

Federal Court



Cour fédérale

Date: 20221116

Docket: T-601-22

Citation: 2022 FC 1571

Ottawa, Ontario, November 16, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

HAPAG-LLOYD AKTIENGESELLSCHAFT

Plaintiff

And

GOLDEN TRUST TRADING INC.

Defendant

ORDER AND REASONS

[1] Golden Trust Trading Ltd [Golden Trust], the defendant in the underlying action, is seeking an extension of time for filing a statement of defence pursuant to Rule 8 of the *Federal Court Rules*, SOR/98-106 [*Rules*]. I will dismiss the motion because Golden Trust failed to demonstrate that its arguments have some merit and has not provided a reasonable explanation for the delay to file its statement of defence.

I. Background Facts

[2] Golden Trust contracted with Hapag-Lloyd Aktiengesellschaft [Hapag-Lloyd] for the carriage of containers filled with waste paper and plastic film from Vancouver to Bangkok, Thailand. The contract is evidenced by nine waybills issued by Hapag-Lloyd. The containers were all discharged during the spring of 2019.

[3] Due to a change in Thailand's environmental import standards, the contents of the containers could not be imported into that country. Hapag-Lloyd claims that the containers remained in the port unclaimed for 782 days until it was able to re-export 30 of the 33 containers. According to Hapag-Lloyd, the other three containers are still in Thailand and continue to incur costs.

II. Procedural History

[4] On March 18, 2022, Hapag-Lloyd served the Statement of Claim on Golden Trust, claiming US\$3,122,411 for demurrage, storage and re-export costs. On March 30, 2022, Golden Trust's solicitor emailed Hapag-Lloyd's solicitor stating that they intended to file a statement of defence and requested that Hapag-Lloyd's solicitor give them reasonable notice before filing for default judgment. Hapag-Lloyd's solicitor acknowledged receipt of this email, but did not specifically agree to give notice.

[5] On August 30, 2022, as Golden Trust had not yet filed a statement of defence, Hapag-Lloyd served a motion for default judgment. Because that motion did not comply with certain requirements of the Rules, the registry did not accept it for filing.

[6] On August 31, 2022, Golden Trust attempted to file a statement of defence. However, as the time for doing so had elapsed, the registry did not accept it for filing. On September 9, Golden Trust tried to file a responding motion record. The registry did not accept this record for filing because Hapag-Lloyd's motion for default judgment had not been filed.

[7] On September 21, Hapag-Lloyd filed an *ex parte* motion record for default judgment.

[8] On September 22, Golden Trust filed a responding motion record in respect of the latter motion for default judgment and the present motion for extension of time to file a statement of defence. However, due to technical problems with the electronic filing system, the Court was not aware that these documents had been filed until October 18. Unfortunately, in her earlier communications with the registry, counsel for Hapag-Lloyd did not disclose that these documents had been served upon her client, which added to the confusion. Be that as it may, the situation has now been clarified and Hapag-Lloyd has responded to Golden Trust's motion for extension of time.

[9] Because the outcome of Golden Trust's motion for extension of time will obviously have an impact on Hapag-Lloyd's motion for default judgment, I directed that the latter be suspended until the former is decided.

III. Applicable Law

[10] In a long line of cases starting with *Grewal v Minister of Employment and Immigration*, [1985] 2 FC 263, the Federal Court of Appeal has set out the principles applicable to motions for extension of time. The relevant considerations were summarized as follows in *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) at paragraph 3 [*Hennelly*]:

- 1) a continuing intention to pursue the matter;
- 2) that the arguments advanced have some merit;
- 3) that the other party will not suffer any prejudice as a result of the delay; and
- 4) that there is a reasonable explanation for the delay.

[11] In *Canada (Attorney General) v Larkman*, 2012 FCA 204 at paragraph 62, the court emphasized that the four factors listed in *Hennelly* are not to be applied rigidly. The party seeking the extension of time is not required to meet all four factors. Rather, as Justice Gauthier notes in *Alberta v Canada*, 2018 FCA 83 at paragraph 45, the overriding consideration “is ultimately that justice be done between the parties.”

IV. Analysis

[12] In the present case, it is not in the interest of justice to grant the extension of time. Golden Trust was not able to demonstrate that its arguments had some merit, nor did it provide a reasonable explanation for its delay. Failing to demonstrate both of these factors is determinative in the present case. I address the *Hennelly* factors in more detail below.

A. *Intention to Pursue the Matter*

[13] Golden Trust's intention to pursue the matter is weak at best. It is true that in the March 30, 2022, email to opposing counsel, its solicitor stated its intent to file a statement of defence and asked to be notified if ever Hapag-Lloyd intended to file for default judgment. However, Golden Trust failed to file its statement of defence before August 31, 2022, failed to file a notice of intent to respond pursuant to rule 204.1 during that period and failed to provide opposing counsel with any updates. To this day, it has not even filed a notice of appearance. The failure to take any steps to defend the action until confronted with a motion for default judgment is more compatible with an intention to delay the proceeding than with a genuine intention to defend the action.

