Federal Court  Cour fédérale

Date: 20140207

Docket: T-2259-12

Citation: 2014 FC 136

Ottawa, Ontario, February 7, 2014

PRESENT: The Honourable Madam Justice Heneghan

ADMIRALTY ACTION *IN REM* AGAINST THE SHIPS *CAPE APRICOT, ASIAN GYRO, BORON NAVIGATOR, CIELO DI AMALFI, LEO ADVANCE, LEO AUTHORITY, LEO FELICITY, LEO MONO, LEO OSAKA, LEO PERDANA, MEDI GENOVA, MOL PARAMOUNT, MOL SOLUTION, OOCL OAKLAND, ROYAL ACCORD, ROYAL CHORALE, ROYAL EPIC, SEASPAN OSPREY, SEASPAN RESOLUTION,* AND A TUG BOAT WHOSE NAME IS UNKNOWN AND *IN PERSONAM*

BETWEEN:

WESTSHORE TERMINALS LIMITED PARTNERSHIP BY ITS GENERAL PARTNER WESTSHORE TERMINALS LTD., WESTSHORE TERMINALS INVESTMENT CORPORATION, AND WESTAR MANAGEMENT LTD.

Plaintiffs

and

**LEO OCEAN, S.A.,
TOKEI KAIUN COMPANY LIMITED,
KAWASAKI KISEN KAISHA LIMITED ('K'-LINE), SEASPAN ULC,
JEFFREY MCDONALD, AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIPS *CAPE APRICOT*, *ASIAN GYRO*, *BORON NAVIGATOR*, *CIELO DI AMALFI*, *LEO ADVANCE*, *LEO AUTHORITY*, *LEO FELICITY*, *LEO MONO*, *LEO OSAKA*, *LEO PERDANA*, *MEDI GENOVA*, *MOL PARAMOUNT*, *MOL SOLUTION*, *OOCL OAKLAND*, *ROYAL ACCORD*, *ROYAL CHORALE*, *ROYAL EPIC*, *SEASPAN OSPREY*, *SEASPAN RESOLUTION*, AND A TUG BOAT WHOSE NAME IS UNKNOWN**

Defendants

and

JEFFREY MCDONALD, SEASPAN ULC, *SEASPAN OSPREY*, *SEASPAN RESOLUTION* AND *CHARLES H. CATES VII* OR ALTERNATIVELY A TUG BOAT WHOSE NAME IS UNKNOWN AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP *CAPE APRICOT*, THE SHIP *CAPE APRICOT*, LEO OCEAN S.A., TOKEI KAIUN COMPANY LIMITED AND KAWASAKI KISEN KAISHA LIMITED ('K'-LINE)

Third Parties

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] Westshore Terminals Limited Partnership by its General Partner Westshore Terminal Ltd., Westshore Terminals Investment Corporation, and Westar Management Ltd. (the "Plaintiffs" or "Westshore"), pursuant to Rules 3, 220(1)(a), 385(1)(a), 481 of the *Federal Courts Rules*, SOR/98-106 (the "Rules") and the inherent jurisdiction of the Court in respect of a warrant to arrest, seek determination of the following questions:

1. Whether there was a binding agreement in place pursuant to which Westshore agreed to waive its right to arrest sister ships of the Defendant ship "Cape Apricot";

2. Whether pursuant to subsection 43(8) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 a plaintiff can arrest the offending Vessel and a sister ship.

[2] Although notice of this motion was given to all parties, submissions were made only by the Plaintiffs, Defendant and Third Party Leo Ocean S.A. ("Leo Ocean" or "Leo"), and Defendant and Third Party Kawasaki Kisen Kaisha Limited ("Kawasaki").

BACKGROUND

[3] The factual background below is taken from the affidavits, including exhibits, filed on behalf of the Plaintiffs, that is the affidavits of lawyer Mr. Peter Roberts and Mr. Nick Desmarais, a lawyer and Corporate Secretary of Westshore Terminals Limited Partnership, and the affidavit of Mr. Gary Wharton, Counsel for the Defendant Leo.

[4] On December 7, 2012 the Vessel "Cape Apricot" (the "Vessel"), owned by Leo hit a marine terminal trestle owned and operated by the Plaintiffs at Roberts Bank, British Columbia, leading

from the shore to Berth #1 (the "incident"). As a result of the incident the Berth was rendered unusable pending repairs, allegedly causing a loss to the Plaintiffs that is estimated to be in excess of $60 million.

