Federal Court  Cour fédérale

Date: 20161117

Docket: T-272-15

Citation: 2016 FC 1281

Montréal, Quebec, November 17, 2016

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

VERREAULT NAVIGATION INC.

Plaintiff

and

662901 N.B. LTD.
AND
CAI GROUP INC.
AND
THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP
"CHAULK LIFTER"
AND
THE SHIP "CHAULK LIFTER"

Defendants

JUDGMENT AND REASONS

[1] The tug *Chaulk Determination* and the barge *Chaulk Lifter*, sister ships, came to a sad end. The *Chaulk Determination* sank in the Port of Trois-Rivières. She left behind unpaid bills and her owners left it to others to clean up the resulting pollution and to remove her valueless wreck.

[2] Meanwhile, the *Chaulk Lifter* had already been arrested in Verreault Navigation Inc.'s shipyard at Les Méchins for unrelated debts. She was later sold in this Court by the Acting Marshal for $600,000. The claims filed against the proceeds of sale are in excess of $6,500,000.

[3] Some claims, totalling $136,856.16, which enjoy priority, have already been paid out.

[4] This is a motion for payment out of the balance of $463,143.84, plus accumulated interest. I shall deal with the claims in the order of their alleged priority.

[5] In this case there are no maritime liens and sufficient funds are on hand to pay in full the two claimants who assert statutory liens to which the law gives priority. Consequently, there is no need to rule as to how they rank as between themselves. A possessory lien ranks next. There follow two registered mortgages, two claims against the *Chaulk Lifter* as a sister ship, and finally a creditor who may not be a marine creditor.

I. Background

[6] The *Chaulk Determination* and *Chaulk Lifter* were both owned by 662901 N.B. Ltd. which was incorporated in March 2012. Registration of its purchase of the *Chaulk Lifter* was

finalized December 17, 2013. The record does not give the history of the *Chaulk Determination*. The company's sole officer and director was David Chaulk.

[7] In addition to 662901 N.B. Ltd., David Chaulk had other companies. There is understandable confusion on the part of the creditors as the names of the companies may have been used interchangeably. There is evidence that there was another company, Chaulk Air Inc., which may have carried on business as CAI Logistics. There is reference in some of the documents filed by different creditors to CAI Investments Inc., to CAI Group Inc. and to 662903 N.B. Ltd.

[8] The *Chaulk Determination* and *Chaulk Lifter* arrived at the Port of Trois-Rivières, on November 27, 2013. The *Chaulk Determination* only left as a wreck after she sank, on December 26, 2014.

[9] On March 30, 2014, 662901 N.B. Ltd. issued a promissory note to David Chaulk's brother, Brent Chaulk in the amount of $305,000. Among other things, the note states "security is in the form of a marine mortgage on the vessel *Chaulk Lifter*."

[10] On June 15, 2014, 662901 N.B. Ltd. issued a promissory note to David Chaulk's father, Morris Chaulk in the amount of $42,000. It likewise provides that security is in the form of a mortgage on the *Chaulk Lifter*.

[11] Harbour dues were not paid on either ship. Consequently, l'Administration portuaire de Trois-Rivières (hereinafter Trois-Rivières) issued a Detention Order against both, on June 26, 2014.

[12] A single mortgage in favour of Brent and Morris Chaulk in the amount of $347,000 was registered July 18, 2014.

[13] On August 20, 2014, 662901 N.B. Ltd. made an arrangement with Trois-Rivières in which, in consideration of a partial payment of what was owed in harbour dues and giving Trois-Rivières a mortgage for $57,305.27, the Detention Order was lifted. Brent and Morris Chaulk gave priority to Trois-Rivières' mortgage.

[14] The *Chaulk Lifter* arrived at Verreault's yard at Les Méchins on October 7, 2014, in order that various work be carried out.

