Federal Court  Cour fédérale

Date: 20160108

Docket: T-1226-10

Citation: 2016 FC 27

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

Ottawa, Ontario, January 8, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

OFFSHORE INTERIORS INC.

Plaintiff

and

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

Defendants

WOLRIGE MAHON LIMITED in its capacity as Appointed Vessel Construction Officer of the Defendant Vessel "QE014226C010", HARRY SARGANT III, MOHAMMAD ANWAR FARID AL-SALEH, and 642385 B.C. LTD.

Intervenors

ORDER AND REASONS

[1] This decision results from two motions heard by the Court in Vancouver, British Columbia on December 14, 2015, as well as a preliminary evidentiary motion which I decided from the bench at the hearing.

I. **PRELIMINARY MOTION**

[2] At the hearing, Worldspan Marine Inc. [Worldspan] brought a preliminary motion, seeking leave under Rule 312 to file new evidence and written representations in support of its main motion dated October 14, 2014 related to Section 12.1 of the Vessel Construction Agreement [VCA] and in reply to the responding Motion Record of Harry Sargeant III [Sargeant] filed on November 23, 2015. These reasons on the preliminary motion were delivered orally from the bench at the hearing on December 14, 2015 and are now being released in writing.

[3] Sargeant argues that Rule 312, which allows supplementary filings with leave of the Court, applies only to applications and not to motions. However, he acknowledges that the Court has discretion to allow such filings and refers the Court to the decision of the Federal Court of Appeal in *LaPointe Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 [*Atlantic Engraving*], which set out the test that, for evidence to be adduced in these circumstances, the applicant must show (in addition to other elements of the test) that the evidence was not previously available. This requirement is intended to prevent a party from splitting its case and ensure that the best case is put forward at the first opportunity. *Atlantic Engraving* refers to whether the evidence was available prior to a cross-examination. Sargeant argues that in the case at hand, the relevant time to be examined, in considering whether the evidence was available, was prior to the time at which Worldspan filed its motion on October 14, 2014.

[4] I agree with Sargeant's submissions that, regardless of the correct answer to the more technical question of whether Rule 312 applies to this motion, the test I should apply is that prescribed by *Atlantic Engraving*. Specifically, I should consider whether Worldspan was in a position to file the evidence and make the written representations, which it now seeks to file, when it filed its original motion materials on October 14, 2014.

[5] Worldspan argues that Sargeant's Motion Record raised new issues in arguing that the motion is *res judicata*, subject to estoppel, or an abuse of process. Worldspan does not seek to adduce new evidence on these issues and states that it relies primarily on Reasons of the Court in previous interlocutory decisions in support of the written submissions it wishes to file on these issues. Notwithstanding this, I consider the principles in *Atlantic Engraving* to be applicable and have considered whether Worldspan was in a position to make these submissions when it filed its original motion materials on October 14, 2014. I find that it was in such a position, as the Reasons of the Court in previous interlocutory decisions, upon which its proposed submissions on the *res judicata* point seek to rely, pre-date the filing of its motion.

[6] Also, Sargeant demonstrated that his counsel had raised in the past the fact that it was Sergeant's position that the argument, that Section 12.1 of the Vessel Construction Agreement gave amounts due to Worldspan priority over Sargeant's mortgage, was *res judicata*. The record indicates that the issue of priority arising from Section 12.1 was raised by the Plaintiff, Offshore Interiors Inc., in June 2014 on the motion to sell the Vessel, and that Sargeant's written representations in response argued that this issue was *res judicata*. I do not read the Court's

subsequent decision on that motion to decide this issue and therefore cannot accept Worldspan's argument that it thought the *res judicata* argument was itself *res judicata*.

[7] As Sargeant's argument on estoppel and abuse of process represent alternative formulations of the *res judicata* argument, and as the written submissions that Worldspan wishes to file on all three issues are essentially the same, my conclusion applies equally to all three issues. Sargeant's position was known prior to Worldspan filing its motion materials on October 14, 2014. As such, there is no basis to exercise discretion to provide Worldspan with leave to file additional submissions on these issues.

