

Federal Court



Cour fédérale

Date: 20171221

Docket: T-624-15

Citation: 2017 FC 1184

Vancouver, British Columbia, December 21, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TOWN OF SHELBURNE

Plaintiff

and

**THE SHIP KNOWN AS “FARLEY
MOWATT”, AND THE OWNERS AND ALL
OTHERS INTERESTED IN THE SHIP
“FARLEY MOWATT”, AND TRACY DODDS**

Defendants

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The Town of Shelburne (the “Plaintiff”) brings a motion for Summary Judgment or, in the alternative, for a summary trial, pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”) in respect of its claim against the Ship known as “FARLEY MOWATT” (the “Defendant Ship”) and the Owners and all others interested in the Ship “FARLEY MOWATT”

and Tracy Dodds (collectively “the Defendants”). In its Notice of Motion, the Plaintiff seeks the following relief:

An order:

1. Pursuant to *Rule 213* granting summary judgment in favour of the Plaintiff for the entirety of its claim and dismissing the entirety of the Defendants’ counterclaim.
2. Ordering the removal of the Ship “Farley Mowatt” from the Shelburne Marine Terminal (“Terminal”).
3. Awarding costs of this motion and the action to the Plaintiff on a solicitor-client basis; and
4. Providing for the enforcement of the Court’s order.
5. Such further and other relief as the Plaintiff may request and this honourable Court may allow.

II. BACKGROUND

[2] The Plaintiff commenced its action *in rem* by way of a Statement of Claim issued out of this Court on April 21, 2015. On December 14, 2015, the Plaintiff amended its Statement of Claim to include Tracy Dodds as a personal Defendant. In the Amended Statement of Claim the Plaintiff sought the following relief:

1. Judgment against the Defendants in the amount of CAD \$14,009.28 representing fees for berthage and services provided to April 21, 2015 plus interest;
2. Amounts representing fees for berthage and services provided to the Defendants after April 21, 2015, which amounts will be specified before trial;
3. Amounts representing costs and expenses incurred as a result of the Defendant Ship’s sinking at the Plaintiff’s

Marine Terminal on June 25, 2015, which amounts will be specified before trial;

4. All costs of this action;
5. In default of payment, an Order for appraisal and sale of the Defendant Ship, "FARLEY MOWATT";
6. An order for removal for the Ship from the Plaintiff's Marine Terminal forthwith; and
7. Such further and other relief as the nature of the case may require and as this Honourable Court may deem just and proper.

[3] A Warrant for the arrest of the Defendant Ship was issued on April 21, 2015. The Defendant Ship was released from arrest on January 25, 2016.

[4] The following details are taken from the Amended Statement of Claim, the Defence and Counterclaim filed by the Defendants, the Reply and Defence to Counterclaim, as well as from the affidavits of Kyle Ereaux and Dylan Heide, which affidavits were filed by the Plaintiff in support of its motion for Summary Judgment.

[5] Mr. Ereaux is a lawyer with the law firm of Metcalf & Company, solicitors for the Plaintiff and Mr. Heide is a Chief Administrative Officer with the Plaintiff.

[6] The Plaintiff operates the Shelburne Port Authority, including the Shelburne Marine Terminal. The Defendant Ship entered the port of Shelburne on or about September 9, 2014 and moored at the Marine Terminal operated by the Plaintiff. On or about September 10, 2014, a "Berthing Agreement" (the "Agreement") was executed between the Shelburne Port Authority

and the Defendant, Mr. Dodds. Among other things, that agreement provided for the payment of berthage fees by the Defendant Mr. Dodds to the Plaintiff. According to the affidavit of Mr. Heide, no berthage fees have been paid from September 2014 to date.

[7] The Defendant Ship sank at the pier in June 2015. According to the evidence of Mr. Heide, the Plaintiff incurred expenses in connection with the refloating operation that was conducted by the Canadian Coast Guard and the Ship-Source Pollution Fund. Specifically, the Plaintiff paid for the security detail that was required during the refloating operation.