[15] 662901 N.B. Ltd. defaulted on the Trois-Rivières mortgage. As a result, Trois-Rivières arrested the *Chaulk Lifter* on December 12, 2014, while she was in Verreault's dry dock. Verreault intervened in that action and obtained a Court Order permitting her to be removed from the dry dock. Otherwise, the *Chaulk Lifter* remained in Verreault's possession.

[16] As aforesaid, the *Chaulk Determination* sank on December 26, 2014.

[17] Verreault then instituted this action against the *Chaulk Lifter*. It was in this action that the ship was ordered to be sold on June 23, 2015. The sale was completed against full payment of the $600,000, on August 4, 2015.

II. The Claimants

[18] The claim with the highest priority is that of the Acting Marshal. His claim, in the amount of $42,395.19, has already been paid, so nothing further need be said.

[19] Next are the costs in bringing the ship to sale. These would include preparation, serving, and filing of the statement of claim, affidavit to lead warrant of arrest, motion to sell, attending the auction, and related matters. In this case, the costs are divided in two. It was Trois-Rivières which first arrested the *Chaulk Lifter*, but it was Verreault which brought her to sale. Trois-Rivières' costs have already been paid. Verreault's are in the amount of $3,306.23, which shall be awarded.

[20] There followed payment out of two preferred claims, given priority under various provisions of the *Canada Marine Act*. Transport Canada was paid $37,155.70 for outstanding harbour dues and for the cost of repairing damage to its dock at Les Méchins, which was struck by the *Chaulk Lifter*. The damage to the dock totalled $23,207.17. Trois-Rivières was paid $57,305.27 for harbour dues unrelated to the mortgage, and its costs.

[21] There remains in Court $463,143.84 plus a modest amount of accumulated interest. The claims remaining to be dealt with are as follows:

a) Verreault's share of the costs in bringing the *Chaulk Lifter* to sale;

b) Verreault's claim, which enjoys a possessory lien which may not cover the entire amount alleged to be owing;

c) Trois-Rivières which, in addition to holding a mortgage on the *Chaulk Lifter*, has a claim against the *Chaulk Determination*;

d) Brent and Morris Chaulk who hold a mortgage;

e) The Canadian Coast Guard which took care of the clean-up of the oil spill occasioned by the sinking of the *Chaulk Determination*;

f) The Administrator of the Ship-source Oil Pollution Fund for security to satisfy such claims as may be filed against the Fund by those who suffered oil pollution damage caused by the *Chaulk Determination*; and

g) Ketah Investments Inc., a lender.

III. The Claim of Verreault Navigation Inc.

[22] Verreault obtained judgment *in rem* against the *Chaulk Lifter* and *in personam* against 662901 N.B. Ltd. and CAI Group Inc. in the amount of $217,551.67, with a pre and post-judgment interest, and costs. It is common ground that neither company has any assets apart from the *Chaulk Lifter*.

[23] In addition to the judgment, which essentially covered its services until the ship left the dry dock, it has additional claims for wharfage, various movements of the barge, fuel supply and inspections. Its total claim is in the amount of $373,726.98.

[24] It undoubtedly enjoys a possessory lien which outranks the two mortgages which pre-date the commencement of its work (*Osborne Refrigeration Sales & Services Inc v Atlantean (Ship)*, [1979] 2 FCR 661; *Scott Steel Ltd v Alarissa (The)*, [1996] 2 FCR 883; *Governor and Company*

of the Bank of Scotland v Nel (The), [2001] 1 FCR 408). To the extent it may not have a possessory lien, it claims priority in *custodia legis*.

[25] Other parties, particularly Trois-Rivières, while conceding there is a possessory lien for part of the claim, dispute the quantum. Verreault charged for moving the ship from time to time, without a Court Order, and allegedly made an unconscionable profit.

