Federal Court  Cour fédérale

Date: 20221005

Docket: T-279-22

Citation: 2022 FC 1375

Ottawa, Ontario, October 5, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

INAMINKA MARINE SERVICES LIMITED., a body corporate

Plaintiff

and

CANADA FLUORSPAR (NL) INC., a body corporate

Defendants
(*In Personam*)

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"

Defendants
(In Rem)

<u>CORRECTED</u> ORDER AND REASONS

<u>(Corrected October 7, 2022, under Rule 397(2), to include the release from arrest omitted from the Order)</u>

I. **Overview**

[1] This motion arises in the context of the within action by the Plaintiff, Inaminka Marine Services Limited [IMS], *in personam* against Canada Fluorspar (NL) Inc. [CFI] and *in rem* against the Ship "Barge H-404" [the Barge]. In the action, IMS claims amounts owing for services alleged to have been provided to these Defendants. The Barge is under arrest in this action, and the Plaintiff's principal, Captain Richard Spellacy, has filed a Caveat against its release.

[2] In this motion, CFI invokes section 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] to seek a stay of IMS's action and, under Rule 488 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeks release of the Barge from arrest. The motion arises in the context of proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] in the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency [the Bankruptcy Court] arising out of the insolvency of CFI, in which the Bankruptcy Court has issued a stay of proceedings against CFI. In the alternative, CFI moves to strike the *in rem* portion of IMS's action pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release the Barge from arrest pursuant to Rule 488.

[3] As explained in greater detail below, the motion for a stay is granted and the Barge is released from arrest, because CFI has satisfied the Court that, taking into account applicable jurisprudence and the particular circumstances of this matter, the Bankruptcy Court is a more

appropriate forum for adjudication of the Plaintiff's claim. It is therefore unnecessary for the Court to adjudicate CMI's motion for alternative relief.

II. **Background**

[4] The *in personam* Defendant, CFI, is a corporation incorporated in Newfoundland and Labrador [NL]. It operates a fluorspar mine in St. Lawrence, NL. CFI is the owner of the Barge and employs the Barge to support the loading of cargo ships at the marine terminal at the site of its mine. While there was no evidence before the Court on this point, I understand the parties to agree that the Barge is a foreign vessel, registered in Panama.

[5] The Plaintiff, IMS, is also a corporation incorporated in NL. In this action, it claims for consultation and design services, related to a method and facilities for moving the Barge on and off the loading piers at CFI's marine terminal in response to inclement weather, the cost of which services it says remains owing by CFI.

[6] IMS commenced this action on February 16, 2022 and obtained a Warrant for the arrest of the Barge, which was executed that same day. The Barge was arrested where it was berthed at the Marbase (the former Marystown Shipyard) in Marystown, NL, and currently remains at the Marbase under arrest.

[7] Pursuant to an order dated February 22, 2022 [Interim Receivership Order], the Supreme Court of Newfoundland and Labrador General Division [SCNL] appointed Grant Thornton Limited [GT or Interim Receiver or Monitor] Interim Receiver of all of the property of CFI and

another company, Canada Fluorspar Inc. The Interim Receivership Order identifies such property [Property] to include all current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, except for the Excluded Property (as defined in the Interim Receivership Order). The Barge does not form part of the Excluded Property.

[8] The Interim Receivership Order provides that no proceedings shall be commenced or continued against or in respect of CFI, Canada Fluorspar Inc., or the Property without the consent of GT or leave of the SCNL. It also stays any proceedings currently underway against CFI, Canada Fluorspar Inc., or the Property at the time of the Interim Receivership Order, pending a further order of the SCNL.

[9] The Interim Receivership Order states that the SCNL requests the aid and recognition of any court having jurisdiction either within Canada or abroad to give effect to the order and assist GT, as Interim Receiver, in carrying out the order. It further requests that all other courts make orders and provide assistance to GT as may be necessary or desirable to give effect to the Interim Receivership Order.