[8] In its Amended Statement of Claim, the Plaintiff sought an Order for the immediate removal of the Defendant Ship from its premises. That pleading was served on December 14, 2015, on the solicitors for the Defendants. By a request for an urgent hearing, the Plaintiff submitted a Notice of Motion on December 15, 2015, seeking an interlocutory injunction to have the Defendant remove the Ship from its Terminal.

[9] In the Statement of Defence filed on December 24, 2015, the Defendants admitted the allegations set out in paragraphs 2, 3 and 4 of the Amended Statement of Claim. Paragraph 4 alleges that the Defendant Mr. Tracy Dodds “is an individual understood by the Plaintiff to be the Owner of the Defendant Ship at all material times”.

[10] The Defendants filed a Statement of Defence on December 24, 2015. They deny the allegation in the Statement of Claim relative to the execution of the Agreement, but claim that the berthing was pursuant to a berthing agreement dated September 10, 2014.

[11] In their Defence, the Defendants plead that the berthing agreement was amended orally, to the effect that the Plaintiff was aware that the Defendant Ship would be scrapped for salvage and the proceeds of that operation would be used to pay berthage fees.

[12] The Defendants also plead that the agents and employees of the Plaintiff prevented their access to the Defendant Ship which led to the sinking of the Defendant Ship at the dock. Further, they plead that the agents and employees of the Plaintiff interfered with the sale of the engine from the Defendant Ship.

[13] The Defendants filed a Counterclaim in which they claim that the Plaintiff is responsible for preventing the Defendants from servicing the Defendant Ship while in the possession of the Plaintiff.

[14] The Defendants further claim that the engine and other equipment, valued at \$60,000, sustained damage as a result of the sinking.

[15] The Plaintiff filed its Reply to the Defence on December 29, 2015. It denies the allegations in the Defence, in particular that any of the parties intended to scrap the Defendant Ship at the Terminal or that the payment of berthage fees was subject to proceeds from scraping the Defendant Ship.

[16] As well, the Plaintiff also denies that it took possession of the Ship or assumed any responsibility for its maintenance.

[17] In its Defence to the Defendants' Counterclaim, the Plaintiff denies all allegations and any liability to the Defendants. It alleges that if any damages were sustained by the Defendants, such damage resulted from the Defendants' failure to maintain the Ship.

[18] Following a hearing on December 30, 2015, Justice Fothergill issued an Order on December 31, 2015, which provide in part as follows:

Tracy Dodds shall cause the Ship "Farley Mowatt" to be removed from the Shelburne Marine Terminal at his own risk and expense within 15 days of the date of this order;

[...]

If there are circumstances beyond Mr. Dodds' control that render it impossible or not reasonably practical for him to remove the Ship "Farley Mowatt" from the Shelburne Marine Terminal within 15 days of the date of this order, he may bring a motion, supported by evidence, to vary this order;

[19] By a Notice of Motion filed on January 21, 2016, to be dealt with in writing pursuant to the Rules, the Plaintiff sought an Order that the Defendant Tracy Dodds show cause why he should not be held in contempt of the Order made on December 31, 2015, requiring the removal of the Defendant Ship within 15 days of that Order.

[20] A Show Cause Order was signed by Prothonotary Morneau on February 11, 2016, requiring the Defendant Mr. Dodds to move the Defendant Ship by February 26, 2016 and further if removal did not take place, to appear at a hearing in Halifax, Nova Scotia on March 16, 2016 to Show Cause why he should not be held in contempt.

[21] The Defendant, Mr. Dodds, did not move the Ship within the time limit and the Plaintiff sought another Order for the removal of the Ship. A Consent Order was signed by Justice McDonald on March 23, 2016, requiring the removal of the Ship by April 8, 2016.

[22] Upon the consent of the parties, an Order was signed by Justice Mactavish on May 10, 2016, finding the Defendant Mr. Dodds to be in contempt of Orders made on December 31, 2015, February 11, 2016 and April 11, 2016.

[23] The Order of May 10, 2016 condemned Mr. Dodds to pay a fine of \$5,000.00 to the Plaintiff and a fine of \$5,000.00 to the Receiver General of Canada. The Order also provided for the issuance of a warrant for the arrest and imprisonment of the Defendant Mr. Dodds, for a period of twenty days.

