

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160908

Docket: A-146-16

Citation: 2016 FCA 224

Present: NADON J.A.

BETWEEN:

PLATYPUS MARINE, INC.

Appellant

and

**THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP "TATU" and
THE SHIP "TATU"**

Respondents

Heard at Ottawa, Ontario, on August 31, 2016.

Order delivered at Ottawa, Ontario, on September 8, 2016.

REASONS FOR ORDER BY:

NADON J.A.

Federal Court of Appeal



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REASONS FOR ORDER

NADON J.A.

[1] Before me is a motion by the Appellant, Platypus Marine Inc., pursuant to which it seeks an order declaring that the ship *Tatu* (the Vessel) will remain under arrest until such time as security or bail for its claim is posted pursuant to Rule 486 or that the Vessel is released pursuant to Rule 487.

[2] For the reasons that follow, I conclude that the motion must be dismissed.

[3] A brief summary of the relevant facts will be helpful in understanding the issue raised by the Appellant's motion.

[4] In an action commenced by Loralee B. Vogel (Federal Court File: T-1615-15), the Vessel, a 90 foot luxury yacht insured for U.S. \$5.8 million, was arrested in Vancouver on September 23, 2015 pursuant to a warrant for its arrest issued by the Federal Court.

[5] On October 29, 2015, the Appellant, a ship repairer based in Port Angeles, Washington, commenced an action *in personam* and *in rem* against the owners of the Vessel and the Vessel and served and filed a Caveat Release pursuant to Rule 493(2).

[6] By its action, the Appellant claimed the sum of U.S. \$285,508.92 pertaining to the costs of moorage, storage, repair and other services rendered to the Vessel. The Appellant further claimed the sum of U.S. \$100,000 representing an interest charge agreed to by the parties.

[7] On December 15, 2015, the Respondents having entered no defence regarding the principal amount of U.S. \$285,508.92, Mr. Justice Fothergill of the Federal Court granted judgment in full to the Appellant for the Canadian equivalent of U.S. \$285,508.92, i.e. Canadian \$363,455.61 plus costs in the amount of \$1,500. However, with respect to the agreed interest charge of U.S. \$100,000, Mr. Justice Fothergill granted leave to the Respondents to file and serve a statement of defence and directed that the matter be dealt with by the Court at a later date.

[8] At the end of January, 2016, the Respondents made payment in full to the Appellant of the sum ordered to be paid by Mr. Justice Fothergill, including costs and interest.

[9] On May 3, 2016, Mr. Justice Hughes of the Federal Court heard a motion brought by the Respondents which sought the summary dismissal of the Appellant's claim for interest in the sum of U.S. \$100,000.

[10] On the following day, Mr. Justice Hughes dismissed the Appellant's claim for interest concluding that the agreed interest charge violated the criminal interest provisions found in section 347 of the *Criminal Code*, R.S.C. 1985 c. C-46. As a result, Mr. Justice Hughes refused to enforce the parties' agreement regarding interest and, in lieu thereof, he awarded the Appellant interest in the amount of Canadian \$35,000, i.e. interest at a rate of five percent per annum as provided by the *Interest Act*, R.S.C. 1985 c. I-15, section 4.

[11] Shortly thereafter, the Appellant filed a Notice of Appeal in this Court challenging the validity of Mr. Justice Hughes' decision. This appeal, I am told, will likely be heard in Vancouver by the end of this year.

[12] On August 19, 2016, late in the day, the Respondents made a payment to the Appellant in the sum of Canadian \$35,992.46 which represents payment in full of Mr. Justice Hughes' judgment plus interest on that amount at five percent calculated from the date of payment of the initial judgment to date.

[13] By reason of this payment, the Respondents say that both judgments issued by the Federal Court have now been satisfied. Consequently, in their view, they are entitled to have the Vessel released. If I understood the parties correctly, it appears that the Respondents advised the

Appellant that they intended to bring proceedings in the Federal Court to have their ship released. This seems to have prompted the Appellant to bring the present motion.

[14] As I indicated earlier, I am of the view that the Appellant's motion cannot succeed.

[15] I begin by stating the obvious that the ship is presently under arrest pursuant to a warrant issued by the Federal Court in Federal Court File: T-1615-15 and in respect of which the Appellant filed a Caveat Release pursuant to Rule 493(2). Consequently, notwithstanding a dismissal of this motion, the Vessel will remain under arrest unless the Appellant consents to its release or an order issues from the Federal Court releasing the Vessel from arrest.

[16] The Appellant submits that since its motion is one that is akin to a motion for a stay, the three pronged test formulated by the Supreme Court in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR MacDonald*) is the one that applies. In other words, the Appellant says that in order to succeed on its motion, it must demonstrate that there is a serious question to be decided on the appeal, that a refusal to grant its motion will likely cause irreparable harm and that the balance of convenience lies in its favour.

