Federal Court of Appeal | Cour d'appel fédérale

Date: 20141219

Dockets: A-416-13

Citation: 2014 FCA 302

CORAM: **NADON J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

HARRY SARGEANT III

Appellant

and

MOHAMMAD ANWAR FARID AL-SALEH

Respondent

Heard at Vancouver, British Columbia, on June 9, 2014.

Judgment delivered at Ottawa, Ontario, on December 19, 2014.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] On February 28, 2013, Prothonotary Lafrenière (the "Prothonotary") of the Federal Court made the following order (the "Prothonotary's Order"):

a) he granted leave to Mohammad Anwar Farid Al-Saleh (the "Respondent" or "Al-Saleh") to intervene in Federal Court action T-1226-10;

b) he declared that the Federal Court had jurisdiction to adjudicate the Respondent's *in rem* claim against the Vessel "QEO14226C010" (the "Ship"), a 144-foot tri-deck motor yacht that is the subject matter of proceedings commenced by Offshore Interiors Inc. ("Offshore") in case T-1226-10;

c) he dismissed Harry Sargeant III's (the "Appellant") motion to strike the Respondent's *in rem* claim against the Ship; and

d) he recognized and enforced a September 19, 2011 judgment of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida in Al Saleh v. Harry Sargeant III et al., Case No. 50 2008 CA010187 XXXX MB AJ (the "Florida Judgment").

[2] The Prothonotary's Order was appealed to a Judge of the Federal Court. On November 29, 2013, Madam Justice Strickland (the "Judge") upheld the Prothonotary's Order in regard to points a), b) and c) above, but allowed the appeal in regard to point d) above (the "Federal Court Judgment"). Thus, she refused to recognize and enforce the Florida Judgment, but held that the Federal Court could adjudicate the Respondent's *in rem* claim against the Ship and she dismissed the Appellant's motion to strike the Respondent's *in rem* claim.

[3] The appeal before this Court pertains only to that part of the Federal Court Judgment which upheld the Prothonotary. There is no cross-appeal with regard to her refusal to recognize and enforce the Florida Judgment.

[4] For the reasons that follow, I have concluded that this appeal must be allowed. I find that the Respondent's *in rem* claim does not fall within the Federal Court's maritime jurisdiction under subsections 22(1) or 22(2)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "*Act*") as it is not, in pith and substance, a maritime claim within the meaning of those provisions of the *Act*. Therefore, I find that the Prothonotary and the Judge erred when they did not dismiss the Respondent's *in rem* claim on that basis.

I. THE FACTS AND DECISIONS BELOW

[5] The following summary of the facts is necessary so as to place the appeal in its proper context.

[6] In February 2008, the Appellant and Worldspan Marine Inc. ("Worldspan") entered into a Vessel Construction Agreement (the "Agreement") whereby Worldspan agreed to build a 144-foot custom-built luxury yacht for the Appellant.

[7] Pursuant to the terms of the Agreement, Worldspan would remain owner of the Ship until delivery to the Appellant. It was also agreed that, during the course of construction, the Appellant would make monthly payments in arrears to Worldspan to cover its expenditures for the prior month.

[8] Another term of the Agreement provided that the Appellant would have a continuing first priority security interest in the Ship to secure his advances to Worldspan. On May 14, 2008, a builder's mortgage in favour of the Appellant was filed in the Vancouver Ship Registry.

[9] Worldspan began construction of the Ship in March 2008. By August 2009, advances made to Worldspan by, or on behalf of, the Appellant amounted to US$11,064,525.38.

[10] In August 2009, the Appellant obtained a construction loan from Comerica Bank in the sum of US$9,400,000.00 so as to cover the remaining cost of construction.

[11] From August 2009 to March 2010, Comerica paid to Worldspan on behalf of the Appellant a sum of US$9,387,398.67. In April 2010, an additional sum of US$200,000.00 was advanced to Worldspan on behalf of the Appellant.

[12] Thus, by April 2010, a sum of US$20,651,924.05 had been advanced to Worldspan.

[13] Because of differences between the Appellant and Worldspan regarding project costs, construction of the Ship came to an end in April or May 2010.

[14] On July 28, 2010, Offshore, a sub-contractor of Worldspan, filed a Statement of Claim in the Federal Court of Canada for unpaid invoices regarding services rendered and materials provided to Worldspan in connection with the construction of the Ship. On the same day, Offshore arrested the Ship.

[15] On May 27, 2011, Worldspan and related entities filed a petition in the British Columbia Supreme Court (the "B.C. Supreme Court") for relief under the Companies Creditors' Arrangement Act, R.S.C., 1985, c. C-36 (the "CCAA").

[16] Following the petition filed in the B.C. Supreme Court for relief under the *CCAA*, Pearlman J.of that Court established a claims procedure whereby Worldspan's creditors were required to deliver a proof of claim, no later than September 9, 2011, failing which they would be barred from making or enforcing their claim. Pearlman J.'s order also provided that any creditor who filed a proof of claim asserting an *in rem* claim against the Ship could pursue that claim, outside the *CCAA* proceedings, in the Federal Court. Pearlman J. sought the aid of the Federal Court to carry out this part of his order.

A. *Proceedings before Prothonotary Lafrenière*

[17] On August 29, 2011, the Prothonotary established a claims process for creditors asserting an *in rem* claim against the Ship which provided that such creditors were to make known their *in rem* claim to the Monitor established in the *CCAA* proceedings (the "Monitor") by September 9, 2011, failing which the claim would be barred forever (the "Claims Process Order") .

[18] The Claims Process Order further provided that, once notified by a creditor of his or her intention to assert an *in rem* claim against the Ship, the Monitor was to notify such creditors of the requirement to file an affidavit in the Federal Court. This affidavit should contain all particulars and documents in support of their claim against the Ship and specify the nature of the claim so as to enable the Court to determine if the claim constituted an *in rem* claim and its priority vis-à-vis the other creditors' claims.

[19] The Claims Process Order also provided that creditors asserting an *in rem* claim against the Ship were to file their supporting affidavit in the Federal Court twenty-one days after they had received the required notice in writing from the Monitor. Finally, the Claims Process Order provided that all questions relating to the right of any *in rem* claimant against the Ship were to be determined by the Federal Court upon further application by any interested party or claimant.

