Federal Court  Cour fédérale

Date: 20100624

Docket: T-2075-09

Citation: 2010 FC 695

Ottawa, Ontario, June 24, 2010

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

ALPHA TRADING MONACO SAM

Plaintiff

and

**THE SHIP "SARAH DESGAGNES" AND
THE OWNERS AND ALL OTHER INTERESTED
IN THE SHIP "SARAH DESGAGNES" AND
TRANSPORT DESGAGNES INC. AND
MARITIMA FLUVIALE DI NAVIGAZIONE SPA**

Defendants

and

**PETRO-NAV INC., AS DISPONENT OWNER AND
TRANSPORT DESGAGNES INC., AS REGISTERED OWNER, OF
THE DEFENDANT SHIP "SARAH DESGAGNES"**

Plaintiffs by Counterclaim

and

ALPHA TRADING MONACO SAM

Defendant by Counterclaim

REASONS FOR ORDER AND ORDER AND INTERLOCUTORY INJUNCTION

[1] The issue in this motion for an anti-suit injunction is whether it is oppressive and vexatious for a bunker supplier to arrest a ship in Canada to secure a claim for several unpaid invoices; to release the ship on an undertaking by her owners to post bail; to then unilaterally amend the statement of claim to limit it to one invoice and then to re-arrest the ship in Belgium to secure a claim against her time charterer for payment of the other invoices. In my opinion, it is.

[2] The Sarah Desgagnés, a Canadian-flagged product carrier, owned by Transport Desgagnés Inc., and under long-term time charter to its affiliate, Petro-Nav Inc., was, at material times, under subtime charter in the Shelltime 4 form to Maritima Fluviale Di Navigazione SpA of Genoa, Italy (MFN). Among other things, it was the charterer's obligation to furnish and pay for fuel. A special rider clause was added to make it clear that in no circumstances were the time charterers to purport to grant a lien on the ship.

[3] MFN also had other ships on time charter. It regularly ordered bunkers from Alpha Trading Monaco Sam. of Monaco. Under Alpha's trading conditions, MFN purported to contract not only on its own behalf but also on behalf of the shipowners. The contract is governed by Italian law.

[4] The ship was on time charter to MFN from December 2008 through to July 2009. Bunkers were taken onboard on 11 occasions at various ports. According to Alpha, none of these invoices has been paid.

[5] On 11 December 2009, an affidavit to lead warrant and a statement of claim were filed with the Registry of this Court, a warrant of arrest was issued, and the ship was arrested in Montréal that day. The statement of claim alleged 11 unpaid invoices dating from 14 January 2009 to 9 July 2009 for fuel supplied in the Netherlands, the United Kingdom, Gibraltar, Greece, Canada, the United States, Curacao and Belgium.

[6] In no case did the bunker receipts signed on behalf of the ship show that Alpha had arranged the bunkering. It was not the actual supplier. The statement of claim *in rem* against the ship and *in personam* against Transport Desgagnés and MFN claimed US$1,054,191.01 with interest and costs.

[7] The ship was released later that day on a personal undertaking by Transport Desgagnés to provide security in agreed form and amount, or failing that as directed by the Court.

[8] There was some toing and froing over the next ten days, but it was coming down to bail for CDN$1.5 million. Then, on 22 December 2009, Alpha's Canadian counsel informed Transport Desgagnés's counsel that he had been instructed to amend the statement of claim so as to only pursue one claim in Canada, that being for bunkers delivered at Corpus Christi, Texas. The invoice was for US$138,707.58. Security of CDN$185,000 was requested, and was tendered into Court to stand as bail. It should be noted in passing that bail in the form of a cash deposit into Court earns interest.

[9] Although served with the Canadian action, MFN has not appeared. Unbeknownst to Transport Desgagnés at the time, in January 2010 Alpha took an action *in personam* against MFN in Italy with respect to the same said ten invoices, i.e. all except the one for bunkers delivered at Corpus Christi. Thereafter, a fresh action *in personam* was instituted in Canada under docket T-99-10 against Transport Desgagnés with respect to the ten invoices which originally formed part of the action *in rem*, and were then withdrawn. Unjust enrichment is alleged on the basis that by virtue of the terms and conditions of sale, title to the bunkers had never passed.

[10] Both cases have proceeded in Canada and are specially managed by order of the Acting Chief Justice. Various orders have been set down by the prothonotary to facilitate their orderly development.

[11] Then, on 4 May 2010, Alpha applied for, and obtained, a conservatory seizure of the ship in Belgium to secure its claim against MFN which is the subject of the Italian action. The Italian courts ordered MFN into bankruptcy three days later.