[5] On December 7, 2012, the Plaintiffs commenced an action in the Supreme Court of British Columbia and obtained a warrant for the arrest of the Vessel.

[6] On December 7, 2012 counsel for the parties entered negotiations to arrange for the release of the Vessel from arrest. Westshore was represented at the time by Mr. Peter Roberts, a partner in the Vancouver law firm Lawson Lundell LLP. Leo Ocean was represented by Mr. Gary Wharton, a lawyer with the Vancouver firm of Bernard and Partners.

[7] On December 8, 2012, Counsel for Leo Ocean offered to provide a Letter of Undertaking ("LOU") in the amount of US$24 million in exchange for the release of the Vessel from arrest.

[8] On December 10, 2012**,** according to Mr. Desmarais, he was asked by the Westshore insurers to instruct Mr. David McEwen, Q.C. to "represent Westshore and provide maritime expertise to assist Mr. Roberts". Mr. McEwen was given those instructions on the same day.

[9] In the course of the negotiations for the release of the Vessel from arrest, Mr. Roberts raised the question "of availability of sister ships in the name of Leo Ocean SA" as recorded in an email sent at 5:59 p.m. on December 10, 2012; a copy of that email is exhibit L to the affidavit of Mr. Roberts.

[10] Mr. Roberts further deposed that he spoke with Mr. Wharton between 6:00 and 7:00 p.m. on December 10, 2012 and advised that the Plaintiffs were looking for security in the amount of C$100 million for the release of the Vessel. According to Mr. Roberts, Mr. Wharton advised him that the basis for the arrest of sister ships was very weak and that those ships were likely mortgaged to close to their value.

[11] According to Mr. Roberts, in this conversation Mr. Wharton told him that his clients would resist efforts to move the Vessel from Westshore's Berth until the issue of security was settled. Paragraph 29 of Mr. Roberts' affidavit refers to that conversation as follows:

> In this conversation, Mr. Wharton also advised that the Vessel would resist efforts to move off Westshore's dock unless the issue of security was sorted out. This included the likelihood that the owners of the Vessel would apply to Court to post bail for its actual value at which time the Court would be told that Westshore's demand for security at C$100 million was not reasonable, hence the need for a bail application.

[12] Mr. Roberts accepted what Mr. Wharton said. He did not conduct research on the issue of the maximum amount that could be posted as security for the release of the Vessel or on the availability of sister ship arrest.

[13] Mr. Desmarais deposes in his affidavit that early in the evening of December 10, 2012 Mr. Roberts advised him that the best security Westshore could obtain from the shipowner was US$26 million. Mr. Roberts also advised that the amount of available security was capped at the value of the offending Vessel, Leo would resist moving the Vessel from Berth #2, and that the claim to arrest

sister ships depended on them coming to Canada. On the basis of this discussion, Mr. Desmarais instructed Mr. Roberts to accept the LOU for US$26 million.

[14] Further communications took place between Mr. Roberts and Mr. Wharton. At 6:23 a.m. on December 11, 2012 Mr. Wharton sent an email to Mr. Roberts advising that he had instructions to issue the LOU at US$26 million.

[15] After reviewing a revised version of the LOU received from Mr. Wharton at 7:24 a.m., Mr. Roberts spoke to Mr. Wharton at 8:00 a.m. by telephone and advised him that subject to some minor changes, the LOU was acceptable. At 10:29 a.m. Mr. Wharton sent Mr. Roberts the signed LOU by email, together with a draft Release from arrest. The LOU signed on December 11, 2012 contained a provision that Westshore would refrain from arresting any other ships or property under the same ownership as the Vessel.

[16] Shortly after 10:30 a.m. on December 11, 2012, Mr. McEwen, Mr. Roberts and Mr. Wharton participated in a conference call where they discussed the right to arrest sister ships. Paragraph 40 of Mr. Roberts' affidavit provides, in part, as follows:

> […] Mr. McEwen advised Mr. Wharton that the inclusion in the LOU of the clause preventing the arrest of sisterships [*sic*] was unacceptable to Westshore. Mr. Wharton advised that based upon the discussions between him and myself, his client had an agreement with Westshore and that the Vessel ought to be allowed to depart on that basis. It was agreed during this call to seek a hearing before the Court at 2:00 p.m. to address the conflicting positions. Mr. Wharton did not agree to Mr. McEwen's suggestion during that call to move the Vessel from Berth #2 at the Terminal. Mr. Wharton advised that the loaded Vessel would have to remain at Berth #2 until the Court dealt with the terms of release.