[20] On September 9, 2011, the Respondent filed his proof of claim in the *CCAA* proceedings in which he asserted an *in rem* claim against the Ship. More particularly, the Respondent asserted that he was a creditor of Worldspan in that he had obtained a jury verdict in the amount of US$28,000,000.00 from the State of Florida against the Appellant for fraud and conspiracy to

commit fraud. He asserted that to the extent that the Appellant, or any entity that he controlled, had an interest in an asset held by Worldspan, he had a claim to that interest as a judgment creditor of the Appellant.

[21] In compliance with the Claims Process Order, the Respondent filed an affidavit in the Federal Court on November 3, 2011 setting out the particulars of his claim with supporting documents.

[22] In his affidavit, the Respondent states that he is a creditor of the Appellant by reason of the Florida Judgment obtained against, inter alia, the Appellant and International Oil Trading Company LLC. Further, he states that the Appellant's advances to Worldspan for the construction of the Ship constituted money of which he was defrauded by the Appellant and to which he is entitled as a result of the Florida Judgment.

[23] For the purpose of his affidavit, the Respondent repeats and relies on the facts pled in the complaint which he filed in the Florida Court on April 10, 2008. He explains that the Florida action results from the establishment of a Jordanian Company by the Appellant, himself and a third individual, each owning one-third of the company's shares. According to the Respondent, the purpose of the Jordanian Company "was to secure contracts with the US Government to supply oil to the United States Armed Forces stationed in Iraq from 2004 onward." He then states that the Appellant and the third shareholder conspired to defraud him of his one-third interest in the Jordanian Company and the profits resulting from its operation.

[24] The Respondent relates that on July 27, 2001, a Florida State Court jury awarded him damages in the sum of US$28,800,000.00 after finding, inter alia, the Appellant jointly and severally liable for conspiracy to commit fraud, aiding and abetting fraud and specific breaches of Jordanian law, namely breach of fiduciary obligations, tortious injury, unfair competition and breach of trade secrets.

[25] The Respondent also states that, as of November 1, 2011, he was owed a sum of US$29,259,222.00, which represents the original damage award of US$28,800,000.00 plus post-judgment interest in the amount of US$459,222.00. The Respondent states that he has received no payment from the Appellant or the other defendants in the Florida action and that he is currently pursuing enforcement remedies with respect to the Florida Judgment against, inter alia, the Appellant both in the United States and Canada.

[26] The Respondent further states that he believes payments in the amount of approximately US$9,400,000.00 were made by and on behalf of the Appellant to Worldspan for the construction of the Ship in and around the same period of time that the Appellant and his co-conspirator defrauded him of his interest in the Jordanian Company. He adds that, based on his examination of the Appellant's affidavit and the documents appended as exhibits thereto, he believes that the payments made to Worldspan by the Appellant and on his behalf "were made with funds that I was defrauded of by Mr. Sargeant, that were the subject matter of the Florida action, and that such funds constitute trust property."

[27] He also explained that these payments made by, or on behalf of, the Appellant combined with the security that Worldspan gave to the Appellant in the form of the ship mortgage, registered in the Canadian Register of Vessels on May 14, 2008, give rise to his *in rem* claim against the Ship.

[28] On February 6, 2012, the Respondent filed a motion in the Federal Court seeking intervener status in the proceedings commenced by Offshore, a declaration that the Federal Court had jurisdiction to adjudicate his *in rem* claim against the Ship and an order recognizing and enforcing the Florida Judgment.

[29] On February 7, 2012, the Appellant filed a motion in the Federal Court for an order dismissing the Respondent's *in rem* claim against the Ship on two grounds. First, the Appellant said that the Respondent's claim was not an *in rem* claim against the Ship and, second, that the Federal Court did not have jurisdiction over the claim. In making his motion, the Appellant relied on sections 22 and 43 of the *Act* and the admiralty jurisdiction of the Federal Court.

[30] Pursuant to the Prothonotary's Order, the Respondent was granted intervener status. The Prothonotary also declared that the Federal Court had jurisdiction to determine the Respondent's *in rem* claim and he recognized and ordered the enforcement of the Florida Judgment as a final judgment of the Federal Court. Accordingly, he dismissed the Appellant's motion.

[31] The Prothonotary's Order was appealed to the Federal Court by the Appellant and Comerica Bank and, on November 29, 2013, the Judge granted the appeal in part. She upheld the

Prothonotary's Order in all respects other than with regard to the recognition and enforcement of the Florida Judgment. In her view, the relief sought and granted to the Respondent in the Florida Judgment was not one which fell under the Federal Court's jurisdiction pertaining to Canadian maritime law. Hence, the Florida Judgment could not be recognized and enforced by the Federal Court.

[32] On appeal of the Federal Court Judgment, the Appellant argues the Judge erred when she did not dismiss the Respondent's *in rem* claim and that consequently the Respondent should not have been granted intervener status.

[33] I note, as an aside, that on June 27, 2014, the Prothonotary approved the sale of the Ship to 1005257 B.C. Limited for a sum of US$5,000,000.00, effective June 30, 2014. The order approving the sale provides that the Ship is to be sold free and clear of any and all claims, liens and encumbrances. The proceeds of sale are to be held in trust by Bernard LLP, solicitors for Offshore, in Canadian funds in an interest-bearing trust account pending further order of the Court.

B. *The Federal Court's Judgment*

[34] The Judge dealt with three issues in reaching her conclusions, namely: the standard of review; whether the Prothonotary erred in refusing to dismiss the Respondent's *in rem* claim; and whether the Prothonotary erred in finding that the Federal Court had jurisdiction to recognize and enforce the Florida Judgment.

[35] Regarding the standard of review, the Judge referred to *Seanautic Marine Inc. v. Jofor Export Incorporated*, 2012 FC 328, [2012] F.C.J. No. 440, a judgment of Boivin J. (as he then was), which held that the standard of review for discretionary orders made by prothonotaries varied depending on whether the questions raised in the motion were vital to the issue of the case or not (Federal Court Judgment, at para. 28).

[36] The Judge concluded that a prothonotary's decision dismissing a motion to strike was not vital to the issue of the case. Therefore, she found that the Prothonotary's Order should only be disturbed if it was clearly wrong. That is, if the exercise of his discretion was based on a wrong principle of law or a misapprehension of the facts (Federal Court Judgment, at para. 66).