[10] Subsequently, pursuant to an initial order dated March 11, 2022, which was amended and restated on March 18, 2022 [CCAA Order], the Bankruptcy Court appointed GT the Monitor for CFI, Canada Fluorspar Inc., and Newspar (a General Partnership), pursuant to the CCAA. To avoid confusion, I note that the Bankruptcy Court, which issued the CCAA Order, is the same

provincial superior court that issued the Interim Receivership Order, although styled differently for purposes of the CCAA proceeding.

[11] The CCAA Order provides that CFI remains in possession and control of its current and future assets, undertakings and property. It also stayed all proceedings against CFI or its property until July 10, 2022 [Stay Period]. Through a series of extensions, the Bankruptcy Court extended the Stay Period, which is currently effective until October 17, 2022. The CCAA Order further provides that either CFI or GT has the ability to apply to any court for the recognition of the CCAA Order and for assistance in carrying out the terms of the order.

[12] By order dated March 18, 2022, as subsequently revised [SISP Order], the Bankruptcy Court approved a Sale and Investment Solicitation Process [SISP] with respect to the assets of CFI. In the SISP Order, the Bankruptcy Court requests the aid in recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to the SISP Order and to assist the applicants for the SISP Order (which include CFI acting through GT) and their respective agents in carrying out the terms of the SISP Order.

[13] On August 3, 2022, CFI filed its Notice of Motion in support of the motion now before the Court, seeking the following relief:

A. a stay of IMS's action against it and the Barge, pursuant to section 50(1) of the Act, and release of the Barge from arrest pursuant to Rule 488;

B. in the alternative, that this Court strike the *in rem* portion of IMS's action, pursuant to Rule 221, on the basis that IMS's claims do not fall within the scope of section 22(2)(m) of the Act, and release of the Barge from arrest pursuant to Rule 488;

C. in the further alternative, an extension of time for CFI to file its defence to IMS's action.

[14] On September 2, 2022, Captain Richard Spellacy, IMS's sole shareholder, officer and director, filed a Caveat against the release of the Barge from arrest. I understand from counsel's submissions that the Caveat was filed in support of a claim for master's wages.

[15] CFI subsequently served and filed its full motion record on or about September 20, 2022, and IMS filed its responding materials on September 26, 2022. The parties argued this motion on September 28, 2022. I understand from the parties that a motion to approve a proposed sale of CFI's assets under the SISP had been scheduled to be heard by the Bankruptcy Court on September 27, 2022, the day before the hearing of this motion. CFI's counsel advised at the outset of the hearing of the present motion that the motion before the Bankruptcy Court was being rescheduled and that a new hearing date had not yet been set. However, counsel confirmed that the approval to be sought from the Bankruptcy Court at that motion was in support of the closing of the proposed sale by October 7, 2022, or October 17, 2022 as an outside date.

III. **Issues**

[16] This motion raises the following two principal issues for the Court's determination:

A. Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest; or

B. In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the *in rem* jurisdiction of the Federal Court.

IV. **Analysis**

A. *Whether the Court should exercise its discretion pursuant to section 50(1) of the Act to stay the within action commenced by IMS and, as a consequence, release the Barge from arrest*

(1) General Principles

[17] In addressing this issue, it is helpful first to review general principles and supporting jurisprudence governing a motion of this nature in the context of an insolvency proceeding underway in a provincial superior court. In formulating the following explanation, I am borrowing liberally from my decision in *RMI Marine Limited v Scotia Tide (Ship)*, 2019 FC 114 [*RMI Marine*], which canvassed many of the same principles.

[18] Section 50 of the Act grants this Court the authority to stay a proceeding in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction or where it is in the interests of justice to do so. The party seeking a stay is required to clearly establish the existence of a more appropriate forum (*Holt Cargo Systems Inc v ABC Containerline NV (Trustee of)*, 2001 SCC 90 [*Holt*] at para 89).

[19] As discussed in *RMI Marine*, the jurisprudential framework applicable to a motion of this sort was discussed in *Holt* and the companion decision in *Antwerp Bulkcarriers, NV (Re)*, 2001 SCC 91 [*Antwerp*]. *Holt* and *Antwerp* were decisions that arose in the context of the bankruptcy of a Belgian container line, which resulted in the arrest of one of its vessels, the "Brussel", at the Port of Halifax through an *in rem* action in the Federal Court.