[17] The original LOU in the amount of US$26 million dollars was delivered to Mr. Roberts during this teleconference.

[18] Counsel for the Plaintiffs, including Mr. McEwen, and Leo appeared before a judge of the Supreme Court of British Columbia at 2:00 p.m. on December 11, 2012. Mr. Wharton argued that the Vessel should remain at Berth #2 until the Court ruled on whether there was a binding agreement to provide security and the motion was adjourned until the following day.

[19] In his affidavit, Mr. Desmarais states that he was informed by Mr. McEwen about his suggestion to counsel for Leo that the Vessel be moved only a few hundred metres to Berth #1 pending the Court's decision. Mr. Desmarais was also advised by Mr. McEwen that Mr. Wharton rejected that suggestion, and insisted the Vessel remain at Berth #2 until the issue of whether there was a valid agreement in place was decided.

[20] According to Mr. Demarais, on December 12, 2012 it was decided that Mr. McEwen would take conduct of the action on behalf of Westshore. Concerned with the continuing presence of the Vessel at Berth #2, Mr. Desmarais instructed Mr. McEwen to offer to release the Vessel on the basis that a second LOU would be provided without the condition against arresting other ships. This alternate LOU was forwarded in draft form to Mr. Wharton by email from the office of Mr. McEwen late in the morning of December 12, 2012.

[21] Mr. Wharton, at paragraph 39 of his affidavit, gives a different perspective on the question of a second LOU, as follows:

> Following the British Columbia Supreme Court appearances post-morning of December 11, 2012 (as described by Mr. Roberts and Mr. Desmarais), it was me who contacted Mr. McEwen to suggest the provisional second LOU in order to get the vessel clear of Berth #2.

[22] Mr. Roberts justifies his actions in accepting the form of LOU offered by Mr. Wharton on the need to have the Vessel moved from Berth #2 and "to mitigate what I understood to be the significant and mounting financial losses to Westshore".

[23] Likewise, Mr. Desmarais deposes that he instructed Mr. Roberts to accept the LOU signed on December 11, 2012 in light of the significant financial consequences that would be faced by Westshore if the Vessel remained moored at Berth #2. According to Mr. Desmarais, when he instructed Mr. Roberts to accept the LOU of December 11, 2012, he was unaware that Westshore would be "waiving a realistic right to obtain further security from the insurer of Leo by arresting a sistership [*sic*]".

[24] The original LOU offered security in the amount of US$26 million against Westshore's claim, following adjudication of that claim either in the British Columbia Supreme Court or the Federal Court, at the option of the Plaintiffs.

[25] On December 19, 2012, Mr. Douglas Schmitt, a lawyer with the Vancouver law firm Alexander Holburn, that is Mr. McEwen's law firm, wrote to Mr. Wharton, inquiring if the latter would accept service of the Statement of Claim issued on that date by the Federal Court.

SUBMISSIONS

The Plaintiffs

[26] The Plaintiffs argue that their "agreement" to accept the original LOU is not binding upon them because it was based upon mistake and coercion.

[27] They submit that there was a common mistake, shared by the Defendant Leo Ocean, that the amount of available security is capped at the value of the Vessel. The Plaintiffs argue that this is wrong.

[28] Second, they submit that there was another mistake, either common or unilateral, that the right to arrest sister ships was "weak and of little or no value" to them.

[29] Finally, the Plaintiffs argue that they were subject to economic duress in "agreeing" to accept the LOU from Leo Ocean. In this regard, they rely on the decision of the Privy Council in *Pao On v. Lan Yiu Long*, [1979] 3 All E.R. 65 (P.C.). The Plaintiffs plead that they were forced to accept the terms offered by Leo Ocean in order to minimize disruption to their business and to mitigate financial losses.

Leo Ocean

[30] Leo denies that there was any mistake that induced the Plaintiffs to accept the proffered LOU. It argues that equity should not be applied to rescind the LOU, noting that at all material times the Plaintiffs were represented by Counsel experienced in matters of maritime law. Leo rejects the

contention that Lawson Lundell, the firm at which Mr. Roberts is a partner, was inexperienced in maritime law.