[24] However, the payment of the fines and the order for the committal and detention of Mr. Dodds were suspended until May 31, 2016 to allow Mr. Dodds to purge his contempt by removing the Defendant Ship at his “sole cost, risk and expense”.

[25] The Defendant Ship was not removed as of May 31, 2016 and on June 1, 2016, a warrant for the committal of Mr. Dodds was signed by Justice Mactavish. According to the affidavit of Mr. Heide, Mr. Dodds was arrested and imprisoned in August 2016, pursuant to the Order of May 10, 2016.

III. The Motion for Summary Judgment

[26] The Plaintiff filed its motion for Summary Judgment on February 28, 2017 and the motion was argued on June 13, 2017.

[27] The Defendant Mr. Dodds did not appear upon the hearing of the motion for Summary Judgment nor did he file any responding materials.

IV. Discussion and Disposition

[28] Motions for Summary Judgment are governed by Rules 213 to 216 of the Rules. The test upon a motion for Summary Judgment is that there is no genuine issue for trial; see the decision in *Manitoba v. Canada* (2015), 470 N.R. 187 (F.C.A.) at paragraphs 11-17.

[29] Upon a motion for summary judgment, each party bears the burden of putting its “best foot forward”; see the decision in *Moroccanoil Israel Ltd. v. Lipton*, 2013 FC 667.

[30] In determining this motion, both the pleadings and the evidence require consideration. No evidence or arguments were presented by or on behalf of the Defendants; their position can be assessed only by reference to the pleadings filed.

[31] The Plaintiff seeks judgment for outstanding berthage fees, as well as all costs and expenses that were incurred as the result of the sinking of the Defendant Ship at the Terminal

on June 25, 2015. It also seeks recovery of all costs of this action and an Order for the removal of the Defendant Ship from the Terminal.

[32] The affidavit of Mr. Heide provides background information about the circumstances giving rise to the Plaintiff's claim. This evidence is not contradicted since Mr. Heide was not cross-examined.

[33] I am satisfied that the Agreement was executed by the Defendant Mr. Dodds whose signature appears on page 4 of the Agreement as "Vessel Owner". Further, in the absence of evidence to the contrary, I find that the Defendant Mr. Dodds is the Owner of the Defendant Ship.

[34] The Agreement clearly provides that the Defendant Ship can be moored at the Plaintiff's property, subject to the terms set out, including the payment of berthage fees. I refer to Clause 6 of the Agreement which deals with the obligation to pay berthage fees. Clause 6 provides as follows:

The Vessel Owner agrees to pay Berthage Fees PRIOR to berthing the Vessel based on the size and type of vessel in accordance with the Rate Schedule incorporated herein as Schedule 1 ("Rate Schedule"). If the Vessel Owner fails to pay in advance, the daily berthage rate set out in the Rate Schedule will apply. Berthage Fees shall thereafter be paid within 30 days of billing.

[35] Clause 11(c) is also relevant and provides as follows:

This permission to berth the Vessel may be terminated immediately by the Port Authority in the event that: (i) Berthage

Fees and any other charges or sums due remain unpaid for 30 days or more, (ii) if there is any breach of the terms of this Agreement, or (iii) the Port Authority, in its sole discretion, determines it to be necessary for the efficient and/or safe operation of the Premises or Terminal.

[36] Mr. Heide deposed that he gave written notice on December 23, 2014, to the Defendant Owner to remove the Defendant Ship immediately, due to non-compliance with the Agreement. At paragraph 13 of his affidavit, he deposed that the Plaintiff was prepared to waive the outstanding fees if the Defendant Ship was removed by January 5, 2015. The Defendant Ship was not removed and no payment was made for berthage.

[37] Clause 11(c) clearly grants the authority to terminate the Agreement if berthage fees remain unpaid for 30 days or more. On the basis of the evidence submitted, that is the case here. Mr. Heide deposed at paragraph 10 of his affidavit, that no berthage fees were paid and that other provisions of the Agreement were breached.

