



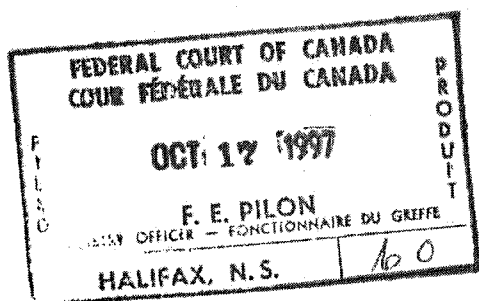
T-2514-96

BETWEEN:

ANATOLIJ LOGUNOV ET AL

Plaintiffs

- and -



THE OWNERS, UAB AZALIJA, AND ALL
OTHERS INTERESTED IN THE SHIP "SHEDUVA"

Defendants

REASONS - TAXATION

F. Pilon
Taxing Officer

The Ship "Sheduva" was sold by Court Order on June 30, 1997 for the purchase price of \$136,790.00. Mr. John MacDonald submitted the Marshall's Bill of Costs for taxation pursuant to 1007(8) on September 4, 1997 along with an Affidavit of Pauline Butler. This matter came before me at St. John's Newfoundland on October 3, 1997. Ms. Pauline Butler, the Enforcement Officer at the Sheriff's Office, was present at the hearing to assist Mr. MacDonald and her solicitor filed another affidavit of Ms. Butler in support of the Sheriff's Bill of Costs. Mr. John Joy is the solicitor for the Plaintiffs, Mr. Richard Collins is acting on behalf of the Harbour Authority of Harbour Grace and Mr. Brad Wicks is representing the claimant Royal Fishing Seafood Ltd. The latter was assisted by Ms. Lee Ann Montgomery, a company representative. Notice of the taxation of the Marshall's costs had been served upon all interested parties by Mr. MacDonald.

At the beginning of the hearing Mr. Joy indicated that all the interested parties agreed upon all the items listed in the Bill of Costs with the exception of three. Parties are objecting to the following three items:

1. The amount of the Sheriff's Commission calculated at \$7,089.50
2. The amount of 4,256.00 UK pounds for advertising costs on the Lloyd's List.
3. The inclusion of the claim of the Harbour Grace Port Authority in the amount of \$20,300.00.

Mr. MacDonald said that all parties will be consenting to his filing of a Notice of Motion for payment out of Court in the amount of \$37,563.70 pursuant to Rule 1008(3) for all the items agreed upon. The record shows that motion was filed on October 8, 1997.

The three contested items are discussed below:

THE AMOUNT OF THE COMMISSION

I heard considerable argument from all Counsel present on the subject of the Marshall's commission particularly from Mr. John Joy. His presentation was convincing as well as brilliant.

Several days following the hearing I came across a report of Taxing Officer Tait in the case of West Line Inc. et al v. the Ship "Xanadu" et al, Court file number T-3709-73. In his report, Mr. Tait concluded that Taxing Officers did not have the authority to vary the amount of poundage or commission received by a Sheriff. According to him, the discretion to increase or decrease that amount clearly lies with the Court. He referred to the provisions of paragraph 9 of Tariff "A" which reads as follows:

"Notwithstanding sections 7 and 8, the fee or allowance or fee for realization on execution, or "poundage", that may be

taken and received by a sheriff may be increased or decreased in the discretion of the Court on the application thereto of any interested party."

Moreover Mr. Tait determined that if the amount claimed by the Marshall is correctly calculated in accordance with paragraph 7 of Tariff "A", the taxing officer is without authority to vary it. Mr. MacDonald submits that the amount of the commission is made pursuant to paragraph 7 of the Tariff "A" which reads:

"A sheriff may take and receive for a service rendered by him the fee or allowance permitted by law for a like service in the superior court of the province in which the service was rendered."

The fee permitted by law in the province of Newfoundland is prescribed at paragraph 1(g) of the Sheriff's Fee Schedule. The Sheriff is entitled to a commission as follows:

20% on the first \$1,000.00;
10% of its next \$2,000.00; and
5% on the balance.

The fee or commission in the amount of \$7,089.50, having been correctly calculated, I believe I have no alternative but to allow it as presented. In my view the discretion to vary the Sheriff's commission lies only with a Judge of the Court and not with the taxing officer. It is unfortunate that this issue was not raised at the taxation hearing; it would have saved time and effort on behalf of all parties.