[31] The Defendant Leo further submits that there was no coercion of the will sufficient to void the Plaintiffs' agreement to accept the LOU. It says that the terms of the LOU were negotiated between the parties between December 7 and December 11, 2012, prior to being accepted by the Plaintiffs on December 11, 2012.

Kawasaki

[32] Kawasaki takes the position that the issue raised in this matter is simply whether the Plaintiffs can arrest multiple ships in order to obtain security in an amount greater than the value of the wrongdoing Vessel or another ship that was arrested.

[33] Kawasaki submits that as a matter of statutory interpretation of subsection 43(8) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "Act"), there is no right to arrest multiple ships. The provision speaks only to an action *in rem* "against any ship". Nothing is said about the right to arrest or the provision of security to obtain the release of arrested property.

[34] Kawasaki further argues that the decision relied upon by the Plaintiffs to support their argument in favour of multiple arrests, that is *Norcan Electrical Systems Inc. v. F.B. XIX (The)* (2003), 235 F.T.R. 237, does not assist the Plaintiffs' position. In that case, there were two proceedings for necessaries supplied to four different ships, that is T-1959-02 and T-2091-02. The issue before the Court was whether the two ships arrested in cause number T-1959-02 could be

arrested in cause number T-2091-02 to secure the claims for necessaries for the two ships that were the subject of T-2091-02. The question of the right to arrest multiple sister ships was not an issue.

[35] In short, Kawasaki argues that the Plaintiffs erroneously rely on an *obiter* comment of the late Prothonotary Hargrave at paragraph 14 where he said "Evident here is that there is no limit, under the Canadian sister ship legislation, on the number of sister ships that may be arrested".

[36] In any event, Kawasaki argues that it is well established that bail can be obtained only to the value of the ship under arrest.

[37] Kawasaki submits if the Plaintiffs succeed in establishing a right to arrest multiple ships, in any event they are barred from doing so in light of the agreement between Counsel as to the provision of security by means of the LOU on December 11th, 2012. That document bars the arrest of sister ships in addition to the arrest of the Vessel.

DISCUSSION AND DISPOSITION

[38] The Plaintiffs raise two issues in this motion. The first relates to whether there was a legally binding agreement between Counsel for the Plaintiffs and Counsel for Leo Ocean concerning the provision of security by means of a LOU which prohibits the arrest of other property owned by Leo and further, that sets the amount of security at US$26 million. The Plaintiffs seek a determination that the agreement concerning the LOU is void.

[39] The second ground of the motion is a determination of the scope of subsection 43(8) of the Act, in other words a question of statutory interpretation.

[40] I will first address the contract issues. The Plaintiffs submit that the agreement to accept the LOU from Leo on December 11, 2012, should be set aside on the ground of mistake, either unilateral or common, or on the basis of economic duress.

[41] In the simplest terms, a contract is a legally recognized agreement between two or more parties giving rise to an obligation that may be judicially enforced; see the decision in *406868 Alberta Ltd. v. Westfair Foods Ltd.*, [1997] A.J. No. 790. A contract can be avoided by factors including mistake or duress. A mistake on the part of one or both parties may mean that there was no *consensus ad idem*; see *Colonial Investment Co. v. Bortland* (1911), 1 W.W.R. 171. The decision in *Stott v. Merit Insurance Corporation* (1988), 63 O.R. (2d) 545 reviews the elements necessary to establish economic duress.

[42] The first mistake alleged by the Plaintiffs is that Counsel for Leo erroneously advised Mr. Roberts that the right to arrest sister ships, in addition to the arrest of the allegedly offending ship, was weak and of little or no value to Westshore.

[43] On the basis of the evidence filed in respect of this motion, there is a conflict between Mr. Roberts, on behalf of the Plaintiffs, and Mr. Wharton, Counsel for the Defendant, on that point. At paragraph 20 of his affidavit, Mr. Wharton says the following:

> In response to paragraphs 24 and 26 of Mr. Roberts' Affidavit regarding the conversation about sistership [*sic*] arrest, I did talk to Mr. Roberts about this issue. I gave him my view that once security is posted, there is a question as to whether you can arrest one or more sisterships [*sic*] as the international convention allows only one vessel arrest (offending vessel or sistership [*sic*] but not both) while our own legislation is unclear on this point. I also advised him that my personal view was that a case for multiple arrests once security was posted was weak.