[38] The question, then, arises whether the Berthing Agreement has been terminated.

[39] The Defendant Ship was present at the Plaintiff's premises pursuant to the Berthing Agreement but no fees had been paid prior to the commencement of the within action and prior to the hearing of the motion for Summary Judgment.

[40] In my opinion, the contract has been terminated as the result of the failure of the Owner of the Defendant Ship to pay the berthage fees; see the decision in *False Creek Harbour Authority v. "Shodan" (The)*, 2002 FCT 275.

[41] Nonetheless, I am satisfied that the Defendants are obliged to pay berthage fees and there is no genuine issue for trial in that regard.

[42] Clause 12 of the Agreement addresses consequences of termination and provides as follows:

Upon termination of this permission to berth, the Vessel Owner shall pay all outstanding Berthage Fees, charges and other sums due and remove the Vessel and any other property immediately. If the Vessel Owner fails to do so, the Port Authority shall have the right to seize the Vessel, remove it from the Premises, and even though it is agreed that the Port Authority is not a bailee of the Vessel the Port Authority may sell the Vessel at non-judicial sale as if the Port Authority was a storage warehouse keeper under the *Storage Warehouse Keepers Act*. R.S.N.S., c. 447 and recover unpaid Berthage Fees or other debts due and all related costs including survey fees, towage, storage, bailiff and legal fees. The Port Authority shall not be liable in any manner for the safekeeping and condition of the Vessel.

[43] This clause imposes liability upon the owner of a berthed ship to pay all outstanding berthage fees and “other debts and all related costs” upon the termination of the permission to berth.

[44] The Plaintiff also seeks recovery of the berthage fees incurred after April 21, 2015 and for other services provided to the Defendant Ship. The Plaintiff claims the amount of \$73,034.95 as set out in Exhibit T to the affidavit of Mr. Heide, for the period September 10, 2014 to April 8, 2017.

[45] In my opinion, the obligation upon the Defendants to pay berthage was a continuing one, even after the termination of the permission to berth. There is no genuine issue for trial arising in this regard, in view of Clause 6 of this Agreement cited above. The amount of the recoverable berthage fees will be discussed below.

[46] The claim for recovery of costs for ancillary services will be discussed below.

[47] The Plaintiff incurred costs for refloating and stabilizing the Defendant Ship after the July 2015 sinking. It also incurred costs for security. It claims recovery of these expenses in the amount of \$13,823.34, as set out in Exhibit U to Mr. Heide's affidavit.

[48] The Plaintiff also spent money on clean-up costs and services necessary for maintenance after the Defendant Ship was effectively abandoned after July 2016. The charges for such maintenance are set out in Mr. Heide's affidavit at paragraph 47 as follows:

The sum of CAD \$21,338 in relation of costs incurred by the Town to date as a result of the Owner abandoning it at the Terminal after July 2016... as follows:

Invoice	Amount	Description
a. Harlow Construction:	\$644	Disposal of debris from the Ship left by the Owner on the Terminal
b. West Green Harbour C&D:	\$271.20	Tipping fees for disposal of debris
c. Robicheau's Pumping:	\$16,795.75	Pumping of Ship
d. Spartan Marine:	\$3,602.49	Rope to secure Ship

e. Faye's Marine Services: \$24.56

Labour to put in rope to secure Ship

[49] Back-up invoices for these charges are attached to Mr. Heide's affidavit as Exhibit V.

[50] Clause 4(c) of the Berthing Agreement provides as follows:

(c) In addition to the foregoing, the Vessel Owner shall be responsible for any loss or damage in connection with the use of the Premises and Terminal including, without limiting the generality of the foregoing (i) any damage to the Port Authority Group property including the Premises and Terminal, (ii) any injury or death of any member of the Port Authority Group, (iii) any liability in respect of wreck removal or in respect of preventing or abating pollution originating from the Vessel Owner's Group and (iv) any loss, damage, injury or death to third parties, resulting wholly or partly from any acts or omissions of the Vessel Owner Group or arising from the occupancy or use of the Premises or Terminal by the Vessel Owner Group regardless of cause, and the Vessel Owner will indemnify, defend, protect and hold harmless the Port Authority Group from (sic)any and against all claims, costs, expenses, actions, proceedings suits, demands and liabilities arising out of or in connection with such loss, damage, personal injury or death.

