 22(2)(d) requires that a claim for damages requires some physical contact or some action caused by the navigation of the vessel. Since there was no direct causation or causal link between the "Aestival" and the damage allegedly sustained by the Plaintiff's vessel, there can be no *in rem* action. I disagree.

[23] Justice Hughes did not purport in *Wells Fargo* to circumscribe, limit or restrict the scope of *in rem* claims that can be brought in this Court. He simply concluded, in the particular circumstances of the case before him, that no action *in rem* arose against the barge MLT-3.

[24] Section 22(2) of the *Act* sets out certain heads of maritime law falling under the maritime law jurisdiction of the Federal Court. The Plaintiff's claim in this instance appears to fall under section 22(2)(d) – any claim for damages or for loss of life or personal injury caused by a ship either in collision or otherwise. The word "otherwise" lends to a broader interpretation of when and how damage is caused, rather than solely while the ship is moving.

[25] In *Newterm Ltd v Mys Budyonnogo (The)* [1992] 3 FC 255, FCJ No 454 (Fed TD), a ship was being spray-painted by her crew while moored at dock and damage was

caused by drifting paint which landed on approximately 400 cars stored nearby. The defendants alleged that the plaintiffs' claim did not fall under the scope of the Court's maritime jurisdiction under section 22 of the *Act*.

[26] The argument advanced by the defendants was the same as that advanced by the Moving Defendants here; namely that the damage caused by the spray paint was not damage "caused by a ship". Counsel also argued that in order for there to be "damage caused by a ship", the ship must be the instrument of the damage and there must be some act or maneuver of navigation involved.

[27] Madam Justice Barbara Reed discounted these arguments and held that the plaintiff's claim did fall under section 22 jurisdiction. She stated as follows at pages 8 to 9:

> "The ITO case involved the negligence of a stevedore-terminal operator in the short-term storing of goods within the port area pending delivery to the consignee. It was held that this was an integral part of carrying on the activity of shipping and had a "close, practical relationship" to the performance of the "contract of carriage". Similarly in this case the activity which allegedly gave rise to damage is an integral part of the activity of shipping and has a close, practical relationship to the navigation of the vessel and shipping."

[28] Further, in assessing claims under section 22, Justice Reed stated:

> In any event, it seems to me that counsel for the plaintiff and the second defendant are right in suggesting that one should adopt a functional or operational test in determining when damage can be said to be "caused by a ship" for maritime law purposes. When the ship is afloat, the damage is the result of actions of the crew acting under directions of its master and those actions are integrally related to the operation of the ship, then the damage should be

> classified as "damage caused by a ship". This is an attractive formulation of the appropriate distinction."

[29] This approach was also recognized by the Court as the correct approach in *Ship-Source Oil Pollution Fund v British Columbia (Minister of Finance)* [2012] FCJ No 1590 at para 34.

[30] The Moving Defendants submit that there is no *in rem* claim because the "Aestival" was not engaged in navigation when the damage it is alleged to have caused occurred. Moreover, they claim that the ship itself was not the actual instrument by which the alleged damage was done. However, this is contrary to the functional or operational test adopted in *Newterm* and in direct contrast to decisions where *in rem* jurisdiction was found despite the fact the vessel was not actively moving: see *The Minerva* [1933] P. 224, involving cargo that fell from the Minerva's hoist and damaged an adjacent vessel, and *Outhouse v Thorshavn* [1935] Ex CR 120 [*Outhouse*], where oil was pumped overboard and caused damage. Moreover, in *Outhouse*, it was held that "damage by a ship" includes damage done by those in charge of a ship with the ship as the noxious instrument.

[31] The maintenance of a vessel is an integral part of carrying on the activity of shipping. It is irrelevant whether such maintenance is done while the vessel is moored in the water, while the vessel is in drydock, or while the vessel is blocked out of the water. The broad language of section 22(2)(d) is sufficient to cover damage caused anywhere the vessel is located so long as the damage done is by those in charge of the vessel to some third party or piece of property.

[32] In the case at hand, the "Aestival" itself is alleged to be the noxious instrument of the damage as portions of the "Aestival" were sanded and ground off and it was that solid particulate (actual pieces of the "Aestival" itself) which was allowed to escape that caused the damage to the Plaintiff's vessel. Using the functional operational test and based on the facts as pleaded in this matter, I conclude that the Plaintiff's claim falls under section 22(2)(d) of the *Act*.

[33] Section 43(2) of the *Act* provides that section 22 jurisdiction may be exercised *in rem* against the offending vessel. Further, the Plaintiff's claim under section 22(2)(d) is not excluded from *in rem* enforcement by way of section 43(3).

[34] Although the Moving Defendants may ultimately be vindicated in their position that no damage occurred, it remains that the present motion is not the proper forum to adjudicate the merits of the Plaintiff's claim. The parties' affidavit evidence on matters relating to liability is of little value on this motion as I am required to take the facts stated in the Affidavit of Lead Warrant, as well as the allegations made in the Statement of Claim, as proven.

[35] Assuming those facts to be true, I find that the Plaintiff's claim is one that falls under Canadian Maritime Law and under this Court's section 22(1) jurisdiction. With a valid *in rem* claim against the "Aestival", the Plaintiff was entitled to arrest it pursuant to section 43(8). The arrest should accordingly stand.

Amount of Bail

[36] Pursuant to Rule 485, the Court may fix the amount of bail to be given for the release of arrested property. The general rule which governs the amount of bail to be provided in order to obtain the release of a ship or prevent its arrest is that bail must be sufficient to cover the plaintiff's reasonably arguable best case, including interest and costs, but limited by the value of the arrested vessel: see *Calogeras & Master Supplies Inc v Ceres Hellenic Shipping Enterprises Ltd* [2006] FCJ No 952, 2006 FC 764 at para 3.

[37] The Plaintiff's claim is for the sum of $42,765.74, plus damages for loss of use of the Vessel, and interest and costs. The Moving Defendants properly conceded at the hearing that if the Court decides to set bail, that it should be set in the amount of $58,000.00.

ORDER

THIS COURT ORDERS that:

1. The bail for the release of the sailing vessel "Aestival" is hereby fixed in the amount of $58,000.00, to be paid into court or to Bernard LLP in trust.

2. The motion is otherwise dismissed.

3. Costs of the motion, hereby fixed in the amount of $750.00, inclusive of disbursements and taxes, shall be paid by the Defendants, Island-Sea Marine Ltd., Kenneth W. Higgs, and the sailing vessel "Aestival", in any event of the cause.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1625-12
STYLE OF CAUSE:	0871768 B.C. LTD. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SAILING VESSEL "AESTIVAL" ET AL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	AUGUST 13, 2013
REASONS FOR ORDER AND ORDER:	LAFRENIÈRE, P.
DATED:	NOVEMBER 13, 2013

APPEARANCES:

PAUL D. MOONEY	FOR THE PLAINTIFF
JOSEPH SPEARS	FOR THE DEFENDANTS, THE VESSEL "AESTIVAL", ISLAND-SEA MARINE LTD. KENNETH W. HIGGS

SOLICITORS OF RECORD:

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STRAITH LITIGATION CHAMBERS WEST VANCOUVER, BRITISH COLUMBIA	FOR THE DEFENDANTS THE VESSEL "AESTIVAL", ISLAND-SEA MARINE LTD. KENNETH W. HIGGS