[44] The Plaintiffs appear to be arguing that Mr. Wharton was "mistaken" in his opinion as to the availability of multiple arrests and that Mr. Roberts was "mistaken" in relying upon Mr. Wharton's advice.

[45] Mr. Wharton was acting in his capacity as Counsel to the Defendant Leo. His primary duty, as a Solicitor, lay with his client, not to Mr. Roberts; see *Canadian National Railway Co. v. McKercher LLP* (2013), 446 N.R. 1 and *Canada (Minister of National Revenue – M.N.R.) v. Vlug*, 2006 FC 86.

[46] I see no merit in the protestations of Mr. Roberts, as set out in paragraph 4 of his affidavit, that he had never before been involved in the arrest of a ship in either the Federal Court or in the Supreme Court of British Columbia. Assistance was available and indeed, according to Mr. Roberts, he spoke with Mr. David McEwen, Q.C., on December 10, 2012 and said that the Plaintiffs "wished to retain him to provide advice on the admiralty aspect of this matter". As well, according to paragraph 5 of his affidavit, Mr. Desmarais said that Mr. McEwen was instructed to act on behalf of Westshore in particular to provide "maritime expertise to assist Mr. Roberts".

[47] Mr. McEwen was available to advise the Plaintiffs about the acceptability of the LOU that was negotiated with Mr. Wharton. I take judicial notice of the fact that Mr. McEwen is a senior counsel, with recognized expertise in the field of maritime law.

[48] I am not convinced that Mr. Wharton's advice was mistaken or in error. It appears that in bringing this motion with respect to multiple arrests, the Plaintiffs themselves implicitly acknowledge that the issue is not clear cut since they are seeking determination of that question by the Court.

[49] In any event, insofar as the LOU represents an agreement, it was negotiated between Mr. Roberts as the lawyer for the Plaintiffs, and Mr. Wharton as Counsel for Leo. Mr. McEwen was involved, as another lawyer, prior to the delivery of the signed LOU by email at approximately 10:29 a.m. on December 11, 2012.

[50] The second "mistake" alleged by the Plaintiffs again refers to advice from Mr. Wharton to the effect that the limit of security to be posted is the value of the ship. According to the Plaintiffs, Mr. Wharton "mistakenly" advised Mr. Roberts that security would be capped at the value of the Vessel.

[51] The Plaintiffs argue that this was wrong and the mistaken belief in that regard was fundamental to the agreement, in light of the amount of the claim for damages.

[52] In my opinion, there was no mistake here. In *Norcan, supra*, Prothonotary Hargrave said the following at paragraph 10:

> As to setting bail, the general rule is that a plaintiff is entitled to bail in an amount sufficient to cover his or her reasonably arguable best case, together with interest and costs, limited by the value of the wrongdoing vessel: see for example *Brotchie v. Karey T (The)* reflex, (1994), 77 F.T.R. 71 (F.C.T.D.) at page 72, *Moschanthy, The*, [1971] 1 Lloyd's Rep. 37 (Adm.), at page 44, a decision of Mr. Justice Brandon. As to the cap on bail at the value of the ship, see *Staffordshire, The* (1872), 1 Asp. M.L.C. 365 (P.C.) at page 372; *Charlotte, The*, [1920] P. 78 (Adm.) at page 80 and "Admiralty Practice" by Kenneth McGuffie, British Shipping Laws, Vol. 1, London: Stevens and Sons Ltd., 1964 at page 140. This cap on bail applies even though the claim, costs and interest may exceed the value of the arrested ship.

[53] There was no error, and there is no basis to set aside the agreement on the ground of mistake.

[54] The Plaintiffs' arguments about economic duress are likewise ill founded. In *Stott, supra*, the Ontario Court of Appeal identified the following facts necessary to establish duress:

1. The pressure must amount to coercion of the will;
2. The pressure must be illegitimate;
3. The party seeking relief must have taken steps to avoid the act complained of.

[55] The "pressure" here is the Defendant Leo's refusal to allow the Vessel to be moved before security was in place. In my opinion, while Leo's position may have put pressure on the Plaintiffs and their lawyers, including Mr. Desmarais, an in-house lawyer and Corporate Secretary of Westshore Terminals Limited Partnership, I fail to see how this amounted to "coercion of the will".