[37] On the other hand, the Judge found that the Prothonotary's Order with regard to the recognition and enforcement of the Florida Judgment was one that was vital to the final issue of the case and, therefore, should be reviewed on a *de novo* basis (Federal Court Judgment, at para. 67).

[38] The Judge then turned to the Prothonotary's refusal to dismiss the Respondent's *in rem* claim. Rephrasing the Respondent's arguments, the Judge explained that the doctrine of constructive trust gives rise to a proprietary *in rem* remedy when recovering trust property at common law and in equity. On the basis of section 22 of the *Act*, she noted that the Federal Court had, on several occasions in the past, asserted jurisdiction over *in rem* claims arising from a proprietary claim to the ownership of a vessel based on the doctrine of constructive trust (*Le Drew v. April Anne (The)*, [1977] F.C.J. No. 303 (F.C.T.D.) [*Le Drew*]; *Jesionowski v. Gorecki*,

[1992] F.C.J. No. 816, (1992) 55 F.T.R. 1 (F.C.T.D.) [*Jesionowski*]; and *Neves v. Ship Kristina Logos et al.*, 2001 FCT 1034, [2001] F.C.J. No. 1430 (F.C.T.D.) [*Neves*]) (Federal Court Judgment, at para. 72).

[39] Relying on these authorities, on which the Prothonotary also relied, the Judge held that the Prothonotary was not "clearly wrong" in determining that the Federal Court had jurisdiction, pursuant to sections 22 and 22(2)(*a*) of the *Act*, to consider a claim of ownership arising out of an alleged constructive trust (Federal Court Judgment, at para. 73).

[40] For the same reason, she ruled that the Prothonotary was not clearly wrong in accepting that the facts alleged by the Respondent with respect to the Appellant's fraud were sufficient to find a *prima facie* constructive trust claim based on the doctrine of unjust enrichment and the principles set out by the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52.

[41] In the Judge's opinion, the Florida Judgment could, at least potentially, serve as evidence in support of a constructive trust claim of which the Respondent was the beneficiary. The Judge noted that in the Respondent's proof of claim filed in the *CCAA* proceedings, he asserted that he is a creditor of Worldspan, that Worldspan is indebted to him and that his claim is an *in rem* claim against the Ship (Federal Court Judgment, at para. 75).

[42] The Judge concluded her analysis by stating that, "Whether Al-Saleh will, ultimately, be able to establish a factual basis to support the constructive trust claim, including that Worldspan

did not receive the alleged trust funds in good faith, is an issue on the merits to be determined at the priorities hearing" (Federal Court Judgment, at para. 76).

[43] Lastly, the Judge dealt with the recognition and enforcement of the Florida Judgment. Although the Respondent has not appealed this part of the Federal Court Judgment, I nonetheless will set out the Judge's rationale both for the sake of completeness and because it is relevant to the jurisdictional aspect of this appeal. On this question, as I have already indicated, the Judge disagreed with the Prothonotary and overturned him.

[44] The Judge noted that the Prothonotary had relied upon *Kona Concept Inc. v. Guimond Boats Ltd.*, 2005 FC 214, [2005] F.C.J. No. 256 [*Kona Concept*] in concluding that the Florida Judgment should be recognized and enforced. The Prothonotary had held that the issue in both that case and in the one before him was not whether the US Court exercised maritime jurisdiction, but whether the claim fell under Canadian maritime law. However, the Judge concluded that *Kona Concept* could be distinguished. She explained her reasoning as follows (Federal Court Judgment, at para. 84):

> [In *Kona Concept*], a US entity, Kona, entered into a contract with a New Brunswick ship building company, Guimond, for the construction of a vessel. Upon breach of the ship building contract, Kona obtained a US judgment against Guimond and commenced an action by way of summary judgment seeking to have the foreign judgment declared to be recognized and enforced by this Court. In response, Guimond moved to strike the statement of claim on the basis that the Court did not have jurisdiction in respect to a non-maritime judgment. Thus, the underlying subject matter of the claim in *Kona Concept* was a contract for the construction of a ship over which, pursuant to section 22(2)(*n*) of the [*Act*], this Court has jurisdiction.

[45] The Judge indicated that, "reading the Kona Concept decision in whole", the real issue to be determined, with respect to a jurisdictional question, is whether or not the claim falls within Canadian maritime law (Federal Court Judgment, at para. 85). She stated that the test for this had been set out by the Supreme Court of Canada in *ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, [1986] S.C.J. No. 38 [*ITO*]. Under that test, three requirements had to be met (Federal Court Judgment, at para. 86):

1. There must be a statutory grant of jurisdiction by the federal Parliament;
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. The law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

[46] These legal principles having been set out, the Judge opined that unlike *Kona Concept*, the Florida Judgment did not arise out of a ship construction contract (Federal Court Judgment, at para. 91). In her view, the cases relied upon by the Respondent on the jurisdictional question (*Le Drew, Jesionowski* and *Neves*) could all be distinguished and added little to the jurisdictional analysis. More specifically she said that none of the cases held that the Federal Court had jurisdiction solely on the basis of a constructive trust. Furthermore, in each of these cases, the connection to the claim was a direct relationship to the ownership or repair of the subject vessel. These were not situations where the parties sought to enforce a non-maritime foreign judgment on the premise that it supported a claim of constructive trust (Federal Court Judgment, at paras. 92 and 94).

[47] The Judge concluded her remarks on this issue in the following manner (Federal Court Judgment, at para. 95):

> Here, the Florida Judgment is one of monetary damages against Sargeant in favour of Al-Saleh. The dispute between them which gave rise to that judgment had no maritime aspect nor does the remaining issue, being its recognition and enforcement, which is distinct from the question of whether a potential constructive trust arising from or supported by the Florida Judgment gives rise to an *in personam* and *in rem* cause of action. The subject matter of the Florida Judgment does not fall within Canadian maritime law and accordingly, pursuant to the *ITO* test, this Court has no jurisdiction to enforce an *in personam* money judgment in the circumstances of this matter.

[48] Finally, given her conclusion that the Prothonotary had not erred in dismissing the Appellant's motion to strike the Respondent's *in rem* claim, she similarly held that he had not erred in granting the Respondent intervener status (Federal Court Judgment, at para. 97).

II. THE APPELLANT'S SUBMISSIONS

[49] The Appellant submits the Judge ought to have reviewed the Prothonotary's Order on a *de novo* basis as it concerned a number of issues that were vital to the final issue of the case. Namely the jurisdiction of the Federal Court to hear the Respondent's *in rem* claim, the conclusion refusing to dismiss the *in rem* claim and the conclusion granting the Respondent intervener status.