[51] In my opinion, the language of this clause is broad enough to cover the Plaintiff's claim for recovery of the costs both for refloating the Defendant Ship after the June 2015 sinking, as well as the costs of maintenance at the Terminal from July 2016 onwards. It follows that there is no genuine issue for trial relative to the interpretation and application of this clause.

[52] The Plaintiff claims berthage charges, plus interest, in the amount of \$62,336.50, as set out in Exhibit T attached to the affidavit of Mr. Heide, at pages 109 to 139 of the Plaintiff's record. However, I am not satisfied that Exhibit T correctly sets out recoverable berthage fees.

[53] The charges for the period September 9, 2014 to January 8, 2015 are found at pages 123, 124, 125 and 126 of that record. Each invoice for these four months shows a charge of \$1,674.86, including HST. These charges total \$6,699.44.

[54] The charges for the period January 9, 2015 to December 8, 2015 are found at pages 127 to 139 of the Plaintiff's record. There are 11 invoices, each in the amount of \$1,674.86, including HST; the total charges for this period are \$18,423.46.

[55] The charges for the period January 9, 2016 to December 8, 2016 are set out on pages 121, 120, 119 and 117 of the Plaintiff's record. These charges total \$18,423.46.

[56] The charges for the period December 9, 2016 to April 8, 2017 are set out on pages 116, 112, 113, and 114 of the Plaintiff's record. The charges total \$6,699.44.

[57] The grand total of these charges is \$50,245.80.

[58] Pages 122, 118, 135 and 136 are also part of Exhibit T to Mr. Heide's affidavit.

[59] Page 122 records a berthage charge, to Mr. Tracy Dodds, for the “Kings Endeavour” for September 16, 2014. There is no evidence that this charge is relevant to the within motion for Summary Judgment and will not be considered.

[60] Page 118 shows a charge for Woodworkers Invoice # 487554 for duct tape, no trespassing and keep out signs for the “Farley Mowatt”, in the total amount of \$ 14.88. This invoice is dated September 2, 2016. This would be an ancillary cost incurred by the Plaintiff.

[61] Page 135 records charges for supplies purchased to secure the wharf relative to the Defendant Ship. The noted supplies were danger tape, polye braid rope, LED flashlight and no trespassing signs. The invoice shows the date of August 13, 2015, and a total charge of \$ 47.44. These charges will be allowed, in addition to the amount set out in Exhibit V.

[62] Page 136 is an invoice for security services provided in the period July 16-31, 2015 for security; the charge is \$ 10,558.44. This invoice does not refer to the engagement of an outside company and is issued in the name of the Plaintiff. However, this charge relates to a period that is covered by invoices in Exhibit V and there is no basis for double recovery. This charge will not be allowed.

[63] Pages 110 and 111 show a running tally of the Plaintiff’s charges. This tally is not correct since it shows some duplication and is unreliable. Page 111, however, also shows interest charges in the amount of \$12,090.70.

[64] Clause 9 of the Agreement addresses interest as follows:

If Berthage Fees and other monies due hereunder are not paid in full 30 days after billing interest is payable as set out in the Rate Schedule.

[65] No Schedule is attached to the Agreement that appears as Exhibit B to the affidavit of Mr. Heide. In these circumstances, I am not satisfied that the Plaintiff has proven a right to recover interest.

[66] The Plaintiff seeks an Order for the removal of the Defendant Ship from the premises in Shelburne.

[67] An Order in that regard was made by Justice Fothergill on December 31, 2015 but the Defendant Ship was not removed.

[68] Subsequent to the hearing of this **present** motion, a letter dated August 4, 2017 was provided by counsel for the Plaintiff advising that the Defendant Ship had been moved from the Terminal. This issue is now moot and requires no further consideration.

[69] I turn now to the Counterclaim advanced by the Defendants.