[56] It seems to me that Counsel for Leo was entitled to take the position that the Vessel would not be moved until security was posted. It is the usual consequence of an arrest that the ship will not be moved while under arrest, in the absence of consent or of a Court order; see the decision in *Whyte v. "Sandpiper IV" (The)* (2002), 217 F.T.R. 314. On the basis of the evidence submitted and the general law in Canada regarding movement of the ship while under arrest, I find that there was no "coercion of the will". Rather, there was bargaining.

[57] I am equally satisfied that the pressure was legitimate. Leo wanted its Vessel released from arrest. The Vessel had been moored at Berth #2 on December 7, 2012. The Plaintiffs chose to arrest the Vessel while so moored. The Plaintiffs are deemed to know the law concerning the consequences of arrest. There was nothing illegitimate in the position adopted by Leo. Commercial realities involving ships are not unique to the Plaintiffs in this case.

[58] Leo had a reasonable and legitimate interest in securing the release of its Vessel from arrest as soon as possible. That release would be obtained either by agreement with the Plaintiffs as to the form and amount of security or by way of a Court order following a hearing.

[59] Insofar as Leo refused to consent to movement of the Vessel prior to positing security to obtain its release from arrest, it was allowed to do so. There was nothing illegal or unfair, at law, in its refusal to accommodate the Plaintiffs' request.

[60] The Plaintiffs were at liberty to seek recourse from the Courts. Although they filed an application before the British Columbia Supreme Court on December 11, 2012 and appeared on that date before that Court, they did not pursue their application to a final hearing and order.

[61] According to the test in *Stott, supra*, in order to obtain relief on the basis of economic duress a party must demonstrate that it took steps to avoid the act complained of. The Plaintiffs' took some steps, but did not carry them through to a determination. It is inappropriate for them now to complain that they were compelled to accept the security offered by Leo if they were dissatisfied with it. In any event, I am satisfied that there was no economic duress in this case, as defined in *Stott, supra*.

[62] There remains the question as to the availability of multiple arrests.

[63] Subsection 43(8) of the Act provides as follows:

43(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.	43(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.

[64] The reference to actions *in rem* means that an action can be taken in certain circumstances directly against the ship; see subsections 43(2) and (3) as follow:

43(2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22	43(2) Sous réserve du paragraphe (3), elle peut, aux termes de l'article 22, avoir

may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court.	compétence en matière réelle dans toute action portant sur un navire, un aéronef ou d'autres biens, ou sur le produit de leur vente consigné au tribunal.
(3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised in rem with respect to a claim mentioned in paragraph 22(2)(*e*), (*f*), (*g*), (*h*), (*i*), (*k*), (*m*), (*n*), (*p*) or (*r*) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.	(3) Malgré le paragraphe (2), elle ne peut exercer la compétence en matière réelle prévue à l'article 22, dans le cas des demandes visées aux alinéas 22(2) *e*), *f*), *g*), *h*), *i*), *k*), *m*), *n*), *p*) ou *r*), que si, au moment où l'action est intentée, le véritable propriétaire du navire, de l'aéronef ou des autres biens en cause est le même qu'au moment du fait générateur.

[65] Paragraph 22(2)(e) is relevant and provides as follow:

22(2)(*e*) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;	22(2)*e*) une demande d'indemnisation pour l'avarie ou la perte d'un navire, notamment de sa cargaison ou de son équipement ou de tout bien à son bord ou en cours de transbordement;

[66] The damage in this case was caused by the impact of the Vessel against the Plaintiffs' Berth.

[67] As noted by Kawasaki in its submissions, subsection 43(8) does not speak of "arrest" *per se* but addresses actions *in rem*. Arrest is a procedural right that is available to an injured party as a

means of obtaining security for a future judgment; see *Benson Bros. Shipbuilding Co. (1960) Ltd. v. The "Miss Donna"*, [1978] 1 F.C.R. 379.

[68] The Plaintiffs arrested the Vessel in the British Columbia proceedings. Did they have the right to arrest multiple ships? The right to arrest sister ships exists pursuant to subsection 43(8) of the Act as quoted above. The scope of that right involves the interpretation of subsection 43(8).