[50] The Appellant further submits that even if the Judge's determination regarding the standard of review was correct, she nevertheless erred when she found that the Prothonotary was not clearly wrong in his determination of the issues.

[51] With respect to the jurisdiction issue, the Appellant says that the Respondent's claim to an ownership interest in the Ship is not a matter that falls within the Federal Court's maritime jurisdiction. He argues that a claim to ownership of a ship *per se*, is insufficient to confer jurisdiction on the Federal Court. Instead, the claim, the Appellant says, must be rooted in Canadian maritime law or any other law of Canada relating to navigation and shipping, as required by subsection 22(1) of the *Act*. The Appellant further says that as the underlying basis of the Respondent's claim to an ownership interest, i.e. his allegation of fraud against the Appellant, does not pertain to navigation and shipping, his ownership claim does not fall within the Federal Court's maritime jurisdiction.

[52] The Appellant submits that the authorities on which the Respondent relies for his constructive trust arguments, namely *Le Drew*, *Jesionowski* and *Neves,* are of no help to the Respondent in that the Federal Court's jurisdiction over the claims asserted in those cases did not derive from or depend on the proposed constructive trust interest in the vessels in question.

[53] The Appellant further argues that there is no connection between the Respondent's *in rem* claim and the Ship as the Florida Judgment granted the Respondent monetary damages in relation to a litigation that had no connection whatsoever to the Ship.

[54] The Appellant makes a final point on jurisdiction which is that, absent *in personam* liability on the part of the owner of a ship, there cannot be *in rem* liability. In this case, Worldspan owns the Ship and there has not been an *in personam* claim advanced against that party by the Respondent. The Appellant, who simply has a contractual right to purchase the Ship,

cannot be considered as a beneficial owner of the Ship even if he holds a builder's mortgage on it.

[55] The Appellant also argues that the doctrines of *res judicata* and cause of action estoppel bar the Respondent from bringing a claim based on constructive trust in these proceedings when such a claim could have been raised in the Florida proceedings. He argues that although the Respondent had originally sought a declaration of constructive trust in the Florida proceeding, he notes that the Respondent subsequently abandoned this line of argument at trial in Florida. Lastly, the Appellant argues that, in any event, the Respondent's claim is bound to fail because there is no evidence on the record that Worldspan had any knowledge of the alleged trust, whether actual or constructive, or that it received the trust property for its own benefit.

[56] Consequently, the Appellant says that the Judge erred in not dismissing the Respondent's *in rem* claim and in granting the Respondent intervener status.

III. THE ISSUES

[57] The main issue which this Court must determine on appeal is whether the Judge erred when she upheld the Prothonotary's dismissal of the Appellant's motion to strike the Respondent's claim. In my opinion, this issue hinges on the question of the Federal Court's jurisdiction. Therefore, I would phrase the issue on appeal as follows: did the Judge err when she determined that the Prothonotary was not clearly wrong to conclude that the Federal Court had jurisdiction to adjudicate the Respondent's claim against the Ship?

[58] With respect to the question of whether the Respondent should have been granted intervener status, I would simply say that this issue depends entirely on the answer to be given to the jurisdictional issue and therefore need not be dealt with separately.

IV. ANALYSIS

A. *What was the nature of the Appellant's motion before the Prothonotary?*

[59] I begin with an analysis of the nature of the Appellant's motion to strike the Respondent's *in rem* claim. The Prothonotary treated the Appellant's motion as being akin to a motion to strike pleadings. Thus, he accepted that the allegations made by the Respondent in his affidavit filed on November 3, 2011 could be proved and did not look into the merits of these allegations. The Judge saw nothing wrong with this approach and was of the view that as the Prothonotary's dismissal of the motion to strike was not vital to the issue of the case, his order should only be interfered with if it was clearly wrong (*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 at para. 18).

[60] The Judge then examined the Respondent's claim in the light of the authorities. This led her to find that the Prothonotary was not clearly wrong when he accepted that the facts alleged by the Respondent with regard to the Appellant's fraud were sufficient to support a *prima facie* constructive trust claim based on the doctrine of unjust enrichment. She also found that the Prothonotary was not clearly wrong in concluding that the Federal Court had jurisdiction to consider a claim of ownership arising out of an alleged constructive trust.

[61] In making these determinations, the Judge summarized her understanding of the Respondent's *in rem* claim as follows (Federal Court Judgment, at paras. 68-69):

> [68] In essence, the basis of Al-Saleh's *in rem* claim is that the funds advanced to Worldspan for the construction for the Vessel by Sargeant and IOTC USA or other companies controlled by Sargeant were the proceeds of fraud and unjust enrichment. As such, this gave rise to a constructive trust, and as the beneficiary of that constructive trust, Al-Saleh has a proprietary interest in the ownership of the Vessel. This engages the Court's jurisdiction pursuant to section 22(1) and 22(2)(*a*) of the [*Act*].
>
> [69] Further, that Al-Saleh is therefore entitled to all remedies available to him to recover the trust property including the tracing of same into the hands of a third party, Worldspan, which Al-Saleh alleges was in knowing receipt and/or receipt of the funds obtained by fraud. This gives rise to an *in personam* claim against Worldspan and an *in rem* claim against the Vessel.

[62] After setting this out, the Judge emphasized that whether the Respondent could succeed in establishing the factual basis required to support his constructive trust claim was an issue which would be eventually determined on its merits at the priorities hearing.

[63] On appeal, the Appellant argues that his motion was not a motion akin to a motion to strike pleadings. He argues that in response to his motion, the Prothonotary should have determined the Respondent's claim on its merits. Consequently, the Appellant says that the Judge erred when she did not deal with his motion on a *de novo* basis.

[64] At first I was persuaded by the Appellant's arguments on this question. There is no doubt in my mind that the Appellant's motion to strike, on its terms, sought to have the Respondent's claim determined on its merits. That was clearly its purpose.

[65] In summary, the Respondent filed his claim in compliance with the Claims Process Order which required him to file an affidavit containing the particulars of his claim and any supporting documentation. This was meant to allow the Court to determine if the claim constituted an *in rem* claim and, if so, its priority position.