[8] Worldspan also argues that Sargeant's Motion Record raises new issues in asserting that equity favours Sargeant's position in relation to Section 12.1 and referring to Worldspan as being the party that breached the VCA. However, I note that Worldspan's original Motion Record filed on October 14, 2014 raises arguments about equitable set-off including arguments that Sargeant, in stopping payments to Worldspan without terminating the VCA, does not have the clean hands necessary to invoke equity. Worldspan's Motion Record of October 14, 2014 expressly anticipates that Sargeant may raise equitable set-off arguments. Sergeant's Motion Record filed on November 23, 2015 did raise such arguments, in part in response to Worldspan's own Written Representations.

[9] I have difficulty concluding that considerations of equity are relevant to the motion to be argued involving the contractual interpretation of section 12.1 of the VCA, although that is a decision for me to make following the argument on the motion. Regardless, given that it is clear

from Worldspan's Motion Record of October 14, 2014 that it expressly anticipated that Sargeant would argue the application of equity in support of its position, there is no basis to exercise discretion to provide Worldspan with leave to file additional materials.

[10] Worldspan's preliminary motion is therefore dismissed, with costs payable by Worldspan Marine Inc. to Harry Sargeant III in the fixed amount, inclusive of disbursements, of $1500.

[11] I noted at the hearing that, while Worldspan had not been granted leave to file new written representations, it was at liberty to make oral submissions, based on the record before the Court, in reply to Sargeant's arguments.

II. **MAIN MOTIONS**

[12] The remainder of this decision results from the two main motions argued by the parties on December 14, 2015.

[13] The first motion was originally filed by Worldspan on October 14, 2014, seeking various relief. Pursuant to the Case Management Order of Madam Prothonotary Tabib dated October 26, 2015 [the Case Management Order], this hearing involved only the part of the motion seeking a declaration that amounts that may be due and owing, by Sargeant to Worldspan under the Vessel Construction Agreement [VCA] between those parties, have priority over any security interest of Sargeant and its assignee, Comerica Bank [the Worldspan Motion].

[14] The second motion, filed by Sargeant on November 23, 2015, seeks an Order that the *in personam* claims between Sargeant and Worldspan proceed in the Supreme Court of British Columbia, leaving the *in rem* claims under the Builder's Mortgage between those parties and any claim under section 22(2)(n) of the *Federal Courts Act*, RSC 1985, c F-7 to be addressed in this proceeding [the Sargeant Motion].

[15] For the reasons that follow, both the Worldspan Motion and the Sargeant Motion are dismissed.

III. **BACKGROUND**

[16] The context and history of this proceeding are summarized in the following excerpt from the Case Management Order that scheduled this hearing:

> The underlying action is a claim by the Plaintiff Offshore Interiors for unpaid supplies and services provided to the Defendant Worldspan Marine for the construction of the Defendant vessel "QE014226C010", in fact, the hull of an unfinished yacht. Worldspan had been building the yacht for Harry Sargeant III under the terms of a Vessel Construction Agreement ("VCA").
>
> Offshore arrested the vessel in 2010, and numerous claimants filed *caveat releases*, indicating that they, too, asserted *in rem* claims against the vessel. Offshore obtained a default judgment against Worldspan and the vessel in the amount of $273,754.58 in May 2011. Meanwhile, Worldspan had filed for relief under the *Companies Creditors' Arrangement Act* in the BC Supreme Court. The BC Supreme Court issued a claims process order in July 2011, requiring all creditors to deliver proof of their claims by a certain date. The claims process order, recognizing that the vessel appeared to be the main asset of Worldspan, provided that any creditor could also assert a claim *in rem* against the vessel and pursue that claim outside the CCAA proceedings, in the Federal Court. It asked the Federal Court's assistance in carrying out the order. On August 29, 2011, the Federal Court issued an order

setting out a claims process for any creditor asserting an *in rem* claim against the vessel. The order required claimants to file an affidavit containing particulars in support of their claim and provided that "all questions relating to the right of any claimant *in rem* against the Vessel and all questions respecting the priority of all *in rem* creditors (…) shall be determined at a subsequent hearing date (…)".

