

Federal Court



Cour fédérale

Date: 20140626

Docket: T-1226-10

Citation: 2014 FC 625

**ADMIRALTY ACTION *IN REM* AGAINST THE VESSEL "QE014226C010"
AND *IN PERSONAM***

BETWEEN:

OFFSHORE INTERIORS INC.

Plaintiff

and

**WORLDSPAN MARINE INC.,
CRESCENT CUSTOM YACHTS INC.,
THE OWNERS AND ALL OTHERS
INTERESTED IN THE VESSEL
"QE014226C010" AND
THE VESSEL "QE014226C010"**

Defendants

and

**WOLRIGE MAHON LIMITED
IN ITS CAPACITY AS APPOINTED
VESSEL CONSTRUCTION OFFICER
OF THE DEFENDANT VESSEL
"QE014226C010", HARRY SARGEANT III,
MOHAMMAD ANWAR FARID AL-SALEH,
AND 642385 B.C. LTD.**

Interveners

REASONS FOR ORDER

LAFRENIÈRE P.

[1] The Plaintiff, Offshore Interiors Inc. (Offshore), seeks an order that the Vessel “QE014226C010” (the Vessel) be sold forthwith to 1005257 B.C. Ltd. (the Purchaser), for the sum of USD\$5,000,000.00.

[2] The motion is supported by the Interveners, Mohammad Anwar Farid Al-Saleh, and 642385 B.C. Ltd. (the Landlord). It is opposed by the Interveners, Harry Sargeant III (Sargeant) and Comerica Bank (Comerica).

[3] I provided oral reasons from the Bench to explain to counsel why the Plaintiff’s motion would be granted. This brief endorsement simply serves to commit my reasons to writing.

[4] The underlying proceeding has a long history. In summary, Sargeant and Worldspan Marine Inc. (Worldspan) entered into a Vessel Construction Agreement (VCA) dated February 29, 2008 whereby Worldspan agreed to design, construct, outfit, launch, complete, sell and deliver the Vessel, a 142 foot custom built luxury yacht, to Sargeant. Construction of the Vessel began in March 2008. A Builder’s Mortgage in favour of Sargeant as against the Vessel was filed in the Vancouver Ship Registry on May 14, 2008. By August 2009 payments made by or on behalf of Sargeant to Worldspan totalled USD\$11,064,525.38.

[5] On August 14, 2009, Sargeant entered into a Construction Loan Agreement (CLA) with Comerica and others for USD\$9,400,000.00 to finance the completion of the construction of the

Vessel. Sargeant's interests in the VCA, the Vessel, and the Builder's Mortgage were assigned to Comerica by way of an Assignment of Security Agreement and Mortgage of same date. From August 2009 to March 2010, Comerica paid to Worldspan, on Sargeant's behalf, the sum of USD\$9,387,398.67. By April 2010 the total amount paid to Worldspan by or on behalf of Sargeant in connection with the construction of the Vessel was USD\$20,651,924.05.

[6] A dispute arose between Sargeant and Worldspan concerning project costs and construction of the Vessel ceased in April or May 2010. Offshore commenced the underlying action on July 20, 2010 against Worldspan, Crescent Custom Yachts Inc., the Owners and all others interested in the Vessel, and the Vessel itself for unpaid invoices for services and materials rendered in connection with construction of the Vessel. The Vessel was arrested on July 28, 2010 and has remained under arrest ever since in leased premises on a property owned by the Landlord at 27222 Lougheed Highway, Maple Ridge, British Columbia.

[7] On May 27, 2011, Worldspan and related entities filed a Petition in the British Columbia Supreme Court seeking relief under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36 (CCAA Proceedings).

[8] On May 31, 2011, default judgment was granted by this Court on behalf of Offshore against the Defendants, including the Vessel or her bail, in the amount of \$273,754.58, plus costs.

[9] On July 22, 2011, Justice Pearlman of the British Columbia Supreme Court issued a claims process order in the CCAA Proceedings (CCAA Claims Process Order). This required all creditors to deliver proofs of claim on or before the claims bar date, September 9, 2011, failing which the creditor would be forever barred from making or enforcing any claim. It also provided that any creditor that filed a proof of claim in the CCAA Proceedings asserting an *in rem* claim against the Vessel could pursue that claim, outside the CCAA Proceedings, in this Court.

[10] By Order dated August 29, 2011, I established a claims process for all creditors with *in rem* claims against the Vessel (Federal Court Claims Process Order). That Order provided that notice be given to all creditors of the requirement to file an affidavit containing particulars in support of the claim against the Vessel, specifying the nature of the claim to enable the Court to determine if such a claim constituted an *in rem* claim and, if so, its priority. It also required all such affidavits to be filed 21 days after the *in rem* creditor received the required notice and provided that all questions relating to the right of any *in rem* claimant be determined by the Federal Court upon application.

[11] On February 9, 2012, Offshore filed a motion seeking an order declaring that the Builder's Mortgage does not create a lien or charge in the Vessel other than to secure its delivery. I granted the relief sought by Offshore by Order dated March 5, 2013; however, the Order was reversed on appeal by Madam Justice Cecily Strickland on December 19, 2013. Offshore appealed and the matter is presently under deliberation by the Federal Court of Appeal.

[12] The above facts provide background information that is important for a contextual understanding of the timing and interplay of the motions that were recently brought before this Court.