[66] The text of the Prothonotary's Claims Process Order on this score is noteworthy:

> All questions relating to the right of any claimant *in rem* against the Vessel...shall be reserved until further order of this Court and shall be determined at a subsequent hearing date, the date and time of which shall be set down by this Court upon further application by any interested party or claimant....

This, I believed, clearly meant that any interested party, including the Appellant, could ask the Court to determine the merits of the Respondent's *in rem* claim against the Ship. This was what the Appellant had invited the Court to do since, in his motion to strike, he referred precisely to the above-quoted part of the Prothonotary's Claims Process Order in asking the Court to strike the Respondent's *in rem* claim.

[67] Furthermore, the Prothonotary's Claims Process Order was made pursuant to Rule 492 of the *Federal Courts Rules* (SOR/98-106) (the "*Rules*") which provides as follows:

Directions	Directives
492. (1) The Court may, in making an order under rule 490 or 491 or at any time thereafter, give directions as to	**492**. (1) La Cour peut, au moment où elle rend l'ordonnance de vente des biens, au moment où elle statue sur la requête visée à la règle 491 ou à tout moment ultérieur, donner des directives au sujet :
(*a*) notice to be given to possible claimants to the proceeds of sale;	*a*) des avis à donner aux personnes qui pourraient réclamer un droit sur le

	produit de la vente;
(*b*) advertising for other such claimants;	*b*) de la publicité à faire à leur intention;
(*c*) the time within which claimants must file their claims; and	*c*) du délai dans lequel ces personnes doivent déposer leur réclamation;
(*d*) the procedure to be followed in determining the rights of the parties.	*d*) de la procédure à suivre pour déterminer les droits des parties.
[emphasis added]	[je souligne]
Claims barred	Fin de non-recevoir
(2) A claim that is not made within the time limited and in the manner prescribed by an order of the Court under subsection (1) is barred, and the Court may proceed to determine other claims and distribute the money among the parties entitled thereto without reference to any claim so barred.	(2) Une fin de non-recevoir est opposée à toute réclamation qui n'est pas déposée dans le délai et de la manière prévus dans l'ordonnance rendue en vertu du paragraphe (1), et la Cour peut statuer sur les autres réclamations et répartir le produit de la vente entre les parties qui y ont droit sans tenir compte de la réclamation à laquelle une fin de non-recevoir a été opposée.

[68] This Rule grants the discretion to give directions as to the process to be followed when there are competing claims, as here, to the proceeds of sale of a ship. Further, it provides that the Court may give directions to the parties with respect to the procedure to be followed in determining their rights. That was what, I believed, the Prothonotary's Claims Process Order purported to do in regard to the *in rem* claims filed against the Ship. In the process established by the Prothonotary, it is clear that the step which follows the filing of the *in rem* claims is the determination of their merits and their priority positions.

[69] Because of this view on this point, I determined that the proper course of action was to try to determine the merits of the Respondent's *in rem* claim. I would first of all see if the claim passed muster as a valid *in rem* claim, i.e. whether the Respondent's assertions of fraud and his assertions of constructive trust were proven and, if proven, whether these assertions could support a declaration of constructive trust over the Ship. The next step would have been for me to determine whether, on those facts, as proved, the Respondent's claim fell within the ambit of subsection 22(2)(*a*) of the *Act*.

[70] However, when I attempted to deal with the merits of the claim, I realized that I could not do so because of the state of the evidentiary record. This record, insofar as it concerns the Respondent's claim, is comprised of a number of affidavits, including that of the Respondent, with various documents attached to these affidavits in support of the claim. None of the deponents had been cross-examined on their affidavits. Would I, therefore, have to accept on their face the assertions made by the deponents? Furthermore, I also realized the insurmountable difficulties the slim evidentiary record presented with regard to the constructive trust issue. For example, the Appellant asserts that Worldspan had no knowledge of the alleged trust, whether actual or constructive. Further, the Appellant asserts that there was no evidence that Worldspan received the trust property for its own benefit. To the contrary, the Appellant says that Worldspan gave consideration for the construction of the Ship, that it did not receive any trust property for its benefit and that it was a *bona fide* purchaser for value without notice. According to the Appellant, the fact that Worldspan was a *bona fide* purchaser for value without notice of the trust entails that "tracing" is not an available remedy to the Respondent.

[71] As there is no evidence whatsoever before us from Worldspan, what was I to do with these submissions? This concern was pressing given that the authorities state that the burden of proof is on the recipient of trust property, i.e. Worldspan, to establish that it acquired a legal interest in the property in good faith, for value, and without notice of the breach of trust or other want of authority on the part of the trustee, i.e. the Appellant (see generally Donovan Waters, Mark Gillen and Lionel Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at p. 1334 following).

[72] Consequently, I concluded that I was in no position to make the determination which I had set out to make.

[73] The above considerations led me to rethink my view concerning the Appellant's motion to strike and the nature of the Prothonotary's determination. Although I am still of the opinion that the Appellant's motion was one that sought an order determining the merits of the Respondent's claim, I believe, in the circumstances, that the Prothonotary was right in not dealing with the merits of the Respondent's claim. That exercise, I am satisfied, could not properly be done at that stage of the proceedings, first because of the state of the record and second because the Prothonotary had not actually established a process for the determination of the merits of the competing claims. While it is true that the Claims Process Order stated that following the filing of the claims by *in rem* creditors, the claims would be determined at a hearing date set down by the Court upon further application by any interested party, that statement does not establish a process for determining the claims on their merits. What would have been required is for the Prothonotary to establish a process whereby the parties would be

provided with a schedule and timeframes in which they could file their evidence, cross-examine deponents and file the transcripts of these examinations following which a hearing date would be set down.

[74] Rule 492 gives the Court wide discretion with regard to this process. It would, with respect, have been preferable for the Prothonotary, upon receipt of the Appellant's motion, to have established such a process instead of dealing with the motion in the way he did. That way, all of the issues could have been dealt with, including the point of jurisdiction. However, when the motion to strike was filed, the record did not allow the Prothonotary to determine the merits of the claim. Therefore, given the state of the evidentiary record, the Prothonotary did not err in refusing to address the merits of the claim and, hence, the Judge was correct in refusing to intervene on this ground.