[69] As noted by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 at paragraph 10:

> The interpretation of a statutory provision must be read according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[70] Pursuant to section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, statutes are to receive a fair, large and liberal construction:

Enactments deemed remedial	Principe et interprétation
12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[71] The right to arrest sister ships was addressed in the *1952 International Convention For The Unification Of Certain Rules Relating To The Arrest Of Sea-Going Ships*, 10 May 1952, 439 U.N.T.S. 193 (the "Convention").

[72] Article 3(1) of the Convention provides as follows:

> […] a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship.

[73] The *Senior Courts Act 1981* (U.K.), c. 54 says the following at subparagraph 21(4)(b)(ii):

> 21 Mode of exercise of Admiralty jurisdiction.
>
> […]
>
> (4)(b)an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against
>
> […]
>
> (ii)any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

[74] Subsection 43(8) allows for an *in rem* action against "any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action". Subsection 43(8) was introduced in Canada following an amendment to the Act which came into force on February 1, 1992; see the decision in *Noranda Sales Corp. v. British Tay (The)* (1993), 77 F.T.R. 8 at paragraph 1. To date, it appears that this subsection has not been the subject of judicial interpretation.

[75] The Plaintiffs argue that subsection 43(8) is ambiguous and that, unlike the situation in England, the Canadian legislation does not clearly state that only one ship may be arrested.

[76] The scope of subsection 43(8), in my opinion, turns on the meaning to be given to the words "any ship". Do those words mean more than one? Can a plaintiff arrest the offending ship, as well as one or more sister ships, that is a ship or ships that are beneficially owned by the same owner as the ship subject to the action?

[77] According to *The Oxford English Dictionary*, 2d ed., the word "any" is defined as follows:

> 1. *gen.* An indeterminate derivative of *one*, or rather of its weakened adj. form *a, an*, in which the idea of unity (or, in plural form, *partivity*) is subordinated to that of indifference as to the particular one or ones that may be selected. In *sing.* = A --- no matter which; a--- whichever, of whatever kind, of whatever quantity. In *pl.* = Some--- no matter which, of what kind, or how many [emphasis in original].

[78] The French language version of subsection 43(8) refers to "de tout navire". According to *Dictionnaire Francais-Anglais LaRousse,* 1st ed., the word "tout" is defined as:

> f. toute, pl. tous, toutes… adj. All, whole (total)… All, sole, only, one and only (seul)… Any, every (chaque)… Pl. All.

[79] In the *Le Petit Robert Dictionnaire de la langue française*, 1st ed., "tout", without an article, is defined as follows:

> TOUT, TOUTE (suivi d'un nom sans art.) : un quelconque, n'importe quel; un individu pris au hasard parmi la totalité des individus semblables.

[80] Consideration must be given to both the English and French version of the legislation. Section 13 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) reads as follows:

Both versions simultaneous and equally authoritative	Valeur des deux versions
13. Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative.	13. Tous les textes qui sont établis, imprimés, publiés ou déposés sous le régime de la présente partie dans les deux langues officielles le sont simultanément, les deux versions ayant également force de loi ou même valeur.

[81] In *R v. Daoust*, [2004] 1 S.C.R. 217 at paragraph 28, the Supreme Court of Canada said the following about the interpretation of bilingual legislation:

> If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions.

[82] In my opinion, the key word in subsection 43(8) for the purposes of this motion is "any". Is this word ambiguous?

[83] In *Bell ExpressVu Ltd. v. Rex*, [2002] 2 S.C.R. 559 at paragraph 29, the Supreme Court of Canada commented on ambiguity as follows:

> [...] an ambiguity must be "real" (*Marcotte, supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations.

[84] In my view, having regard to the definitions found in both an English and two French dictionaries, the words "any" and "de tout" are, *per se*, ambiguous. The words can mean one or more than one, depending on the way in which they are used.

[85] However, the inherent ambiguity of "any" and "de tout" is not determinative of the question posed here by the Plaintiffs for determination. The words are to be considered in the context in which they are found and used.

[86] In subsection 43(8) the words are used in the context of *in rem* actions. Such actions can include the exercise of the power to arrest. The Convention referenced above deals with the arrest of sister ships. Canada is not a party to that Convention but in 1992 adopted subsection 43(8) of the Act.

[87] In my opinion, the inherent ambiguity in "any" or "de tout" is resolved by reference to the use of the singular "ship" in the English version and "navire" in the French version. The French version says "de tout navire"; this suggests that the singular is intended because otherwise Parliament could have said "de tous navires".