B. *Merits of Defence*

[14] While no single factor is determinative, it is important that the defendant be able to demonstrate that its defence has some merit. The Court will be hesitant to deny a party the ability to present its case if its arguments have some merit. Conversely, the Court must also prevent the use of its process merely to delay an unavoidable outcome.

[15] In the present case, the arguments put forward by Golden Trust to defend Hapag-Lloyd's action are entirely devoid of merit.

[16] Golden Trust first argues that the Court lacks jurisdiction because section 24 of the waybill assigns exclusive jurisdiction to the courts of Hamburg, Germany. However, section 24

explicitly provides the carrier (Hapag-Lloyd) with the option of filing a suit either in Hamburg or at the place of business of the shipper (Golden Trust). Thus, the Federal Court has geographic jurisdiction over this matter. It is entirely disingenuous to argue a part of section 24 while omitting another part of the same provision.

[17] Golden Trust then submits that the Court lacks subject-matter jurisdiction because the claim arises exclusively from an alleged breach of contract, a matter falling under the jurisdiction of the provincial courts. This argument overlooks the obvious fact that the contract at issue is for the carriage of goods on a ship. This falls squarely within the jurisdiction of the Federal Court as set out in paragraph 22(2)(i) of the *Federal Courts Act*, RSC 1985, c F-7:

<p>(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:</p> <p>...</p> <p>(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;</p>	<p>(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :</p> <p>...</p> <p>i) une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie;</p>
---	--

[18] *Inter Atlantic Canada Ltd v Rio Cuyaguajeje (The)*, 2001 FCT 306 [*Inter Atlantic*], is of no assistance to Golden Trust because the contract at issue in that case did not pertain to the carriage of goods on a ship, but to “an agreement to exploit a fishing quota:” *Inter Atlantic*, at paragraph 26.

[19] Golden Trust also argues that German law is the applicable law according to section 24 of the waybill. It would follow that Hapag-Lloyd, having neither pled nor proved German law, has failed to establish the legal basis for its claim. This argument, however, runs contrary to the settled legal principle that when evidence of foreign law is lacking, the matter is decided according to domestic law: *Fernandez v “Mercury Bell” (The)*, [1986] 3 FC 454 at 460 (CA); *Best v Best*, 2016 NLCA 68 at paragraph 10; *Quickie Convenience Stores Corp v Parkland Fuel Corporation*, 2020 ONCA 453 at paragraph 29; *Chen v Canada (Citizenship and Immigration)*, 2018 FC 608 at paragraph 7. In any event, Golden Trust has not shown that the matter would be decided differently under German law.

[20] Golden Trust also asserts that Hapag-Lloyd breached a contractual obligation and a common-law duty of care to keep it informed about the status of the delivery of the cargo. Golden Trust did not specify which clause of the waybill created this contractual obligation nor did it provide any jurisprudence supporting its claim of a common-law duty. In fact, this argument runs afoul of the explicit provisions of the waybill. Section 20(1) unambiguously provides that the carrier is not obliged “to give any notification of the arrival of the Goods” to the shipper.

[21] Furthermore, Golden Trust cannot rely on its ignorance of the change of import regulations in Thailand as a defence or as a ground for Hapag-Lloyd’s alleged obligation to inform it of any material change because subsection 12(3) of the waybill states that it is the shipper’s responsibility to comply with all applicable regulations. Therefore, the contract did not require Hapag-Lloyd to inform Golden Trust about the changes in import regulations.

[22] Golden Trust suggests that any ambiguity in the contract must be interpreted in its favour. However, it has not pointed to any such ambiguity.

[23] Lastly, Golden Trust pleads Hapag-Lloyd's failure to mitigate its damages. This submission, however, is based on Hapag-Lloyd's alleged duty to inform Golden Trust that the cargo could no longer enter Thailand. I have already found that such a duty runs against the explicit terms of the contract. Thus, it cannot ground an argument that Hapag-Lloyd failed to mitigate its damages. In any event, on a motion for default judgment Hapag-Lloyd will still have to provide the Court with sufficient evidence to demonstrate on the balance of probabilities the *quantum* of its damages.

[24] I conclude that the lack of merit of Golden Trust's proposed defence strongly militates against granting an extension of time.

C. *Prejudice Resulting From Extension*

[25] Golden Trust submits that Hapag-Lloyd will not be prejudiced by an extension of time. It alleges that all the cargo has now been re-exported from Thailand and that, therefore, any delay in resolving this case will not cause further damage to Hapag-Lloyd. It also argues that a delay of a little more than four months to file its defence is not substantial.