B. *Does the Respondent's claim fall within the Federal Court's maritime jurisdiction?*

[75] The Prothonotary also dealt with the question of jurisdiction and the question pertaining to the recognition and enforcement of the Florida Judgment. These questions could clearly be decided by the Prothonotary, irrespective of his failure to determine the merits of the Respondent's claim. He held that the Florida Judgment could be recognized and enforced, a finding which was overturned by the Judge. As noted above, no appeal has been taken of that part of the Federal Court Judgment. Hence, for our purposes, the Florida Judgment does not exist and cannot be of any help to the Respondent in this appeal.

[76] The question of the Court's jurisdiction is, however, a different matter. If, for example, the Respondent is unable to prove that his claim falls under subsection 22(2)(*a*) of the *Act*, then the Federal Court has no jurisdiction. Considering that the Prothonotary did not decide the merits of the Respondent's claim, what was the nature of his determination on jurisdiction?

[77] The Prothonotary's Order declared that, "This Court has jurisdiction to adjudicate the *in rem* claim of Mohammad Anwar Farid Al Saleh against the Defendant vessel". I do not believe that the Prothonotary's intention was to make a final determination on this point. Rather, I understand him to say that, on the assumption that all of the facts alleged by the Respondent in his claim can be proven, the claim is one that may fall under the Federal Court's maritime jurisdiction. In other words, the Prothonotary concluded that he would not strike the Respondent's claim because the claim was not one that was bereft of any chance of success.

[78] In my view, this is how the Judge understood the Prothonotary's Order and why she stated that whether the Respondent was able to establish the factual basis in support of his constructive claim was a matter which would be determined at the priorities hearing (Federal Court Judgment, para. 76). This explains why she reviewed the Prothonotary's Order on jurisdiction on the standard of "clearly wrong." Had she been of the view that the Prothonotary was making a final determination on jurisdiction, she no doubt would have reviewed that decision on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[79] However, after careful consideration of the parties' respective arguments on jurisdiction and upon consideration of the nature of the claim filed by the Respondent, I am of the opinion that both the Prothonotary and the Judge were clearly wrong when they concluded that the Federal Court had jurisdiction to entertain the Respondent's claim. The claim asserted by the Respondent cannot, in my view, be determined by the Federal Court as it does not pertain to any subject matter over which the Federal Court has jurisdiction. In other words, because of the jurisdictional barrier to the Respondent's claim, it cannot possibly succeed and should be dismissed. Had I not been of that view, I would have returned the matter to the Prothonotary with instructions directing him to establish a process pursuant to which the Federal Court would determine the merits of the Respondent's claim. However, because of my conclusion on the jurisdictional issue, this step will not be necessary.

[80] For the purpose of determining whether the Court has jurisdiction, I must accept the Respondent's claim as it has been presented and must assume that the factual allegations are capable of being proved. There is, however, one caveat and that is that the Florida Judgment has not been recognized by the Federal Court. At paras. 21-27 of this judgment (above), I have set out the claim presented by the Respondent pursuant to the Claims Process Order. I will now reformulate his claim for the purpose of my determination of the question of jurisdiction bearing in mind that the Florida Judgment, on which his claim is premised, has not been recognized and consequently cannot help him. However, that is not fatal since he has incorporated in his affidavit of November 3, 2011 the facts pled in his complaint in the United States. In other words, the allegations of his complaint in the United States form part of his claim herein. Whether he could successfully prove those facts is not an issue which I need to address.

[81] Thus, formulated in the broadest way possible, what is before the Court is the following claim. The Respondent claims against the Appellant and other individuals in connection with the establishment of a Jordanian company in which he, the Appellant, and another individual each had a one-third share. The purpose of the company was to secure contracts with the Government of the United States for the supply of oil to the United States Armed Forces stationed in Iraq from 2004 onward. The Respondent says that in connection with the operation of that company, the Appellant and the other individual conspired to defraud him of his one-third interest in the company and the profits arising therefrom. He argues that he is entitled to compensatory damages representing the full amount of money due and owing by the Appellant and the other individual in respect of certain identified contracts. He further argues that he is entitled to punitive damages and post-judgment interest. That is, in essence, the underlying factual basis of the claim which led to the Florida Judgment.

[82] I note from the pleadings filed in the Florida Court that at one point the Respondent asked the Florida court to grant him a constructive trust on all payments to be made by the Defense Energy Support Center, situated in the State of Virginia, in connection with the contracts at issue and any extensions and renewals of those contracts. However, prior to the trial, the Respondent abandoned his request for such a declaration. For the purpose of the present exercise, I will assume that the Respondent, as part of his claim against the Appellant for fraud, would seek a declaration of constructive trust from the Federal Court in regard to the Appellant's assets including moneys paid to Worldspan in connection with the construction of the Ship.

[83] The Respondent alleges that these funds, provided by the Appellant to Worldspan in order to construct the Ship, constitute the money that he was illegally deprived of by the Appellant's fraud. Therefore, he alleges that to the extent that the Appellant, or any entity controlled by him, has an interest in the Ship, he has a claim to that interest as a possible judgment creditor of the Appellant. He also asserts that because the funds used by the Appellant to make advances to Worldspan "were the proceeds of fraud" they are therefore "impressed with a constructive trust in his favour [and] he is entitled to rely on the doctrines of constructive trust and unjust enrichment as the legal basis of his claim" He further adds that as the beneficiary of a constructive trust he can trace his trust property to the Ship. Moreover, the Respondent alleges that Worldspan knew that the Appellant's advances were funds of which the Respondent was defrauded. Therefore, Worldspan's receipt of those advances was not in good faith. Thus, he concludes that he can pursue an *in personam* claim against Worldspan as well as an *in rem* claim against its Ship.

[84] Finally, the Respondent says that any proceeds of sale of the Ship constitute trust property to which he is entitled because such proceeds do not form part of Worldspan's estate and are not available to Worldspan's creditors.

[85] The above constitutes the entirety of the Respondent's claim formulated in the broadest possible way.

[86] The Respondent takes the position that as his claim falls under subsection 22(2)(*a*) of the *Act*, being a claim for an ownership interest in the Ship, the Federal Court's maritime jurisdiction is engaged. It will therefore be useful to reproduce subsections 22(1) and 22(2)(*a*) of the *Act*:

22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and Shipping, except to the extent that jurisdiction has been otherwise specially assigned.	**22.** (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas – opposant notamment des administrés – où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.
…	[…]
22. (2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**22.** (2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :
(*a*) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;	*a*) une demande portant sur les titres de propriété ou la possession, en tout ou en partie, d'un navire ou sur le produit, en tout ou en partie, de la vente d'un navire;

[87] The starting point of any analysis on this issue is the Supreme Court's decision in *ITO*, where it set out the requirements which had to be met in order for the Federal Court to have jurisdiction over any matter brought before it, including maritime matters, namely: (1) the existence of a statutory grant of jurisdiction by Parliament; (2) a body of federal law essential to the disposition of the case and which nourishes the statutory grant of jurisdiction and (3) a "law of Canada" on which the case is based.