ADVERTISEMENT ON THE U.K. LLOYD'S LIST

The invoice for this expense is in the amount of \$4,256.00 Sterling Pounds which would convert to approximately \$9,000.00. Ms. Butler explained she could not make it to the office on April 23, 1997 due to a severe snowstorm. On the next day she discovered that her staff had

placed the advertisement without being authorized; she tried to stop it but it was too late. It is admitted by the Sheriff that this advertisement was placed in error.

Mr. MacDonald argues that this is one of the issues of the financial accountability and the risk that the Sheriff's office assumes by arranging judicial sale of ships. Counsel refers to the provisions of the Order for sale at paragraph 8(a):

"A public auction for the ship Sheduva shall be advertised once between the date of this Order and May 1st, 1997 in each of the following publications and such other publications and in such frequency, but not less than the above stated, as the Marshall deemed appropriate or as the broker recommends".

In his opinion the authority to place additional advertisement is provided for in the Court Order, although in this instance it is admitted to have been done by mistake.

Mr. Wicks argues that the record shows that this advertisement was of very limited value. He supports the power of the Sheriff to place additional advertisements if deemed necessary and that indeed this was done in the present case with the consent of all parties who agreed to publish the sale of the ship once in the May edition of EMAP Business Communication Ltd. at the cost of \$1,800.00. However, the placing of the advertisement in Lloyd's List was an unfortunate error and regrettably counsel maintains it should not be allowed because of the limited fund available to the creditors from the proceeds of sale. Finally, Mr. Wicks refers to the wording of the Commission for Sale as the authority to the Sheriff and observes that the terms here are much more vague. Mr. Collins supported Mr. Wicks' arguments.

Mr. Joy said that, although he sympathizes with the employees in the Sheriff's office who are often working under intense pressure, this invoice should come out of the general revenue of the Province of Newfoundland. He suggests that one has to keep a sense of proportion

here. Authorized expenses for advertisements are already at approximately \$12,000.00. Adding this additional invoice of \$9,000.00 would be unfair when one considers the existing fund and the fact that many creditors will never get paid. Finally, Mr. Joy submits that in this particular action the sale of the ship was entirely due to the initiative and efforts of the crew; they actually found the buyer. In his view this item in the Bill of Costs should be disallowed.

In my opinion the circumstances of this case support the disallowance of this item. Regretfully, an error in communication within the Sheriff's Office lead to the placing of the advertisement. I think that once the mistake is admitted, the other creditors should not have to be penalized.

CLAIM FROM THE HARBOUR GRACE PORT AUTHORITY

This claim in the amount of \$20,300.00 is for wharfage dues for the ship from November 16, 1996 to June 6, 1997. Mr. Collins, who is representing this claimant, had submitted two invoices to the Sheriff for inclusion in his Bill of Costs. Counsel argues that wharfage dues are payable even in the absence of a formal agreement between parties. He refers to the case of DeWolf v. Punchard et al, a Nova Scotia decision dated July 15, 1873. That case can be summed up as follows; Plaintiff was proprietor of a wharf at Wolfville, Nova Scotia and the Defendants were the contractors for building the Windsor & Annapolis Railway, and, while so engaged, persons in their employ had used the wharf for landing rails, etc. Plaintiff claimed \$500.00 for the wharfage of goods landed upon its wharf for Defendants, at their request; and for dockage of vessels at the Plaintiff's wharf for Defendants at their request. The Court decided that the Defendants', having used the Plaintiff's wharf, the law raised an implied contract that they would be paid a reasonable sum for this use and occupation.

Mr. Collins then refers to a decision of the Exchequer Court of Canada in Her Majesty the Queen et al v. the Ship "City of Windsor" et al, a decision brought to his attention by Mr. Joy. At page 236 The Honourable Mr. Justice McDougall stated:

"Where a party in an action in rem has incurred costs which have benefited not only himself but parties in other actions against the same property, the costs so incurred by him for the benefit of all, will if the proceeds of the property are insufficient to satisfy all claims in the various actions, be paid to him out of the fund in Court in priority and before any other payment is made thereabout"¹

Mr. Collins maintains that safekeeping of the ship for 192 days in Harbour Grace while under arrest supports his view that costs incurred by the Port Authorities for the benefit of all should be considered in priority of other claims. Finally counsel refers to the case of Banco A. Basil S.A. v. Ship "Alexandros G. Tsavliris et al"². In his Judgment The Honourable Mr. Justice Gibson analyzed the claim of Fraser Surrey Docks Ltd. and concluded as follows at page 286:

"At no time following the arrest of the Defendant Ship was an agreement between the Marshall and Fraser Survey entered into under which the Marshall agreed to assume Fraser Surrey's deck charges as Marshall's expenses".