[20] Following the arrest of the "Brussel", the shipowner was declared bankrupt by the Belgian bankruptcy court, and the trustees in bankruptcy obtained from the Superior Court of Québec an order recognizing the judgment of the Belgian court. The trustees subsequently obtained an order that the proceeds of sale of the vessel or the vessel itself be provided to the trustees for distribution through the Belgian bankruptcy [the Québec Superior Court Order]. This order was contrary to the ongoing procedural framework developed in the Federal Court for sale of the vessel and distribution of its proceeds. Relying in part on the Québec Superior Court Order, the trustees applied to the Federal Court for a stay of its proceedings and to have the proceeds of sale paid out to them. Justice MacKay of the Federal Court ruled against the trustees [the Federal Court Order].

[21] Both the Québec Superior Court Order and the Federal Court Order were appealed, and the Supreme Court of Canada ultimately considered the resulting appellate decisions.

[22] In Antwerp, which considered the appeal from the Québec Superior Court Order, the Supreme Court concluded (at paragraphs 37 and 40) that the Federal Court's maritime jurisdiction, once properly engaged by the commencement of the in rem action and the arrest of the ship, was not lost as a result of the subsequent bankruptcy of the shipowner. The Supreme Court also explained (at paragraphs 37 and 45 to 47) that the bankruptcy court had no power to deal with the vessel, which had already been captured by a competent order of the Federal Court. In essence, the Supreme Court found (at paragraphs 48 to 53) that the bankruptcy court's issuance of what amounted to an anti-suit injunction improperly attempted to restrict the Federal Court's ability to exercise its jurisdiction. The Supreme Court noted (at paragraphs 54 to 55) that it was open to the Federal Court judge to enter a stay if he considered it appropriate to do so, or to decline to accede to the request of the trustees as he did, and that the circumstances would have been the same had the bankruptcy occurred in Canada rather than in Belgium.

[23] In *Holt*, the Supreme Court considered the appeal from the Federal Court Order. The Supreme Court held (at paragraphs 41 to 44) that, pursuant to the applicable Canadian conflict of laws principles, the plaintiff, which had arrested the vessel in the Federal Court, was entitled to have its maritime lien status, conferred under the law of the United States where the plaintiff provided services to the vessel, recognized in the Federal Court proceeding.

[24] Consistent with the decision in Antwerp, the Supreme Court noted in *Holt* (at paragraphs 60 to 66) that the Federal Court did not lose jurisdiction as a result of orders issued by the Superior Court of Québec sitting in bankruptcy. The Supreme Court then considered whether the Federal Court should nevertheless have deferred to the Belgian bankruptcy court on the basis of international comity, concluding (at paragraphs 85 to 87) that international coordination was an important, but not necessarily a controlling, factor. The Federal Court was required to be mindful of the difficulties presented by international bankruptcies, including the desirability of minimizing the multiplicity of proceedings and potentially inconsistent decisions, as well as the need to do justice to the particular litigants before it. No single consideration was to be elevated to a controlling position in the exercise of the Federal Court's discretion whether to stay its own proceedings.

[25] Finally, in considering (at paragraphs 80 to 98) whether the Federal Court erred in the exercise of its discretion to deny the trustees' motion for a stay of proceedings, the Supreme Court noted that the principles on which the discretion should be exercised in this type of matter were authoritatively settled in Amchem Products Inc v British Columbia (Workers' Compensation Board), [1993] 1 SCR 897. That case explained that the relevant question was whether there was a more appropriate jurisdiction based on the relevant factors and that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff (pages 920 to 921). After noting the public policy considerations applicable in the context of an international bankruptcy, the Supreme Court described as follows (at paragraph 91 of *Holt*) the factors to be considered in making the discretionary decision:

> 91. The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and

> 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[26] The Supreme Court concluded that the Federal Court had considered the relevant factors in arriving at its decision. Justice MacKay had acknowledged the importance of comity and international coordination in a proper case, but he placed primary emphasis on the fact that he was dealing with an in rem action by secured creditors against the vessel which, at the time of the bankruptcy, the Federal Court had already arrested and, at the time of the interventions of the Canadian bankruptcy court, he had already ordered appraised and sold. The Supreme Court rejected the trustees' argument that the plaintiff was forum shopping by arresting the vessel in Canada and acknowledged that Justice MacKay had appropriately given weight to the juridical advantage afforded to the plaintiff in Canada through recognition of the secured status of its maritime lien.