[88] In *Monk Corp v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779, [1991] 1 S.C.J. No. 28 [*Monk*], the Supreme Court reiterated the principles which it had enunciated in *ITO*. At para. 27 of his reasons, Iacobucci J., writing for the majority, summarized his understanding of the Supreme Court's decision in *ITO* as follows:

> (1) The second part of the s. 2 definition of Canadian maritime law provides an unlimited jurisdiction in relation to maritime and admiralty matters which should not be historically confined or frozen, and "maritime" and "admiralty" should be interpreted within the modern context of commerce and Shipping.
>
> (2) Canadian maritime law is limited only by the constitutional division of powers in the *Constitution Act, 1867*, such that, in determining whether or not any particular case involves a maritime or admiralty matter, encroachment on what is in pith and substance a matter falling within s. 92 of the Constitution Act is to be avoided.
>
> (3) The test for determining whether the subject matter under consideration is within maritime law requires a finding that the subject matter is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal competence.
>
> (4) The "connecting factors" with maritime law were the proximity of the terminal operation to the port of Montreal, the connection between the terminal operator in activities within the port area and the contract of carriage by sea, and the fact that the storage in issue in the case was short term pending final delivery to the consignee, Miida.
>
> [Emphasis added]

[89] At para. 69 of his memorandum of fact and law, the Appellant makes the following argument relevant to the determination of the Federal Court's jurisdiction in this appeal. I therefore reproduce it in full.

> Sargeant submits that under s. 22 of the *Federal Courts Act*, a claim to ownership of a Ship on its own is not sufficient for the Federal Court to have jurisdiction with respect to that claim. In order for the Federal Court to have jurisdiction, the claim to ownership must be rooted in Canadian maritime law or any other law of Canada relating to navigation and shipping, as required under s. 22(1) of the *Federal Courts Act*. The claims listed in s. 22(2) are simply examples of types of maritime matters, but claims must still comply with the language of s. 22(1) of the

> *Federal Courts Act* in order for the Federal Court to have jurisdiction. The Federal Court has no jurisdiction unless the basis for the claim or cause of action underlying the claim for an ownership interest in the vessel relates to navigation and shipping.

[90] I agree entirely with the second sentence of the Appellant's submission above that a claim to ownership of a ship "must be rooted in Canadian maritime law or any other law of Canada relating to navigation and shipping, as required under [subsection 22(1) of the *Act*]." I also agree with the last sentence of the above submission where the Appellant argues that the Federal Court does not have jurisdiction "unless the basis for the claim or cause of action underlying the claim for an ownership interest in the vessel relates to navigation and shipping".

[91] However, the Appellant is clearly wrong when he says in the third sentence of the above paragraph that the claims described in subsection 22(2) of the *Act* constitute examples only of the type of claims which may constitute maritime claims, but that those claims must nevertheless comply with the language of subsection 22(1) for the Court to have jurisdiction. That, with respect, is incorrect.

[92] There can be no doubt whatsoever that once a claim is held to fall within one of the heads found in subsection 22(2) of the *Act*, there is necessarily substantive maritime law to support the claim (*Siemens Canada Ltd. v. J. D. Irving Ltd.*, 2012 FCA 225, [2012] F.C.J. No. 1120 at para. 35; *Skaarup Shipping Corporation v. Hawker Industries Limited* [1980] 2 F.C. 746 (F.C.A.) at para. 7). In other words, if it is determined that a claim falls under any of the heads described in subsection 22(2), it cannot, in my respectful view, be argued that such a claim is not one that is rooted in Canadian maritime law or any other law of Canada relating to navigation and shipping.

[93] Put another way, if the Respondent's claim falls within subsection 22(2)(*a*), it necessarily is a claim over which the Federal Court has jurisdiction. The question then is whether the Respondent's claim falls within that subsection. In making that determination, I accept the approach taken by Prothonotary Hargrave in *Atlantic Yacht & Ship Inc. v. Sovereign Yachts (Canada) Inc.*, 2003 FC 965, [2003] F.C.J. No. 1232 at para. 7 (*Atlantic Yacht*) where, after referring to that part of *ITO* where McIntyre J. cautioned against encroachment on matters which were in pith and substance matters of local concern involving property, civil rights or other matters exclusively within provincial jurisdiction, Prothonotary Hargrave said that approach was one that should be taken not only with regard to subsection 22(1) of the *Act*, but also with regard to the specific heads of subsection 22(2). Further, Prothonotary Hargrave said the following when considering whether a claim fell within the purview of subsection 22(2)(*a*) of the *Act* (at para. 7):

> I must still keep in mind that even in utilizing a contemporary approach (as explained by McIntyre J. in his reasons in *ITO*) I should consider the natural meaning on reading through the provision at issue: I must not distort the statutory jurisdiction granted to the Federal Court by giving a forced and unreasonable reading to sections of the *Federal Courts Act* which are relevant to the present instance.

[94] As I understand Prothonotary Hargrave, the point he makes is that in attempting to determine whether a claim falls under any of the specific heads of subsection 22(2), the words of the provisions must not be interpreted in such a way as to convert what is not a maritime claim into a maritime claim. With that proposition, I cannot but agree.

[95] With these principles in mind, I will now explain why I conclude that the Federal Court has no jurisdiction to entertain the Respondent's claim. First of all, I have no hesitation in saying

that the Respondent could not bring, in the Federal Court, the action which he brought in the Florida court. That action deals with matters of contract, tort, and fraud in respect of the establishment and operation of a Jordanian company set up for the purpose of securing contracts with the Government of the United States to supply oil to the United States Armed Forces in Iraq. That action, and thus the claim before the Federal Court, is clearly one pertaining to property and civil rights and does not pertain to maritime matters over which the Federal Court would have jurisdiction. That is precisely why the Judge, correctly in my view, refused to recognize and enforce the Florida Judgment. The Respondent's claim for fraud against the Appellant is a claim that could only be brought before one of the superior courts of the provinces where, I believe, the Florida Judgment might have been recognized and enforced.