[70] In the Counterclaim, the Defendants plead that the Plaintiff prevented access to the Defendant Ship for the purpose of service and maintenance. They allege that the Plaintiff was in possession of the Defendant Ship and that the sinking occurred as the result of inattention by

the Plaintiff. They also claim that there was damage to the engine, bow thruster and other salvage items valued at \$60,000.

[71] The Defendants seek to attribute responsibility for the deterioration of the Defendant Ship to the actions of the Plaintiff. They also seek to recover damages for alleged reduction in value of the engine and other equipment.

[72] In its Defence to the Counterclaim, the Plaintiff denies that the Defendant suffered any damage but if damage was sustained, the Plaintiff relies upon the indemnity and insurance clauses in the Berthing Agreement. The Plaintiff argues that any damages suffered by the Defendants were due to the negligence of the Defendants.

[73] In my opinion, there is no serious issue for trial arising from the Defendants' counterclaim.

[74] The terms of the Berthing Agreement provide that the Defendant Owner was responsible for the maintenance of the Defendant Ship. In any event, there is no evidence that any actions or omissions of the Plaintiff contributed to damage to the Defendant Ship or to any reduction in her value. I am satisfied that no genuine issue arises from the Defendants' Counterclaim and the Counterclaim will be dismissed.

[75] The Plaintiff seeks recovery of legal fees incurred in prosecuting this action to judgment.

[76] Clause 12 of the Berthing Agreement provides that the Plaintiff can seek recovery of its legal costs in relation to recovery of unpaid berthage fees “or other debts due and all related costs” including legal fees, upon termination of the “permission to berth” provided by the Agreement.

[77] Clause 13 also refers to recovery of legal fees and provides as follows:

The Port Authority shall have a lien against the Vessel in respect of any sum or other debts howsoever or whatsoever due to the Port Authority under this Agreement and the Vessel Owner shall pay to the Port Authority all reasonable costs and expenses of recovering same, including legal fees, howsoever and whatsoever incurred by or on behalf of the Port Authority.

[78] I have reviewed the legal bills that were provided by counsel for the Plaintiff. These accounts cover the services from April 21, 2015 to December 12, 2016. Total charges for services including HST are \$65, 929.31.

[79] The legal bills also record disbursements in the amount of \$5,775.31.

[80] I am not satisfied that the Plaintiff should receive the total amount claimed for legal services. Charges are made for services that appear not to be directly related to this action for recovery of unpaid berthage fees and maintenance of the Defendant Ship, for example work performed in drafting media releases.

[81] As well, the legal bills refer to services relative to steps that were not taken, for example the entry of default judgment and steps to sell the Defendant Ship. I will allow recovery of 75% of the amount claimed for legal services, including HST, in the amount of \$49,446.99.

[82] The claim for disbursements, including HST, will be allowed.

[83] The Plaintiff seeks elevated costs in respect of this motion and in respect of the action, generally.

[84] The Plaintiff also argues that punitive damages should be awarded in light of the continuing disregard of the Defendant Owner, Mr. Tracy Dodds, of several court Orders directing him to remove the Defendant Ship. It submits that the fact that the Defendant Mr. Dodds had been found in contempt should serve as a basis for awarding punitive damages and that the costs award made by Justice Fothergill be “topped up” and solicitor and clients costs be awarded to the Plaintiff.

[85] I am not persuaded by the Plaintiff’s submissions on the issues of elevated costs and punitive damages.

[86] The Order of February 11, 2016 was a “Show Cause” Order issued pursuant to Rule 467 of the Rules. That Rule provides as follows:

(1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall

(1) Sous réserve de la règle 468, avant qu’une personne puisse être reconnue coupable d’outrage au tribunal, une

<p>be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt</p>	<p>ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :</p>
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| <p>(a) to appear before a judge at a time and place stipulated in the order;</p> | <p>a) de comparaître devant un juge aux date, heure et lieu précisés;</p> |
| <p>(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and</p> | <p>b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;</p> |
| <p>(c) to be prepared to present any defence that the person may have.</p> | <p>c) d'être prête à présenter une défense.</p> |

[87] The Plaintiff alleges that the Defendant, Mr. Dodds, breached several Orders, including the Order of February 11, March 23 and April 11, 2016.