[27] While there are factors that distinguish the "Brussel" litigation from the circumstances in the case at hand, *Holt* and Antwerp nevertheless provide in significant measure the framework that governs the exercise of discretion in considering CFI's motion for a stay under section 50 of the *Act.*

[28] *One obvious factual difference* is that the bankruptcy in the present case arises in a domestic context, not an international one. As noted in *RMI Marine*, this Court must nonetheless consider the effect of an order of a provincial superior court issued in the context of an

insolvency, which is an important, but not necessarily a controlling, factor (para 39). In that respect, guidance can also be taken from the decision in *Always Travel Inc v Air Canada*, 2003 FCT 707 [*Always Travel*], which also arose in the context of a CCAA proceeding in a provincial superior court.

[29] *Always Travel* involved a proposed class action in the Federal Court against a number of airlines, including Air Canada. At that time, Air Canada was the subject of an order from the Ontario Superior Court of Justice under the CCAA, which protected it against legal proceedings in the context of an intended restructuring. On that basis, Air Canada moved to have the Federal Court stay its proceedings.

[30] Much like the present case, the order of the Ontario Superior Court of Justice in *Always Travel* stayed all proceedings against Air Canada and expressly requested the aid and recognition of any Canadian court in carrying out the terms of the order (at para 8). Justice Hugessen of the Federal Court granted a stay of proceedings for three months, or until such earlier time as the stay by the Ontario Superior Court of Justice was lifted. In addressing the role of the Federal Court in considering a CCAA order from a provincial superior court, Justice Hugessen relied in part on the decisions in *Holt* and Antwerp in providing (at paragraphs 10 to 12) the following explanation:

> 10. Superior courts do not order each other about or make orders interfering with each other's process. Rather, it is essential that they should cooperate. Conflicts between courts, or other bodies having ultimate judicial power, may well have serious results, including perhaps even loss of liberty. In Canada, superior courts do not compete with one another. They accord to one another "full faith and credit," as was said in *Morguard Investments Ltd. v. De Savoye*, and repeated in the Brussel decisions. Justice Farley's order specifically requests that this Court, in comity, and more than that, in recognition of the fact that both courts are engaged in a single legal system in the

> administration of Canadian justice, should lend its aid to the order of the Ontario Superior Court of Justice staying proceedings.
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> 11. It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders first because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, and subsequently in *RJR MacDonald Inc. v. Canada (Attorney General)*. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence; it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made.
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> 12. That is not the end of the matter. If a party to proceedings in this Court thinks that a stay should not be granted in comity and in aid of a provincial superior court order, it is at liberty to oppose the stay or, if the stay is granted, apply to this Court to have it lifted. The plaintiffs would thus have been free to bring evidence today and make representations to me that for some reasons or other these proceedings ought not to be stayed, but matters did not develop in that way. Let me be quite clear. The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid. Nothing that I say or do today forecloses the plaintiffs from making an application if they so wish. I say that simply because in the way in which these proceedings developed, it was agreed between counsel and the Court that we should deal with this matter today strictly on issues of law, matters of fact being left to another day, if necessary.

[31] I pause to note that the body of jurisprudence explained above is also canvassed in CFI's written representations in support of this motion, and IMS explained in its own written representations that it takes no issue with CFI's explanation of the basis upon which the Federal Court has determined when it is appropriate to impose a stay. However, at the hearing of this

motion, disagreement developed between counsel as to the significance of the above passage from *Always Travel*. CFI's counsel relies on this passage in support of a submission that, in responding to the motion, IMS bears the burden of proving that the Federal Court should not issue the requested stay in aid of the Bankruptcy Court. IMS disputes this position, arguing that, as the moving party, CFI must bear the burden.