[13] The first salvo was by the Landlord. It moved for an order that the arrest warrant for the Vessel be set aside or, alternatively, that the arrest warrant be varied to permit the Landlord to remove the Vessel from the Premises and to store the Vessel in the Landlord's exterior yard or such alternative location as may be directed by the Court.

[14] Sargeant in turn brought a motion to relocate the Vessel to Richmond Shipyard and for a priority charge for the movement of the Vessel and future rent. Sargeant submits that steps to prepare the Vessel for the relocation must be taken immediately as the window of opportunity is very short due to unfavourable tides later in the summer.

[15] The two motions for immediate relief from the Court prompted Offshore to bring the present motion for approval of the sale of the Vessel to the Purchaser.

[16] It should be noted that this is not the first time that Offshore has sought the Court's assistance to sell the Vessel. On September 28, 2011, Offshore sought leave to market the Vessel for sale. Mr. Justice Sean Harrington issued an Order on May 7, 2013 approving the process for marketing and advertising the sale of the Vessel with a gross asking price of USD\$18,900,000.00. Notwithstanding extensive marketing efforts and an extension of the

marketing order, no satisfactory offer was received. The Vessel has since languished at the Landlord's premises, accumulating rent charges and depreciating in value.

[17] Concerned about the depreciating value and declining marketability of the Vessel, Offshore seeks a court-ordered sale in order to clear title and to create a fund for distribution of proceeds once priorities are determined. There is now an individual, identified as JC Mas, who has expressed a serious interest in purchasing the Vessel through a numbered company. Mr. Mas apparently has no shortage of funds and has put down a deposit of \$200,000.00.

[18] Offshore desires that a sale to Mr. Mas take place. However, Sargeant and Comerica oppose the sale and are content to have the Vessel relocated to another shipyard and stored there until the claims process comes to an end.

[19] Considering all of the circumstances, I consider it proper and in the interests of justice that the Vessel be sold. The parties all agree that the Vessel will have to be monetized at some point in time. In fact, counsel for Sargeant and Comerica conceded at the hearing that the Vessel must first be sold by court order before it can be completed.

[20] While a vessel is under the protection of a warrant of arrest, the Court's role is to protect the interests of all the creditors, not some of them. In my view, it would be unreasonable to continue to hold the Vessel under arrest, at large expense (for relocation and future rent) and for an indefinite period of time. The result would be a reduced recovery for the claimants, whether they have a secured interest or otherwise.

[21] On the basis of the affidavit evidence filed on behalf of Offshore, which has not been cross-examined or contradicted by Sargeant and Comerica, and the appraisal prepared by Aegis Marine Surveyors Ltd. at the Landlord's request on May 17, 2013, I conclude the Vessel has significantly depreciated in value since its arrest and is reaching the point of obsolescence. The offer to purchase by 1005257 B.C. Ltd. represents, in my view, fair value for the Vessel and its equipment.

[22] The purchase price is clearly inferior to the amounts claimed by the secured creditors, Sargeant and Comerica. However, they have not established that a better offer could be obtained in the foreseeable future that would be in the interests or the benefit of the claimants.

[23] The time is ripe to sell the Vessel for the following reasons:

- (a) First, the Vessel has been under arrest for four years;
- (b) Second, the Vessel was the subject of a Marketing Order issued by Mr. Justice Harrington dated October 7, 2011, as extended by Mr. Justice Hughes on June 4, 2012, which resulted in no reasonable offer;
- (c) Third, the movement of the Vessel from the Landlord's premises would involve risk of damage and the Vessel is not insured for the benefit of the creditors;
- (d) Fourth, the Vessel is incomplete and has a limited market;
- (e) Fifth, the Vessel has significantly declined in value since its arrest and will depreciate further by further delay;
- (f) Sixth, additional costs, including relocation costs and future rent, will have to be incurred in the event the vessel remains under arrest; and

- (g) Seventh, the Landlord has agreed to release its claim to distraint of the items listed in the schedules to the offer to purchase so that the sale may complete without the necessity of further hearings and potential priority disputes to address the Landlord's rights, which is of value to all parties concerned.

[24] Given all of the circumstances, it is clear that no greater value could, in any circumstances either now or in the immediate future, be realized by further marketing. Indeed, there is every likelihood that if the Vessel is not sold now, there will be further diminishment in value by way of deterioration. In short, I am satisfied that a price of USD\$5,000,000.00 is a fair market value for the Vessel and that it is in the interests of the claimants as a whole that the Vessel be sold immediately.

[25] Offshore has prepared, circulated and submitted a draft order to give effect to my oral disposition; however, Comerica has taken issue regarding some of the terms of the order. Comerica is directed to submit a letter forthwith with a proposed draft order for the Court's consideration.

“Roger R. Lafrenière”
Case Management Judge

Ottawa, Ontario
June 26, 2014

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1226-10

STYLE OF CAUSE: OFFSHORE INTERIORS INC. v
WORLDSPAN MARINE INC., CRESCENT CUSTOM
YACHTS INC., THE OWNERS AND ALL OTHERS
INTERESTED IN THE VESSEL "QE014226C010"
AND THE VESSEL "QE014226C010" ET AL

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 23, 2014

REASONS FOR ORDER: LAFRENIÈRE P.

DATED: JUNE 26, 2014

APPEARANCES:

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