[26] After Trois-Rivières arrested the *Chaulk Lifter* while she was then in Verreault's dry dock, Verreault intervened in that action and obtained leave to remove her from the dry dock and to berth her alongside. Thereafter, it moved her from time to time to anchor and back again, to allow other ships to enter its dry dock. These moves were carried out without leave of the Court. Once Trois-Rivières complained, a Court Order was obtained permitting Verreault to move the ship at will. It supplied fuel while she was alongside. When she was at anchor, its tug had to supply fuel to the portable generator which was onboard. It was a cold winter.

[27] Historically, those who held a possessory lien were unable to arrest the ship. The arrest transferred possession to the Marshal and so the possessory lien was lost (*Montreal Dry Docks and Ship Repairing Company, Limited et al v Halifax Shipyards, Limited* (1920), 60 SCR 359). However, with the advent of the *Federal Courts Act*, an arrest does not change possession (Rule 483). Consequently, Verreault could have arrested the *Chaulk Lifter* but would hardly have done so while she was in its dry dock, as a ship under arrest cannot be moved except on the consent of all parties or by order of the Court. Verreault could not have serviced other ships if the *Chaulk Lifter* were occupying its dry dock.

[28] Subject to the deductions I am about to make, I am satisfied that Verreault's entire claim is covered by a possessory lien. The *Chaulk Lifter* was in its possession. It certainly would not have arrested her while in the dry dock. It was entitled to carry on its business. The evidence of its president Richard Beaupré makes it clear that it would have been too dangerous to leave the *Chaulk Lifter* where she was while other ships were entering or leaving its dry dock. No one moved the Court that the Marshal be put in possession and that he be authorized to hire an ocean going tug to move the ship to Sept-Iles or Matane, at who knows what cost.

[29] That being said, in an ideal world, the judgment of the Court should take effect from the time of the writ as was stated by Lord Esher, M. R. in *The Cella* (1888), 13 Probate 92 at p 87 "but if the money be in court, or the Court has possession of the *res*, it can give effect to its judgment as if it had been delivered the moment it took possession of the *res*"(see also *Nordea Bank Norge ASA v Kinguk (The)*, 2007 FC 434, 2007 FCJ No 593 at para 31). On that basis there would be no claims for services rendered after the arrest, save the Marshal's fees and the cost of converting the ship into cash.

[30] While Verreault benefits from a possessory lien, there is also a downside thereto. It was Verreault, while moving the *Chaulk Lifter*, which caused damage to Transport Canada's wharf. That claim was not incidental to the arrest and does not form part of *custodia legis*. Therefore, that amount of $23,207.17 is to be deducted.

[31] Verreault's accounts also included federal General Sales Tax and Quebec Provincial Sales Tax. It had to pay these amounts, but as it was unable to collect from the shipowner, it is entitled to a rebate estimated at 25%.

[32] Finally, I do not think Verreault should profit on its services rendered which were not covered by its judgment. The parties did not pursue this point on their cross-examination of Mr. Beaupré, but based on the old rule of thumb that absent proof of sound market value of cargo, it would be assumed to be CIF plus 10%. Verreault stated it would not object to a 10% deduction on those services.

[33] According to my calculations, in addition to the aforesaid $23,207.17, there should be a deduction of $4,056.61 with respect to GST, $8,092.94 with respect to PST and $13,531.25 representing profit on invoices 022175, 022177, 022180, 022184, and 022204. Consequently, I find that Verreault has a possessory lien in the amount of $324,839.01.

IV. L'Administration portuaire de Trois-Rivières

[34] The principal amount of Trois-Rivières' claim is in the amount of $316,468.83. $56,305.83 is the amount of the mortgage it held on the *Chaulk Lifter*. The balance of $260,181.00 is for sums owing on the *Chaulk Determination* for further wharfage, clean-up and her removal as she had been abandoned by her owners.

[35] The claim is not contested save and except that, with respect to the mortgage, Brent and Morris Chaulk submit that under the subordination agreement, Trois-Rivières only has priority over their mortgage in the amount of $17,261.98.