[32] As found in *RMI Marine* (at para 42), I regard *Always Travel* as describing the proper attitude of respectful cooperation between courts, an attitude that is consistent with the guidance of the Supreme Court in *Holt* and *Antwerp* as to the importance of comity and cooperation. However, Always Travel should not be interpreted as detracting from the discretion to be exercised by the Federal Court in considering a motion to stay its proceedings or from the requirement to consider the other guidance and factors identified in *Holt*.

[33] As such, I accept IMS's position that CMI, as the moving party seeking a stay of a Federal Court proceeding, bears the burden to clearly establish the existence of a more appropriate forum (see *RMI Marine* at para 86, *Holt* at para 89). However, given the importance of comity and cooperation between courts, I also accept the reasoning in *Always Travel* that, particularly in a circumstance where a provincial superior court has expressly requested the aid of other courts in carrying out the terms of its order, it will typically be difficult for a responding party to resist such a request in the absence of compelling arguments in relation to the factors identified in *Holt*.

(2) Application of Principles

[34] Against that jurisprudential backdrop, I turn to consideration of the parties' arguments as to how the relevant principles should be applied in the case at hand.

[35] First, I note that this is clearly a case where a provincial superior court has issued requests for aid and recognition of its orders, as reflected in the orders canvassed earlier in these Reasons and, in particular, the SISP Order that governs the sale process in support of which CFI is seeking the stay. This is an important factor, complemented by public policy considerations associated with the purpose of the CCAA (see *RMI Marine* at para 86). As CFI submits, the CCAA is broad remedial legislation designed to facilitate a restructuring of debtor corporations in the interest of the company, its creditors and the public (see, *e.g., Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 18).

[36] CFI argues that the SISP, which is being supervised by the Bankruptcy Court, represents a means of achieving an orderly sale of CFI's assets for the general benefit of creditors and stakeholders. CFI submits that such a process cannot proceed efficiently or effectively in separate courts with multiple creditor actions and duplicative motions. I accept the merit of these submissions and afford them weight as relevant public policy considerations.

[37] On the other side of the ledger, IMS argues that it will be prejudiced if it is not permitted to pursue its claim to judgment and satisfaction through sale of the vessel under the Federal Court's *in rem* processes. In support of this position, IMS submits that, in addition to having rights *in rem* under section 22(2)(m) of the Act, it benefits from a maritime lien under section 139(2) of the *Marine Liability Act*, SC 2001, c 6 [MLA], which affords such status to claims that

arise in respect of goods, materials or services supplied to a foreign vessel (within the meaning of section 2 of the *Canada Shipping Act, 2001*, SC 2001, c 26). As previously noted, I understand that it is not disputed that the barge is not registered in Canada and is therefore a foreign vessel for purposes of section 139(2).

[38] IMS takes the position that it requires access to the Federal Court's jurisdiction and processes in order to benefit from the priority afforded by the maritime lien it claims. It also relies on the Federal Court's jurisdiction to use equitable principles of Canadian maritime law to elevate to the equivalent of maritime lien status a claim that may not otherwise benefit from a maritime lien. IMS refers to the explanation of these equitable principles in *Nanaimo Harbour Link Corp v Abakhan & Associates Inc*, 2007 BCSC 109 [*Nanaimo*], in which the Supreme Court of British Columbia [BCSC] considered an application by maritime claimants for an order under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA] that the statutory stay of proceedings conferred by the BIA did not apply to the claimants' Federal Court proceedings. The claimants asserted that their claims benefited from secured status as maritime liens or were entitled to equivalent status pursuant to equitable principles and that the Federal Court had jurisdiction to apply said principles.

[39] *Nanaimo* referred to these equitable principles at paragraphs 21 and 22, explaining that certain of the maritime claimants asserted that they were entitled to elevated status in the Federal Court proceedings as a result of their supply of labour and materials to the ship. The claimants argued that the value of the ship was resultantly enhanced such that it would be inequitable for the mortgagee to be enriched by that enhanced value without credit to the suppliers. Ultimately,

the BCSC granted the claimants' application, concluding that they should have the opportunity to seek maritime lien or equivalent status and that the ranking of priorities and the proof of maritime claims were matters for the Federal Court to determine pursuant to the principles of Canadian maritime law (at para 53).