[26] There is a kernel of truth in these submissions. Indeed, Hapag-Lloyd brought its action almost three years after the events. This suggests that the matter is not urgent and that further delay, in itself, does not cause significant prejudice to Hapag-Lloyd.

[27] Nevertheless, granting an extension of time will deprive Hapag-Lloyd of the possibility of seeking default judgment. While a plaintiff does not initially have an entitlement to obtain default judgment, this forms part of the arsenal of procedural tools offering an expedited resolution of a lawsuit in appropriate cases. Plaintiffs suffer a form of prejudice when they are unable to access those tools and forced to go to a full trial. This is especially so where the defence does not appear to have any merit. Thus, I am prepared to assume that losing the benefit of default judgment would cause some prejudice to Hapag-Lloyd.

D. *Reasonable Explanation for the Delay*

[28] Golden Trust has not provided any valid reason to explain the delay in submitting its statement of defence due on April 19, 2022. It claims that it was waiting on Hapag-Lloyd's solicitor to notify it that they were going to file for default. It relies on *Toronto Regional Real Estate Board v R E Stats Inc (ReDatum)*, 2021 FC 1193 [*Toronto Regional*], for the proposition that the opposing lawyer's silence is a sufficient reason for not filing a statement of defence on time.

[29] On a close reading, however, *Toronto Regional* does not stand for such a broad proposition. In that case, the plaintiff sought an interlocutory injunction after filing its statement of claim. The defendant opposed the motion, which was denied by the Court, but never filed a notice of appearance nor a defence. The Court later issued a notice of status review. The defendant's counsel emailed the plaintiff's counsel to inquire about their intentions, but the latter did not reply. Instead, the plaintiff filed for an *ex parte* default judgment. When it learned of the judgment, the defendant moved to set it aside. It is in that context that my colleague Justice

Michael Manson found that the defendant had sufficiently explained the delay in filing a defence:

[43] Nevertheless, the failed injunction application, the findings of both the Federal Court of Appeal and this Court that the System does not have valid copyright protection, and the lack of any reply by the Plaintiff to the April 7 Email, provided a reasonable basis for the Defendants to have assumed the Plaintiff was not actively pursuing this action and provides some basis for the delay in not filing a Statement of Defence, albeit a weak basis.

[30] In this case, in contrast, there was no reason to believe that Hapag-Lloyd was not pursuing the claim. Hapag-Lloyd did not lose a motion for interlocutory relief, which might have been seen as the main reason for bringing the action in the first place in the *Toronto Regional* case. Moreover, the next step in the proceeding was the filing of Golden Trust's defence. Hence, nothing could be inferred from Hapag-Lloyd's failure to act more quickly.

[31] In addition, in *Toronto Regional* Justice Manson found that, without more, opposing counsel's silence is not a sufficient reason to delay the filing of a statement of defence. In fact, he clearly states at paragraph 41 that "[r]egardless of the actions of the Plaintiff, the Defendants are aware of the Court rules and deadlines." I emphatically agree. The time limits set out in the Rules are mandatory and cannot be ignored simply by seeking the indulgence of the opposing party. If Golden Trust wished to suspend the time limits in this case, it should have obtained Hapag-Lloyd's explicit consent and asked the Court to put the matter in abeyance.

[32] Thus, Golden Trust has not shown any valid reason for not filing a notice of appearance and a statement of defence.

V. Conclusion

[33] In light of the factors enumerated in *Hennelly*, it is not in the interests of justice to grant Golden Trust an extension of time to file its defence. It failed to demonstrate that its proposed defence has some merit and that there was a reasonable explanation for its delay in filing it.

There is some prejudice to Hapag-Lloyd if the motion is granted, and Golden Trust's intention to pursue the matter is too weak to tilt the balance to the other side. Therefore, the motion is dismissed, with costs.

ORDER in T-601-22

THIS COURT ORDERS that:

1. The defendant's motion for extension of time is dismissed.
2. Costs are awarded to the plaintiff.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-601-22

STYLE OF CAUSE: HAPAG-LLOYD AKTIENGESELLSCHAFT v
GOLDEN TRUST TRADING INC.

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO
RULE 369**

ORDER AND REASONS: GRAMMOND J

DATED: NOVEMBER 16, 2022

APPEARANCES:

Nigah Awj	FOR THE PLAINTIFF HAPAG-LLOYD AKTIENGESELLSCHAFT
James Un Rodolfo Assinger	FOR THE DEFENDANT GOLDEN TRUST TRADING INC.

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Montréal, Quebec	FOR THE PLAINTIFF HAPAG-LLOYD AKTIENGESELLSCHAFT
ATAC Law Corporation Burnaby, British Columbia	FOR THE DEFENDANT GOLDEN TRUST TRADING INC.