[36] In order to decide this point, the contract between the Chaulks and Trois-Rivières would have to be analyzed. However, it is not necessary to do so as I am subordinating whatever claim the Chaulks have to those of the other creditors.

[37] Consequently, Trois-Rivières is entitled to payment by priority, after Verreault, of $56,305.83 in virtue of its mortgage.

[38] Despite whatever priority Trois-Rivières may have had with respect to the *Chaulk Determination*, it is well established that, as against the sister ship, the claim only carries with it an ordinary right *in rem*, with no priority (*Fraser Shipyard & Industrial Centre Ltd. v Expedient Maritime Co (The Atlantis Two)* (1999), 170 FTR 1; *Holt Cargo Systems Inc v ABC Container Line, N B (The Brussel)* (2000), 185 FTR 145; and *The Nel*, *supra*). Trois-Rivières' claim with respect to the *Chaulk Determination* in the amount of $260,181.00 shall rank *pari-passu* with other ordinary creditors.

V. Brent and Morris Chaulk

[39] The owner of the *Chaulk Lifter*, 662901 N.B. Ltd. may or may not be indebted to the Chaulks. It is clear that the mortgage was an attempt by David Chaulk to give preference to his brother Brent and to his father Morris.

[40] The evidence comprises affidavits from Brent Chaulk, his wife Sherry Chaulk, exhibits attached thereto, and their cross-examinations. Neither Morris Chaulk nor David Chaulk filed affidavits.

[41] Brent Chaulk testified that he was authorized by his father to speak on his behalf, as he is elderly and sometimes gets confused. This raises the specter of *Lloyd's Bank v Bundy*, [1974] 3 All ER 757 (CA) as there is no evidence that Morris Chaulk benefited from independent legal advice.

[42] Brent and Sherry Chaulk were most forthright in their evidence.

[43] Brent Chaulk was owed $305,000 on eight demand promissory notes issued by David Chaulk. The first of the promissory notes is dated September 15, 2008 and the last June 11, 2014. The funds were all transferred directly from Brent Chaulk's account to the account of Chaulk Air Inc. Only one of these loans, the one on June 11, 2014, in the amount of $45,000 was made after 662901 N.B. Ltd. bought the *Chaulk Lifter*. In April 2009, David Chaulk acknowledged in writing that the amount then owing, which was $200,000, had been borrowed "for the cash flow of CAI during the Department of National Defence project".

[44] Brent did not want to be out of pocket as some of the loans to David were with funds taken from his lines of credit or, at least on one occasion, a credit card. It was David who suggested that the promissory notes bear interest at the rate of 12% per annum. He kept up his interest payments until the spring of 2014.

[45] At this point, Brent expressed some concern as he had to pay the interest on his lines of credit himself. David promised him cheques, but they were not forthcoming. Although he had no intention of calling the loans, he pointed out to David that his days as a commercial pilot were coming to an end and that he had to prepare for his retirement.

[46] It was David who proposed that the owner of the *Chaulk Lifter* 662901 N.B. Ltd. issue a promissory note to cover the $305,000 then owed in principal. That note refers to a mortgage which was later executed. David told Brent "Don't worry, you're protected. I bought this ship and here is a marine mortgage. You're protected, you're safe. You will be the first one paid."

[47] Morris Chaulk had advanced to CAI Group $5,000 in September 2013, $30,000 in February 2014 and a final $10,000 June 17, 2014. The balance of $42,000 was covered by a promissory note similar to that issued to Brent Chaulk.

[48] There is no evidence whatsoever that 662901 N.B. Ltd. was given value or consideration which would cause it to mortgage the *Chaulk Lifter* in favour of David Chaulk's father and brother.

[49] Brent Chaulk was not aware of the precise structure of David Chaulk's businesses. He was lending money to assist David in the furtherance of his business interests. He did not take into account that 662901 N.B. Ltd. was a distinct person in law.