In reply, Mr. MacDonald explained that this item, although part of the Marshall's Bill of Costs, is not accepted as such. The two invoices of the Grace Harbour Port Authority were sent to the Sheriff to be included in his Bill of Costs although it was done for convenience's sake only and objected to by the Sheriff as "genuine" Marshall's expenses. Mr. MacDonald refers to Rule 1003(9) which clearly provides that all costs and expenses to maintain the ship remains with the owner of the ship even after the ship is placed under arrest. Rule 1003(9) states:

¹(1896) Exchequer Court Reports, 5, page 223

² 68 F.T.R., 285

"Service of a warrant under paragraph (6) does not vest possession in, or impose responsibility for the care and maintenance of the property arrested on, the marshal or other officer by whom the seizure was effected, but such possession and responsibility shall continue in the persons in possession of the property immediately before the arrest. No such property, while under arrest, shall be moved without the authority of the Court or the consent of all interested parties."

Counsel says that all parties present are claiming equity to try to recover some of their costs and he thinks that other parties have more valid grounds to support their claim. His position is that these wharfage charges are not a valid Marshall's costs.

Mr. Wicks explains that the Marshall has not really included these invoices in its costs except from the point of view of engaging the debate and that the Marshall does not claim payment of those funds as part of its expenses and refers to the decision of the Federal Court in Banco Da Brasil S.A. (supra) which appears to support the position of those who oppose the validity of this claim as Marshall's costs.

Mr. Joy begins his argument by mentioning that under the Canada Ports Corporation Act, Parliament gave the Corporation a high statutory lien but clearly subject to seamen's wages. Furthermore, it is his position that under the Federal Court Rules the Sheriff assumes no responsibility for the care and maintenance of the ship under arrest until there is an Order of the Court for possession and even then the Marshall is only responsible for the obligations that he has contracted in a reasonable manner. Mr. Joy indicates that this claimant should not have sent outstanding invoices for deck charges to the Marshall but instead should have tried to recover those from the owner of the ship.

In my opinion this claim cannot be allowed as presented. Mr. MacDonald states that the Sheriff does not regard it as Marshall's costs. It was included in the Bill of Costs after the two invoices were received at the Sheriff's office. Ms. Butler testified at paragraph 16 of her Affidavit filed on September 4, 1997 that these charges are not proper Marshall's costs.

I suggest that arguments supporting this claim could properly be addressed before the Court at the time ranking of priorities are argued.

The Bill of Costs contains a claim for \$5,000.00 for deductible insurance. Ms. Butler testified she had received a statement from the solicitors for the Harbour Grace Port Authority alleging that the "Sheduva" had caused damage to the pier during a storm. Parties understand that the claim is being investigated by the insurers and if the claim is paid the amount of \$5,000.00. US deductible will be due under the Hull and Machinery Insurance Policy. There is agreement that this amount should be set aside until that claim is disposed of.

Mr. Joy made further submissions regarding the plaintiff's legal costs suggesting these ranked along with the Marshall's expenses. In my view, it would be improper for a taxing officer to comment on this issue; legal arguments can only be made to a Judge at the hearing of priorities at a later date.

During this hearing I have had a lot of sympathy for the Plaintiff's difficult and exceptional situation throughout the judicial sale process as well as for all the other interested parties who stand to lose substantial amounts of money.

In conclusion, my report to the Court is to the effect that:

1. I would allow the full amount of the Marshall's commission calculated at \$7,089.50;
2. I would disallow the amount of 4,256.00£ for the erroneous advertisement in Lloyd's List; and
3. I would also disallow the claim in the amount of \$20,300.00 for harbour dues to the port authority of Harbour Grace on

the basis that it is not a proper Marshall's cost in the circumstances.

I am very grateful for the assistance and extensive research of counsel in this matter.

Dated at Halifax, Nova Scotia this 17th day of October, 1997.

FRANÇOIS PILON
Taxing Officer