[88] Likewise, the English version of subsection 43(8) says "any ship". The use of the word "ship" suggests that the meaning is singular. If Parliament had intended otherwise, it could have used the words "any ships" or "any other ship".

[89] In any event, according to the dictionary definitions above, "any" and "de tout" can mean "one among many".

[90] There is no evidence before me that Parliament intended to provide a right to multiple arrests in the domestic domain when the Convention makes it clear that only one ship may be arrested, that is either the offending ship or another ship that meets the requirements of Article 3.

[91] Shipping is an international enterprise and ships from the international community frequent Canadian waters. In the absence of evidence to the contrary, I am not prepared to find that the Parliament of Canada intended to introduce a radical change in the matter of multiple arrests of ships, without a clear expression of that intention.

[92] I am satisfied that subsection 43(8) of the Act does not give the right to multiple arrests. It follows that the Plaintiffs are not entitled, as a matter of law, to arrest a sister ship to the Vessel, once they had exercised their right to arrest the offending ship.

CONCLUSION

[93] In conclusion, the motion is dismissed and the questions posed by the Plaintiffs are answered as follows:

> *1. Whether there was a binding agreement in place pursuant to which Westshore agreed to waive its right to arrest sister ships of the Defendant ship "Cape Apricot"?*

[94] Yes, there was a binding agreement in place between the Plaintiffs and Leo whereby the Plaintiffs agreed to waive their right to arrest sister ships of the Vessel.

> *2. Whether pursuant to subsection 43(8) of the Federal Courts Act, R.S.C. 1985, c. F-7 a plaintiff can arrest the offending vessel and a sister ship?*

[95] No, pursuant to subsection 43(8) a plaintiff cannot arrest both an offending ship and a sister ship.

[96] In the result, the motion is dismissed with costs against the Plaintiffs, in any event of the cause, in favour of the Defendant and Third Party Leo Ocean S.A. and the Defendant and Third Party Kawasaki Kisen Kaisha Limited. If the parties are unable to agree on costs, brief submissions not exceeding five (5) pages can be made on or before February 25, 2014.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs against the Plaintiffs, in any event of the cause, in favour of the Defendant and Third Party Leo Ocean S.A. and the Defendant and Third Party Kawasaki Kisen Kaisha Limited. If the parties are unable to agree on costs, brief submissions not exceeding five pages can be made on or before February 25, 2014.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2259-12

STYLE OF CAUSE: WESTSHORE TERMINALS LIMITED PARTNERSHIP BY ITS GENERAL PARTNER WESTSHORE TERMINALS LTD., WESTSHORE TERMINALS INVESTMENT CORPORATION, AND, WESTAR MANAGEMENT LTD.
v.
LEO OCEAN, S.A., TOKEI KAIUN COMPANY LIMITED, KAWASAKI KISEN KAISHA LIMITED, ('K'-LINE), SEASPAN ULC, JEFFREY MCDONALD, AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIPS *CAPE APRICOT*, *ASIAN GYRO*, *BORON NAVIGATOR*, *CIELO DI AMALFI*, *LEO ADVANCE*, LEO *AUTHORITY*, *LEO FELICITY*, *LEO MONO*, *LEO OSAKA*, *LEO PERDANA*, *MEDI GENOVA*, *MOL PARAMOUNT*, *MOL SOLUTION*, *OOCL OAKLAND*, *ROYAL ACCORD*, *ROYAL CHORALE*, AND *ROYAL EPIC*, *SEASPAN OSPREY*, *SEASPAN RESOLUTION*, AND A TUG BOAT WHOSE NAME IS UNKNOWN
and
JEFFREY MCDONALD, SEASPAN ULC, *SEASPAN OSPREY*, *SEASPAN RESOLUTION* AND *CHARLES H. CATES VII* OR ALTERNATIVELY A TUG BOAT WHOSE NAME IS UNKNOWN AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP *CAPE APRICOT*, THE SHIP *CAPE APRICOT* , LEO OCEAN S.A., TOKEI KAIUN COMPANY LIMITED AND KAWASAKI KISEN KAISHA LIMITED ('K'-LINE)

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 12, 2013

REASONS FOR ORDER AND ORDER: HENEGHAN J.

DATED: FEBRUARY 7, 2014

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