DIFFERENCES BETWEEN CANADIAN AND BELGIAN LAW

[12] The reason Alpha is slicing and dicing its recovery efforts lies in distinctions between Canadian and Belgian law.

[13] Under Canadian domestic maritime law, a necessaries man, such as a bunker supplier (save in a few instances which are not pertinent here) does not enjoy a maritime lien. He has a statutory

right *in rem* against the ship to which necessaries were supplied, or a sistership, only if ownership has not changed and her owners are personally liable. There is a rebuttable presumption that necessaries were delivered on the credit of the ship. Apart from maritime liens or statutory equivalent, a ship cannot be arrest to secure a claim against a time charterer.

[14] On the other hand, Canada will give effect to a foreign maritime lien if such is given to a necessaries man by the proper law, even if under our law the shipowner would not be personally liable at all, and no statutory right *in rem* would lie. The only foreign law alleged in the statement of claim to grant a maritime lien is that of the United States. It has been proven, as a matter of fact in other cases before our Courts, that unless it can be established that the bunker supplier did not actually know the time charterer did not have authority to contract on the credit of the ship, the bunker supplier enjoys a maritime lien under American law. We may well give full force and effect to that lien even though other jurisdictions, such as England, would not. Thus, Alpha may be in a better position in Canada with respect to the bunkers taken on at Corpus Christi than with respect to those taken on at the other ports. The owners might be in a position on the merits to establish that they were not privy to the bunker supply terms and conditions, and might be able to rebut the presumption that the bunkers were delivered on the credit of the ship. I endeavoured to set out my understanding of the law in *World Fuel Services v. The "Nordems" (Ship)*, 2010 FC 332, currently under appeal.

[15] Canada is not a party to the 1952 *Convention on the Arrest of Sea-Going Ships.* According to the opinions of Belgian counsel filed in this case, whose opinions differ little one from the other,

Belgium is party to that Convention and has interpreted it in such a way that a ship may be arrested to secure a claim against time charterers who ordered bunkers, even absent a maritime lien and even absent personal liability on the owner's part. This is a dramatic departure from Canadian law. Bail need only be given here to secure a claim against the ship and her owners, never with respect to a claim against her time charterers. The owners have taken various motions in Belgium to have the ship released, all without success to date. The only way they can release the ship is to post bail to cover the indebtedness of MFN. Assuming Alpha has not been paid, Alpha will likely obtain judgment and execute it against the bail. I am told that MFN's bankruptcy trustee takes no interest in the matter. On the other hand, the ship is mortgaged to an amount which may be in excess of her current market value. If bail is not posted, and the ship sold pursuant to Belgian court process, Alpha will likely get nothing.

ANTI-SUIT INJUNCTIONS

[16] Rarely a maritime case comes and goes without a conflict of law issue being raised.

[17] There may be any number of jurisdictions which have a legitimate connection with a cause of action. International comity requires that great caution be exercised before one court takes steps which have a bearing on proceedings in another.

[18] A court may stay proceedings in its jurisdiction in favour of another on the ground that it is a more appropriate forum. This common law power is reflected in Section 50 of the *Federal Courts Act*.

[19] A less common method of control is to issue an anti-suit injunction, thereby restraining a party from continuing proceedings in another jurisdiction. Although such an injunction only works *in personam* and certainly does not purport to be an order against a foreign court, as aforesaid it requires that discretion be exercised most carefully.

[20] Our law on the subject was authoritively set down by the Supreme Court in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897. See also *Holt Cargo Systems Inc. v. ABC Container Line N.V. (Trustee of)*, 2001 SCC 90, [2001] 3 S.C.R. 907.

[21] The owners complain that the interpretation given by the Belgium courts to the 1952 Convention flies in the face of the language of the Convention itself, in that in reality the arrest to secure a claim against a time charterer creates a hybrid maritime lien, contrary to Article 9 thereof. While it may well be that if this Court were called upon to interpret the language of Article 9, it might not share the opinion of the Belgian courts, that is not the point.

[22] The point is that Alpha invoked the jurisdiction of this Court and attorned to it by serving a statement of claim *in rem* on the ship and arresting her with respect to all 11 invoices. It agreed to release her against a promise by the owners to provide security for all 11. It was not necessary that bail be actually filed. Indeed, I venture to say it is far more common for ships to be released against

unofficial security, such as letters of undertaking from protection and indemnity associations, hull and machinery underwriters or, as in this case, a well-known Canadian shipowner.