[50] Had anyone bothered to put 662901 N.B. Ltd. into bankruptcy, the mortgage being a charge on property in favour of a creditor who was not dealing at arm's length would be void as against the trustee (*Bankruptcy and Insolvency Act*, Chapter B-3, s95). This Court has inherent power to vary the ordinary ranking in the exercise of its admiralty and equitable jurisdiction (*The Kinguk, supra*; and *Ballantrae Holdings Inc v "Phoenix Sun" (The)*, 2016 FC 570).

[51] No doubt the Chaulks lent a helping hand out of love for David. However, that love should not come at the expense of arm's length creditors. Should they have a claim at all against 662901 N.B. Ltd., it ranks after the claims of ordinary creditors. The fund created by the sale of the *Chaulk Lifter* will by then be exhausted.

VI. The Canadian Coast Guard

[52] The Coast Guard has submitted a claim in the amount of $1,839,927.68 for out of pocket expenses incurred as a result of the sinking of the *Chaulk Determination*. The Coast Guard was obliged by law to respond to pollution incidents in Canadian waters and so hired Sauvetage Maritime Ocean Inc. to contain, clean and refloat the *Chaulk Determination*. The sum claimed represents the amounts paid.

[53] Although the Coast Guard undoubtedly enjoys high priority were we dealing with the proceeds of the sale of the *Chaulk Determination*, as opposed to the proceeds of the sale of the *Chaulk Lifter*, it is an ordinary creditor and will rank *pari-passu* with other ordinary creditors.

VII. The Administrator of the Ship-source Oil Pollution Fund

[54] This claim differs from the others in that it is a claim for security in the event that the Fund is obliged to compensate parties who may have suffered damages as a result of the pollution caused by the sinking of the *Chaulk Determination*.

[55] Persons who have suffered actual or anticipated oil pollution damage may, in accordance with s 103 of the *Marine Liability Act*, file a claim with the Administrator if that claim is referable to, in this instance, the Bunker Convention which is Schedule VIII to the Act and which has the force of law in accordance with s 70 of the Act.

[56] Section 102 of the Act gives the Administrator the right to commence an action *in rem* "against the ship that is the subject of the claim, or against any proceeds of sale of the ship that have been paid into court …".

[57] This is the first time that the Administrator has had to proceed against a sister ship. In the normal course, shipowners are well insured with underwriters who provide security without question.

[58] While accepting that her claim against the proceeds of the *Chaulk Lifter* carries with it no priority, the Administrator seeks guidance from the Court as to what the nature of her claim would have been against the *Chaulk Determination*. She submits that she enjoys a maritime lien for damage caused by a ship in accordance with s 22(2)(d) of the *Federal Courts Act*. This is

countered by Trois-Rivières which submits that the Administrator enjoys a special legislative right, that no provision was even made for any priority as against the wrong-doing ship, and that no provision was made to allow her to claim against a sister ship.

[59] Other parties made no submissions to the Court in this regard, and indeed had no need to. Any remarks I would make as to the nature of the claim against the *Chaulk Determination* would clearly be *obiter*, and should be left for another day.

[60] As regards the submission that the Administrator may have no claim at all against the proceeds of the *Chaulk Lifter*, while it is true that s 102 of the *Marine Liability Act* only refers to the proceeds of the sale of the ship which is the subject of the claim, that section also gives the Administrator an action *in rem.* The claim is one governed by Canadian Maritime Law if not under s 22(2)(d) of the *Federal Courts Act*, then certainly under s 22(1). Section 43(8) provides that jurisdiction conferred by s 22 may be exercised *in rem* against any ship that is owned by the beneficial owner of the ship that is the subject of the action.

[61] There is nothing in the *Marine Liability Act* which detracts from that provision, and so I am satisfied that the Administrator has a claim against the proceeds of the *Chaulk Lifter* and will rank *pari-passu* with other ordinary creditors.