[88] Only one Contempt Order was issued and that was done on May 10, 2016. I do not see how the Defendant Mr. Dodds could be found in contempt of the Orders of February 11, March 23, and April 11, when no finding of contempt had been made.

[89] In the circumstances, I decline to award any particular costs relative to these Orders. It appears that no costs were awarded upon the issuance of the May 10, 2016 Order and none will be awarded now.

[90] The Defendant, Mr. Dodds, was found in contempt and he was sentenced; he was imprisoned in discharge of the penalty. I am not persuaded that I should increase any costs award against the Defendants in respect of the Contempt Order.

[91] Reliance on the decision in *Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 392 F.T.R. 258, concerning protection of proprietary rights, does not assist the Plaintiff.

[92] The Plaintiff did not plead any interference with a proprietary interest. The principles about the assessment of damages and the award of costs in the context of *Louis Vuitton Malletier S.A.*, *supra*, are not applicable in the present context of breach of a contract for the berthing of a ship.

[93] The Plaintiff seeks costs of this motion and the action on a solicitor-client basis.

[94] An award of costs lies fully in the discretion of the Court; see Rule 400(1) of the Rules. An award of solicitor and client costs is exceptional; see the decision in *Young v. Young*, [1993] 4 S.C.R. 3 at page 134, where the Court said as follows:

The Court of Appeal's order was based on the following principles, with which I agree. Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties...

[95] The Defendant Mr. Dodds consented to the entry of a contempt Order against him but otherwise there is no evidence in this case of “reprehensible, scandalous or outrageous conduct” on the part of the Defendants and no justification to award solicitor and client costs on this action.

[96] In the exercise of my discretion, costs on this motion will be based on Tariff B, Column III, as set out in Rule 407 of the Rules.

V. Conclusion

[97] Accordingly, the Plaintiff’s motion for Summary Judgment is granted in part. The Plaintiff is entitled to recover the following amounts:

- i) Amount of outstanding berthage for September 9, 2014 to April 8, 2017 in the amount of \$50,245.80;
- ii) Outstanding berthage accrued from April 9, 2017 to the date of removal of the Defendant Ship;
- iii) Costs related to clean-up costs and maintenance of the Defendant Ship after July 2016, \$21,338.00;
- iv) Ancillary costs relative to securing of the Defendant Ship in the amount of \$62.32;
- v) Security costs in the amount of \$13, 823.24;
- vi) Partial recovery of legal fees and HST in the amount of \$49,446.99;
- vii) Recovery of disbursements including HST in the total amount of \$5,775.31;
- viii) Costs of this Motion on the basis of Column III of Tariff B as set out in the Rules.

JUDGMENT

THIS COURT'S JUDGMENT is that the Summary Judgment is granted to the Plaintiff as follows:

1. Amount of outstanding berthage for September 9, 2014 to April 8, 2017 in the amount of \$50,245.80;
2. Outstanding berthage accrued from April 9, 2017 to the date of removal of the Defendant Ship;
3. Costs related to clean-up costs and maintenance of the Defendant Ship after July 2016, \$21,338.00;
4. Ancillary costs relative to securing of the Defendant Ship in the amount of \$62.32;
5. Security costs in the amount of \$13, 823.24;
6. Partial recovery of legal fees and HST in the amount of \$49,446.99;
7. Recovery of disbursements including HST in the total amount of \$5,775.31;
8. Costs of this Motion on the basis of Column III of Tariff B as set out in the Rules.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITOR OF RECORD

DOCKET: T-624-15

STYLE OF CAUSE: TOWN OF SHELBURNE v. THE SHIP "FARLEY
MOWATT" ET AL

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: JUNE 13, 2017

JUDGMENT AND REASONS: HENEGHAN J.

DATED: DECEMBER 21, 2017

APPEARANCES:

Eric Machum
Kyle Ereaux

FOR THE PLAINTIFF

SOLICITOR OF RECORD:

Metcalf & Company
Halifax Nova Scotia

FOR THE PLAINTIFF