[40] In the case at hand, IMS similarly argues that the services it provided to the Barge served to enhance its value and that this enhanced value will be realized in any sale of the Barge. As such, in the event it is not successful in arguing entitlement to maritime lien status under section 139(2) of the MLA, it will be seeking equivalent status through an equitable adjustment of priorities in accordance with Canadian maritime law principles.

[41] CFI disputes IMS's claimed entitlement to maritime lien status. Indeed, as it argued under the alternative issue presented in its motion, CFI takes the position that IMS does not qualify as an *in rem* necessaries claimant under section 22(2)(m) of the Act. However, the Court need not reach a conclusion on any of those disputes for the purposes of the present issue, which is whether to grant the requested stay. Importantly, CFI acknowledges that IMS has the right to assert its claim (including its claim for maritime lien or equivalent priority status) in the CCAA proceeding against the proceeds of sale that will result from the SISP. CFI also acknowledges that, as a superior court with inherent jurisdiction and concurrent jurisdiction over Canadian maritime law, the Bankruptcy Court would be in a position to adjudicate IMS's claims and associated arguments for priority.

[42] IMS argues that, as the Federal Court has experience with the adjudication of maritime claims and the application of the principles of maritime law it wishes to invoke, it should not be deprived of the opportunity to pursue its claim in this Court. I also understand it to express doubt as to its ability to invoke these maritime law principles in the CCAA proceeding before the Bankruptcy Court. However, IMS has provided no authority or compelling argument in support of this concern. I find no basis to conclude that the Bankruptcy Court lacks the jurisdiction to adjudicate IMS's claims or that the substantive principles of Canadian maritime law or the Bankruptcy Court's application of those principles would differ from what IMS would encounter before the Federal Court.

[43] There is no question that, if the requested stay were to deprive IMS of a juridical advantage that would be available to it in the Federal Court but not in the Bankruptcy Court, that would be a significant factor militating against granting the stay. Such a consideration was a significant factor underlying the reasoning in *Holt* (at paras 46-50). As explained earlier in these Reasons, the plaintiff in *Holt* enjoyed a juridical advantage before the Federal Court that would be in jeopardy if the Federal Court proceedings were stayed in deference to the Belgian bankruptcy court, because Belgian law would not recognize the plaintiff's maritime lien status under US law. In contrast, in the case at hand, there is no evident juridical advantage to IMS in the Federal Court that would not also be available before the Bankruptcy Court.

[44] Before leaving these arguments by IMS, I should also note that the outcome in *Nanaimo* turned significantly on the fact that the provincial superior court proceeding in that case was being conducted under the BIA. As the BCSC observed at paragraph 10, section 136(1) of the

BIA excludes secured creditors from the statute's scheme of distribution of the assets of a bankrupt party. Relying on that provision and its application in *Holt*, the BCSC assessed the applicant's claims for maritime lien or comparable status as secured claims entitled to be adjudicated outside the bankruptcy (*Nanaimo* at paras 10-19, 53). However, as CFI submits, *Nanaimo* is distinguishable from the case at hand, which involves a proceeding not under the BIA, but under the CCAA. Presumably because the objective of the CCAA is to facilitate the restructuring of insolvent companies rather than distributing their assets, the CCAA does not contain a provision comparable to section 136 of the BIA.

[45] I have also considered other arguments advanced by IMS in opposition to the requested stay. These include a submission that CFI comes to the Court without "clean hands" and therefore should not be afforded the relief it seeks. While IMS has not identified any authority supporting its position, I accept that there is potential for a lack of clean hands to be relevant to the Court's willingness to grant the sort of discretionary remedy represented by a stay under section 50(1) of the Act.

[46] In support of this argument, IMS takes issue with the fact that CFI did not file a Statement of Defence to IMS's Federal Court action, in the over seven months since the action was commenced, and then brought what IMS characterizes as a last minute stay motion, with little notice to IMS, in order to support the impending sale of CFI's assets. IMS also argues that, prior to late August 2022, the Monitor and CFI had not included IMS's counsel on the service list for motions in the CCAA proceeding. IMS submits that these circumstances have caused it

prejudice, including incurring legal costs to respond to this motion and irreparable harm that it will suffer if the Barge is released from arrest.