[23] I do not accept the niceties urged upon me by Alpha that all it is looking for is $1.5 million security all told, part in Canada, part in Belgium. It suggests that it has 11 causes of action, one on each unpaid invoice. However, on cross-examination, Alpha's managing director testified that credit had been extended beyond the 30 days set out in its trading terms and conditions. It instituted one action in Canada for 11 invoices, the ship was arrested with respect to those invoices, she was released against an undertaking to furnish security with respect to all 11 invoices (which undertaking is still in place) so that as far as I am concerned there is but one cause of action. To amend the statement of claim to delete ten invoices and then to bring them back in another docket number under another alleged cause of action is unacceptable. One must put one's best foot forward and not keep other potential causes of action up one's sleeve. Thus, distinctions, which in context are artificial, between actions *in rem* and *in personam* and the fact that parties may be somewhat different, are irrelevant. (*Gentra Canada Investments Inc. v. Lenhdorff United Properties*, [1996] 1 W.W.R. 154, 31 Alta. L.R. (3d) 322 (Q.B.); *OT Africa Line Ltd. v. Magic Sportswear Corp. and al.*, [2004] EWHC 2441; *OT Africa Line Ltd. v. Magic Sportswear Corp. and al.*, [2005] EWCA Civ. 710; and *OT Africa Line Ltd. v. Magic Sportswear Corp.*, 2006 FCA 284)

[24] I consider it significant that Alpha is the plaintiff in both Canada and in Belgium. This point was made by the Nova Scotia Court of Appeal in *ABN AMRO Bank Canada v. Wackett*, [1997] 161 N.S.R. (2d) 48, notwithstanding that the parties in different jurisdictions were not on all fours.

[25] I hasten to add that the reasons for this decision are in no way intended as a slight upon the Belgian courts. Had Alpha not come to Canada first, Transport Desgagnés would have had no standing whatsoever to bring on its motion for an anti-suit injunction. Other jurisdictions give maritime liens in situations where Canada does not. The Unites States is a prime example. However, our sense of public policy is not so offended that we refuse to give effect thereto. If Belgium, by a procedural device, gives what for all intents and purposes is a maritime lien on a ship for a debt incurred by time charterers, so be it!

[26] Alpha is trying to get the best of all possible worlds.

[27] On the facts of this case, it cannot clearly be said that Canada is a more suitable forum. Although the owners are domiciled here and the ship flagged here, she engaged in international trade and took on bunkers in various jurisdictions, including both Canada and Belgium. What is oppressive is that having undertaken to accept bail in Canada for all 11 claims, Alpha then arrested the ship in Belgium to secure a claim advanced by action against MFN in Italy, while it had already sued MFN *in personam* in Canada.

[28] The urgency of this matter does not allow me to set out at great length all the authorities placed before me. However, they stand for the following propositions:

a. There are several jurisdictions with a reasonable connection to this matter. Alpha had the option of filing suit in any number of them. As Mr. Justice Binnie noted in *Holt Cargo,* above, one must take into account the special lifestyle of ocean-going ships. As to the allegation that the plaintiff was engaged in “forum shopping”, he

referred to the following passage from Lord Simon in the *Atlantic Star (The)*, [1974] A.C. 436, [1973] 2 All E.R. 175, quoted by Mr. Justice Ritchie in *Antares Shipping Corp. v. "Capricorn"*, [1977] 2 S.C.R. 422 [at page 453]:

> 'Forum-shopping' is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.

b. Although our rules of Court, Rules 165 and 200, permit a plaintiff to unilaterally amend its statement of claim before a defence is entered, and to discontinue proceedings, those rules are tempered by the overriding power of this Court to control its own process. In *Osborn Refrigeration Sales and Service Inc. v. Atlantian I (The)*, T-1376-74, Mr. Justice Walsh refused to accept a declaration of satisfaction of judgment as the ship was about to be sold by the marshal and as a number of other interested parties had filed caveat releases. In *Magnolia Ocean Shipping Corp. v. Solidad Maria (The)*, T-744-81, Mr. Justice Marceau did not simply stay an action, as contemplated by s. 50 of the *Federal Courts Act*, but invoked the inherent power of this Court to dismiss it outright.

c. Although proceedings may be taken in more than one jurisdiction for the same cause of action, at some point an election must be made. Alpha's case is that both MFN and Transport Desgagnés are parties to its contract. It created its own terms and conditions and, for better or for worse, must live with them.

d. Although this Court may allow, in proper cases, a party to discontinue its action in order to pursue matters elsewhere, this is not one of them. By accepting security,

> albeit in the form of an undertaking, Alpha made its election, and this Court will hold it to it.