[62] In accordance with the Bunker Convention, the security to which the Administrator is entitled is the Canadian equivalent of 1,510,000 Special Drawing Rights (SDR) as defined by the International Monetary Fund. The Administrator had not gotten around to leading evidence as to

the Canadian equivalent. However, it was agreed that basing myself on the breach day rule, I could visit the IMF's website to determine the value of the SDR in Canadian dollars on December 26, 2014, or if there was no quote for that day, on the day next in which a quote was provided. The next quote was on December 29, 2014. The Canadian equivalent of 1 SDR was $1.685130. Consequently the Administrator's claim is for $2,544,546.30 (i.e. 1,510,000 SDR x $1.685130).

[63] The Administrator's share of the proceeds of the sale is less than $45,000. The question arises whether that amount should remain in Court, to be drawn upon if as and when the Administrator approves payments. If no payments would be made, then this amount would be distributed to the ordinary creditors.

[64] As pointed out by Verreault, this process is most impractical and may require numerous counsel to keep their files open for years. To date, one claim has been filed with the Administrator, that of Trois-Rivières. It is not, of course, for the Court to determine whether its claim is covered in whole or in part by the Ship-source Oil Pollution Fund. In addition, the Coast Guard might file a claim.

[65] The most practical way to resolve this matter is to have the funds paid to the Administrator. If as and when problems arise, she may seek directions.

VIII. Ketah Investments Inc.

[66] Ketah's claim arises from a loan agreement made in December 2012 with 662903 N.B. Ltd. That loan was guaranteed by CAI Investments Inc., Chaulk Air Inc., and David Chaulk. The purpose of the loan was to put the ship *Chaulk Tenacity* then in Swansea, Wales, in sufficient condition, free and clear of all claims, to sail to an Eastern Canadian port.

[67] Not only does this claim have nothing to do with the *Chaulk Lifter*, but the *Chaulk Lifter's* owner, 662901 N.B. Ltd., does not figure in the loan in any way. The *Chaulk Tenacity* was not a sister ship as she was in different ownership. Accordingly, this claim is dismissed.

IX. Conclusion

[68] After payment out of $324,839.01 to Verreault and $56,305.83 to Trois-Rivières, of the $463,143.84 presently in Court, there will remain $81,999.00. That amount is to be shared *pro rata* by Trois-Rivières, which has a remaining claim of $260,181.00, the Coast Guard which has a claim of $1,839,927.68, and the Ship-source Oil Pollution Fund which has a claim of $2,544,546.30. Each of these creditors receives a payout of 0.01765449% of the remainder. Trois-Rivières is entitled to $4,593.36, the Coast Guard $32,482.97, and the Administrator of the Ship-source Oil Pollution Fund $44,922.65.

X. Interest

[69] This Court, in the exercise of its admiralty jurisdiction, has considerable discretion with respect to pre-judgment and post-judgment interest. See the *Phoenix Sun*, *supra.* In my opinion,

it would be unfair and unreasonable to award any interest other than that the interest earned on the sums on deposit with this Court which shall accordingly be shared *pro rata*.

XI. Costs

[70] There shall be no order as to costs, other than Verreault's share of the costs in bringing the *Chaulk Lifter* to sale.

JUDGMENT

For reasons given, this Court orders that:

1. Out of the proceeds of the sale of the ship *Chaulk Lifter* the following amounts be paid out:

    a) Verreault Navigation Inc. (its costs of $3,306.23 and possessory lien in the amount of $324,839.01) for a total of $328,145.24;

    b) L'Administration portuaire de Trois Rivières (its mortgage for $56,305.83 plus $4,593.36) for a total of $60,899.19;

    c) The Canadian Coast Guard in the amount of $32,482.97;

    d) The Administrator of the Ship-source Oil Pollution Fund $44,922.65.

2. Accumulated interest in Court shall be shared *pro rata*.

3. There shall be no other Order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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