[17] My first comment is that the motion now before me is not a motion for a stay of the order rendered by Mr. Justice Hughes. Describing its motion as one akin to a motion for a stay does not transform the motion into a motion for a stay. I point out that although the Appellant has appealed the judgment of Mr. Justice Hughes rendered on May 4, 2016, it has not made any attempt to obtain a stay of that judgment. Consequently, the judgment remains enforceable and,

in fact, was satisfied by the Respondents when they made payment of the sum of \$35,992.46 on August 19, 2016. In my respectful view, had the Appellant sought a stay of that judgment and been successful, it would necessarily have followed that the Vessel could not have been released pending a decision of this Court on the appeal. However, that did not happen and therefore, with the greatest of respect, the Appellant's submission that its motion must be treated as a motion for a stay is ill conceived.

[18] My second comment is, as I indicated earlier, that the Vessel is presently under arrest and will so remain even though I will be dismissing the Appellant's motion. The Vessel remains under arrest because of the Caveat Release filed by the Appellant.

[19] A vessel can only be released on consent or if the conditions of release provided in Rules 487 to 489 are met. In particular, I note that Rule 488(1) provides that the Federal Court may on motion order the release of arrested property. Hence, in my respectful view, notwithstanding the fact that final judgments have been rendered, the Federal Court is not *functus* in regard to the arrest of the Vessel. In other words, the Federal Court has ordered that the Vessel be arrested and it can, subject to the rules and the applicable law, order that it be released, upon motion, by the parties.

[20] My third comment is that what the Appellant is asking us to do has no basis in law. In other words, whether a ship under arrest should be released is a matter that is governed by the *Federal Court Rules* and stands to be adjudicated by the Federal Court. This Court does not have

original jurisdiction to order the arrest, the continuance of an arrest, or the release of a vessel. That power belongs to the Federal Court.

[21] In making its submission that I should allow its motion, the Appellant relied on the decision of my former colleague Mr. Justice Evans in *Alpha Trading Monaco Sam v. Sarah Desgagnés (Ship)*, 2010 FCA 209 (*Alpha Trading*). Before Mr. Justice Evans in *Alpha Trading* was a motion brought by the Appellant for an order staying the execution of a Federal Court judgment wherein the Federal Court had ordered the Appellant to cause the release of the *Sarah Desgagnés* from conservatory arrest in Belgium.

[22] Consequently, the question before my former colleague was whether there was a basis justifying the stay of the Federal Court judgment. In making that determination, Mr. Justice Evans applied the three pronged test formulated in *RJR MacDonald*. In answering the questions under that test, Mr. Justice Evans concluded that there was indeed a serious issue on appeal, that refusing to stay the Federal Court judgment would likely cause irreparable harm to the Appellant, and finally that the balance of convenience favoured the Appellant. In *Alpha Trading*, the ship remained under arrest because the Federal Court decision was stayed. Here, the Appellant does not seek a stay, but seeks an order preventing the release of the Vessel.

[23] There can therefore be no doubt that what is before us is nothing comparable to what was before Mr. Justice Evans in *Alpha Trading*. As I indicated earlier, the Appellant is asking me to treat its motion as if it were a motion for a stay and, in that context, to determine the motion on the basis of the test enunciated in *RJR MacDonald*. The motion does not seek to stay the order

rendered by Mr. Justice Hughes and consequently the *RJR MacDonald* test is not applicable herein.

[24] In my respectful view, the question that must be determined, not by this Court but by the Federal Court, is whether there is a legal basis to continue the arrest of the Vessel. Failing the obtainment of the Appellant's consent to the release of the Vessel, the Respondents must apply to the Federal Court asking it to release the Vessel, presumably on the ground that they have satisfied the judgments rendered by the Federal Court both in regard to the principal amount and the interest charges. If there is no basis to keep the Vessel under arrest, then the Federal Court will make the appropriate order.

[25] Should the Federal Court order the release of the Vessel, the Appellant can then appeal that decision and seek a stay. It could also, before filing an appeal, ask the Federal Court to stay its own judgment. However, the Appellant cannot obtain through the present motion what it could have obtained had it sought to stay the judgement of Mr. Justice Hughes.

[26] For these reasons, the Appellant's motion will be dismissed with costs which I hereby fix in the sum of \$2,000.

"M Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-146-16

**(APPEAL FROM ORDERS OF THE HONOURABLE MR. JUSTICE FOTHERGILL
DATED DECEMBER 15, 2015 AND OF THE HONOURABLE MR. JUSTICE HUGHES
DATED DECEMBER 16, 2015, DOCKET NUMBER T-1615-15)**

STYLE OF CAUSE: PLATYPUS MARINE, INC. v. THE
OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP "TATU"
and THE SHIP "TATU"

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: AUGUST 31, 2016

REASONS FOR JUDGMENT BY: NADON J.A.

DATED: SEPTEMBER 8, 2016

APPEARANCES:

John W. Bromley FOR THE APPELLANT
Andrew J. Stainer

W. Gary Wharton FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Bull, Housser & Tupper LLP FOR THE APPELLANT
Vancouver, British Columbia

Bernard LLP FOR THE RESPONDENTS
Vancouver, British Columbia