[96] I note in passing that Rule 326 of the *Rules* gives the Federal Court jurisdiction to recognize foreign judgments in certain circumstances. None of the specified circumstances apply in this case.

[97] I must emphasize that a determination of the Respondent's claim against the Appellant in regard to the Jordanian matter is the foundation of his arguments for a declaration of constructive trust and of the consequent right to trace the funds of which he was defrauded into the Ship. In effect, the Respondent can only obtain a declaration of constructive trust if he is successful on his arguments of fraud against the Appellant. This begs the question as to which court can grant him a declaration of constructive trust over the Appellant's assets and in particular over the funds of which he was defrauded. The only court that could grant him a declaration of constructive trust which would allow him to pursue his remedies against Worldspan's Ship is the court which

could grant him judgment on his allegations of fraud against the Appellant. That court, in my respectful view, is not the Federal Court as the underlying subject matter of the Florida action, i.e. the allegations of fraud against the Appellant, do not pertain to any subject matter over which the Federal Court has jurisdiction, including its jurisdiction over maritime matters. My view that the Federal Court could not make a declaration of constructive trust in regard to the Jordanian matter is, I believe, indisputable.

[98] In *ITO*, the Supreme Court set out a tripartite test which has to be met by a party which seeks to resort to the Federal Court for adjudication of a claim. More particularly, the test requires the existence of a body of federal law, essential to the disposition of the case and a "law of Canada" on which the case is based. Neither the claim for fraud against the Appellant nor the sought-after declaration of constructive trust are questions that are based on a "law of Canada", nor are they questions which require the existence of federal law for their disposition.

[99] Furthermore, it is clear that the claim against the Appellant, which arises from the Jordanian company and its operations, and the declaration of trust are not matters that are "so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal competence" (*Monk*, at para. 27). To the contrary, these questions are in pith and substance matters falling within the exclusive legislative jurisdiction of the provinces under section 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[100] Thus, for these reasons, the Respondent's claim cannot be pursued in the Federal Court. In the eventuality that the Respondent obtains a judgment against the Appellant in regard to the Jordanian matter, or if he is successful in having the Florida Judgment recognized and enforced in a proper forum and is also successful in obtaining a declaration of constructive trust over the Appellant's assets, the question which then arises is whether his attempt to trace the trust funds into Worldspan's Ship constitutes a claim "with respect to title, possession or ownership of a ship..." thus falling within the purview of subsection 22(2)(*a*) of the *Act* and hence within the Federal Court's jurisdiction over maritime matters. Because of my conclusions regarding the fraud action/claim and the declaration of constructive trust in regard thereto, that question is not one which I need to address at the present time. I would, however, say a few words regarding such a claim, without in any way attempting to determine it.

[101] While it is true that the Federal Court has, on a number of occasions, found that it had jurisdiction over claims where a constructive trust was at issue, these were cases where the underlying subject matter of the claim giving rise to the constructive trust clearly fell within the Federal Court's jurisdiction over maritime matters (*Neves, Le Drew* and *Jesionowski*). In none of these cases did the Federal Court decide that it had jurisdiction solely on the basis of the constructive trust claim to an interest in a ship. Because the matters before the Federal Court in those cases were so clearly within the Federal Court's jurisdiction, there was no attempt to address the question which the Respondent's claim gives rise to in this case, i.e. whether an attempt to enforce a declaration of constructive trust over a ship, arising from a factual context which has no connection to navigation and shipping, is sufficient, *per se*, to allow the Federal

Court to exercise jurisdiction over the subject matter granted to it pursuant to section 22 of the *Act*.

[102] In many respects, the Respondent's claim is an unusual one and untypical of the type of claim generally brought before the Federal Court with regard to subsection 22(2)(*a*) of the *Act*. An example of the type of claim generally brought before the Federal Court under subsection 22(2)(*a*) is the Supreme Court's decision in *Antares Shipping Corp. v. The Capricorn*, [1979] S.C.J. No. 119, [1980] 1 S.C.R. 553, where a dispute arose because the ship had been sold by its owners to two purchasers. Consequently, in the Supreme Court's view, there could be no doubt that the claim asserted by one of the purchasers pursuant to subsection 22(2)(*a*) was one that pertained to the title, possession and ownership of the ship.

[103] There is also authority that the jurisdiction of the Federal Court does not extend to claims to ownership by personal creditors. In this respect, I again refer to *Atlantic Yacht* (at para. 17) where Prothonotary Hargrave refers to, *inter alia*, the decision of the English Court of Queen's Bench (Admiralty Division) in *NCNB Texas National Bank and Others v. Evensong Co. Ltd.* "*The Mikado*" [1992] 1 Lloyd's 163 (Q.B. Admlty) and the discussion of that decision by D.C. Jackson in *Enforcement of Maritime Claims*, 3rd ed., (London: LLP Professional Publishing, 2000) at p. 46 (see also *Richard Hughes v. Vail Blyth Clewley*, "*The Siben*" [1994] 2 Lloyd's 420 (Jsy C.A.) and the latest discussion of these cases in D.C. Jackson, *Enforcement of Maritime Claims*, 4th ed., (London: LLP Professional Publishing, 2005) at p. 25, 53 – 54).

[104] On reflecting on this issue, I also have in mind the words of Prothonotary Hargrave in *Atlantic Yacht* (at para. 7) where he cautioned against "giving a forced and unreasonable reading" to the specific heads of subsection 22(2). In other words, the Federal Court should not entertain a claim which is, in pith and substance, one that pertains to a matter of local concern involving property, civil rights or other matters exclusively within the jurisdiction of the provinces.

[105] In any event, this is a question which will have to wait for its day in court. As matters now stand, it need not be decided.

V. CONCLUSION

[106] For these reasons, I would allow the appeal with costs herein and below. I would set aside the decision of the Federal Court dated November 29, 2013 and, rendering the judgment which should have been rendered, I would allow the Appellant's appeal from the Prothonotary's decision of February 28, 2013, I would allow the Appellant's motion to dismiss the Respondent's claim and I would dismiss the Respondent's motion to intervene in Federal Court case T-1226-10.

"M. Nadon"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	DAWSON, TRUDEL JJ.A.
DATED:	DECEMBER 19, 2014

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