[47] On the subject of the stage to which this proceeding has progressed and the fact CFI has not filed a Defence, CFI relies on the stay of all other proceedings imposed by the provincial superior court orders. Of course, in accordance with the reasoning in *Always Travel*, CFI requires the discretionary order now sought from the Federal Court to implement that stay in the present proceeding. However, in these circumstances, I find no basis to conclude that its failure to file a Defence in this proceeding represents any sort of misconduct.

[48] Indeed, CFI argues that the fact this proceeding has not advanced beyond service of the Statement of Claim and arrest of the Barge militates in favour of granting the stay. This position is consistent with the reasoning in *Holt*, in which Justice MacKay's decision not to stay the Federal Court proceeding turned in part on the fact that proceeding has already advanced to issuance of an order for appraisement and sale of the "Brussel".

[49] Turning to the timing of the present motion, CMI filed its Notice of Motion on August 2, 2022. While it did not serve and file the remainder of its motion materials until Tuesday, September 20, 2022, the timing for the filing of IMS's responding materials on Monday, September 26, 2022 and the hearing of the motion on Wednesday, September 28, 2022, was set by the Court at a case management conference on September 22, 2022, following consultation with counsel. IMS has not advanced a compelling argument that the timing of this motion is

untoward or that it had inadequate time to prepare to respond. In my view, IMS has not established that CFI's approach to this litigation represents a lack of clean hand.

[50] Finally, returning to considerations of public policy, IMS submits that granting the requested stay could cause a loss of confidence on the part of the maritime industry that relies upon the Federal Court's *in rem* jurisdiction and processes. In my view, this argument must be considered in the context of the above analysis of IMS's arguments surrounding the loss of juridical advantage it alleges it would experience as result of the stay. As I have found no basis for a conclusion that IMS would be unable to assert its claims and priority arguments before the Bankruptcy Court through the CCAA process, I place little weight on IMS's public policy argument.

(3) Conclusion on Stay Motion

[51] Based on the above analysis, I am satisfied that CFI has clearly established that the CCAA proceeding before the Bankruptcy Court represents a more appropriate forum than the present proceeding for adjudication of claims against the Barge. I will therefore issue a stay of the present proceeding.

[52] At the hearing of this motion, CMI's counsel explained that it is anticipated that the stay in the CCAA proceeding, which currently expires on October 17, 2022, will be extended potentially to a date in February 2023 to afford time for completion of remaining processes under the CCAA. There is no evidence before the Court on an extension of the CCAA stay or its likely duration. However, I accept the logic of CMI's submission that, under the present circumstances,

the duration of the Federal Court stay should be concurrent with that under the CCAA. My Order will so provide. However, it will also reserve the Plaintiff's right to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

(4) Release of the Barge from Arrest

[53] It flows from the decision to stay the Plaintiff's action, and the reasoning underlying that decision, that the Barge should be released from arrest to facilitate its sale along with other assets of CFI through the CCAA proceeding. I note IMS's position that, if the Court were to grant CFI's motion, it should order that CFI post bail for the release of the Barge from arrest. However, the reasoning explained above, underlying the decision to grant the stay, turns significantly on IMS's ability to assert its claim against the proceeds of sale of the Barge achieved through the CCAA process. As CFI has satisfied the Court that a stay is warranted, I do not consider it appropriate to also impose a requirement to post bail to achieve release of the Barge from arrest.

[54] Before leaving the subject of the Barge's release, I will briefly address the significance of the Caveat filed by Captain Spellacy. During the hearing of this motion, disagreement developed between counsel surrounding the scope of the motion in relation to the Caveat. IMS's counsel objected to submissions by CFI's counsel related to the Caveat, taking the position that CFI's Notice of Motion was silent on the subject of the Caveat. CFI responded to the objection by pointing out that the Caveat was filed only on September 2, 2022, a month after the Notice of Motion was filed, but that CFI's subsequent written representations in support of the motion spoke to the Caveat and requested relief in relation thereto.