[29] A case very much on point is the decision of the English Court of Appeal in the *Atlantic Star*, [1972] 2 Lloyd's Rep. 446, [1973] Q.B. 364 (C.A.). This was one of the last gasps of the English courts to enforce a narrow view of *forum non conveniens.* Although reversed by the House of Lords, [1974] A.C. 436, the following words of Lord Denning, in the Court of Appeal, with respect to vexatious and oppressive proceedings still hold true in admiralty (pp. 451-452):

> […] The plaintiff, naturally enough, decides to arrest her in that country which he considers gives the greatest advantage to him. It is his choice and the shipowner cannot gainsay it. The shipowner will, of course, obtain the release of the vessel by giving security: and, on giving it, he will not be called upon to put it up in another country—see *The Putbus*, [1969] P. 136; [1969] 1 Lloyd's Rep. 253. The action goes for trial in the country thus selected by the plaintiff. He is committed to that country and so long as he pursues it there, after accepting security, he will not be allowed to pursue his claim in another country – see *The Christiansborg* (1885) 10 P.D. 141; The Soya Margareta, [1960] 1 Lloyd's Rep. 675*;* [1961] 1 W.L.R. 709; *The Lucile Bloomfield*, [1964] 1 Lloyd's Rep. 324.
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> Such being the law, the plaintiff chooses the country which suits him best. He may, for instance, find that, in one country, the limitation fund is higher than in another: and so forth. But he must elect, sooner or later, to sue in one country only. If he brings an action *in personam* in one country, that does not by itself amount to an election. He may be permitted in proper cases to discontinue that action and pursue his claim in another country, see *The Janera*, [1928] P. 55; (1927) 29 L.l.L.Rep. 273: *The Hartlepool*, (1950) 84 L.l.L.Rep. 145; *The Soya Margareta*, [1960] 1 Lloyd's Rep. 675; [1961] 1 W.L.R. 709. But, once he arrests the ship or accepts security in lieu, he has made his election.
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> [My emphasis.]

[30] Alpha's reliance upon the decision of the Court of Appeal in *Freighters (Steamship Agents) Co. v. The No Four*, [1983] 1 F.C. 852, is misplaced. In that case the defendant moved to have the Canadian action dismissed on the grounds of *lis albi pendens*, as proceedings with respect to the same cause of action had been taken in Korea. The Court refused on the grounds that the plaintiff had an advantage here, in that it was able to arrest the ship to secure its claim for services rendered in the United States and alleged to be secured by a maritime lien. In fact, there were two actions in Korea. The first had already been dismissed by the Court for lack of jurisdiction, and the second had not yet been served. The situation is quite different here in that the Canadian action was issued and served, and the ship arrested months before she was rearrested in Belgium.

[31] I am mindful that this injunction is addressed to persons not within this jurisdiction. However, Alpha has done some business here, in that one of the outstanding invoices is for bunkers taken on at Montréal. By taking action here, it has subjected itself to the full force of our law.

[32] Alpha's counter motion seeking an order that the owners furnish bail in Belgium was withdrawn.

[33] On release of the ship, the owners have promised to fulfil the balance of their original undertaking by depositing CND$1,315,000 into this Court to serve additional bail to secure the claim *in rem* against the ship Sarah Desgagnés and *in personam* against her owners. This promise is backed by an undertaking by their counsel, as officer of this court, that he is holding that said amount in trust for that very purpose.

ORDER AND INTERLOCUTORY INJUNCTION

FOR REASONS GIVEN;

THIS COURT ORDERS that the plaintiff, Alpha Trading Monaco SAM, as well as its officers and directors, and the servants, employees or agents of any of them, and any other person, corporation or entity acting under their instructions or control, including, without restricting the generality of the foregoing, Alessandra Boccone, Gian Luigi Brancaccio and Alpha Trading SpA are ordered to forthwith cause the release of the ship Sarah Desgagnés from her current conservatory arrest in Belgium; to refrain from rearresting, seizing or otherwise detaining the ship Sarah Desgagnés or any other vessel under the same beneficial ownership, in any jurisdiction other than this Court with respect to any of the bunker deliveries which are the subject of this action or Federal Court action T-99-10, the whole in consideration of Transport Desgagnés Inc., once the ship leaves Belgium waters, tendering the additional amount of CDN$1,315,000 in the Registry of this Court to stand as bail for plaintiff's claim against the ship Sarah Desgagnés and her owners, Transport Desgagnés Inc., the whole with costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2075-09
STYLE OF CAUSE:	Alpha Trading Monaco Sam v. The Ship "Sarah Desgagnés" et al.
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APPEARANCES:

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