[55] Further exploration of the parties' positions on the objection clarified that IMS's concern was with the possibility that CFI was seeking to strike or dismiss the Caveat, through arguments akin to those advanced in relation to IMS's action under the second, alternative, issue in this motion. While the evidence upon which IMS relies in this motion was provided in an affidavit sworn by its principal, Captain Spellacy, IMS's counsel explained that this evidence did not speak to Captain Spellacy's personal claim in support of which the Caveat had been filed. Indeed, the Court has very little information related to that claim, other than that it has been described as seeking master's wages.

[56] However, IMS's counsel advised that she accepted that, as a matter of law, if the Court decided to stay IMS's action, then that stay would apply to any caveats filed in the action. CFI's counsel in turn clarified that it was not his intention to advance arguments, akin to those under the alternative issue, to strike the Caveat. Rather, CFI's arguments in relation to the Caveat are advanced solely under the first issue. CFI takes the position that the principles and analyses that support its motion for a stay of the Plaintiff's claim apply equally to the Caveat.

[57] As such, the parties appear to agree that a decision to stay the action includes application of that stay to the Caveat filed therein. The Caveat therefore does not represent an impediment to the Court ordering the Barge released from arrest. Regardless of such agreement, I cannot identify any basis to conclude that the Court's analysis, underlying its finding that the Bankruptcy Court is a preferable forum for adjudication of IMS's claim, would not also apply to the claim underlying the Caveat.

[58] Finally, I note that at the hearing I explored with CMI's counsel the concern raised by IMS's counsel that, once the Barge is released from arrest, it is not precluded from departing the jurisdiction. While the SISP Order contemplates the closing of the sale of CFI's assets, including the Barge, by early to mid October, the sale has not yet been approved. However, I accept CFI's submission that GT is pursuing the sale of the business as a going concern and that, as the parties agree, the Barge is a key asset in the operation of the business. I am satisfied that this is not a case where there is an obvious risk of the Barge fleeing the jurisdiction.

B. *In the alternative, whether IMS's action should be struck pursuant to Rule 221, because the services alleged to be provided to CFI by IMS fall outside the scope of section 22(2)(m) of the Act and, as such, do not fall within the in rem jurisdiction of the Federal Court*

[59] Given my decision to grant the stay requested under the first issue in this motion, and as the second issue is advanced in the alternative, the Court will not adjudicate the second issue.

V. **Costs**

[60] The parties agree that cost should flow to the successful party in this motion. At the hearing, the Court afforded counsel the opportunity to attempt to agree on a lump sum costs figure. While no agreement resulted, CFI's counsel proposed a figure of $3500.00, and IMS's counsel did not make substantive submissions opposing this figure. As CFI's counsel notes, in the somewhat similar motion in *RMI Marine*, I awarded the successful party costs in the all-inclusive amount of $3500.00. I consider that amount appropriate in the case at hand, and my Order will so provide.

<u>CORRECTED</u> ORDER IN T-279-22

THIS COURT ORDERS that:

1. The Plaintiff's action is stayed, effective until October 17, 2022, or any later date to which the stay issued by the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency may be extended.

2. The Plaintiff shall have leave to apply to have the stay of its action lifted at an earlier time in the event of any material change in circumstances.

3. <u>The Defendant Ship is released from arrest.</u>

4. The Plaintiff shall pay the Defendant, Canada Fluorspar (NL) Inc., costs of this motion in the all-inclusive amount of $3500.00.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-279-22
STYLE OF CAUSE:	INAMINKA MARINE SERVICES LIMITED., v CANADA FLUORSPAR (NL) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP, "BARGE H-404"
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 28, 2022
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 5, 2022

APPEARANCES:

Deborah L.J. Hutchings	FOR THE PLAINTIFF
William T. Cahill & Allison Philpott	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

MacNab Fagan & Murphy St. John's, Newfoundland	FOR THE PLAINTIFF
Cox & Palmer St. John's, Newfoundland	FOR THE DEFENDANTS