Sargeant and Comerica Bank both filed proofs of claim in the CCAA process, and affidavits asserting a claim *in rem* pursuant to the Federal Court's order. Their claim, in the amount of some $20 million, is based on a Builder's Mortgage granted to Sargeant by Worldspan to secure the advances made by Sargeant to Worldspan towards the construction of the vessel, and in turn assigned to Comerica by Sargeant to secure a Construction Loan Agreement.

Affidavits were also filed by various trades for outstanding invoices for goods and services provided to Worldspan in the construction, totaling some $1.7 million. While all parties agree that, at law, these claims would rank below the mortgage, the trade claimants have indicated that they would seek an order for an equitable reallocation of the order of priorities based on the conduct of Sargeant and Worldspan.

Finally, Worldspan itself filed an affidavit asserting *in rem* rights and priorities. In particular, Worldspan claims that advances amounting to nearly $5 million in capital remain due and owing to it by Sargeant under the VCA. Worldspan claims that pursuant to s. 12.1 of the VCA, these unpaid advances take priority over Sargeant's mortgage. (Other claimants also asserted *in rem* claims, but these have since been dismissed, paid or withdrawn and are therefore not germane to this discussion).

In parallel, Sargeant, Comerica and Worldspan have filed suits and counter suits in the BC Supreme Court.

The vessel was eventually sold under order of this Court for the sum of $5 million, from which Marshall fees have already been deducted.

Roughly, then, the situation as it stands today could be described as follows: from what remains of the $5 million of the proceeds of sale, Sargeant and Comerica claim to have priority under a Builder's Mortgage for a $20 million claim. Worldspan argues that unpaid advances due to it by Sargeant in the amount of over $5 million (with interest) take priority over the Mortgage. The trade

> claimants would like to see any order of priority reallocated so that their claim of $1.7 million be satisfied first.
>
> From a thousand feet up, the situation described above appears straightforward, but on the ground, it is anything but. Although detailed affidavits of claim have been filed over four years ago in the expectation that there would be cross examinations and eventually, a priority hearing, neither have so far happened. Instead, the issues seem to have been brought before the Court in the form of a series of preliminary motions to strike or for various declarations. First, Offshore brought preliminary motions to strike the claims of several trade claimants and Worldspan's *in rem* claim. It then brought a motion seeking a declaration that the Builder's Mortgage did not create a lien or charge in the vessel other than to secure its delivery. Sargeant also brought a motion to strike another claimant's *in rem* claim based on the validity of the asserted claim as a right *in rem* and this Court's jurisdiction. While these motions have resulted in the summary dismissal of several claims, they have not resolved Sargeant's, Comerica or Worldspan's competing claims. And while these motions have been argued, determined by the case management Prothonotary, appealed to a Judge of this Court, and then appealed again to the Court of Appeal, cross examinations on the affidavits of claim and the scheduling of a priorities hearing have kept being postponed.
>
> The last of the appeals was finally determined in February 2015.
> …

[17] Against this backdrop, the Case Management Order set down the Worldspan Motion and the Sargeant Motion for hearing, on the rationale that the issues raised by these motions can be severed from other issues in this proceeding and that their determination may help to direct and narrow issues still to be resolved in the future. While the issues raised in the two motions before me are not entirely unrelated, they are sufficiently discrete that I will address them separately in these Reasons.

IV. **WORLDSPAN MOTION**

A. ***Facts***

[18] The Worldspan Motion, seeking a declaration that amounts that may be due and owing to it by Sargeant under the VCA have priority over any security interest of Sargeant and Comerica Bank [Comerica], is based on Worldspan's interpretation of the meaning of Section 12.1 of the VCA, which states as follows (with "Builder" meaning Worldspan and "Owner" meaning Sargeant):

> SECTION 12 – TITLE
>
> 12.1 Builder will retain title to the Vessel until delivery to Owner. Builder grants to Owner a continuing first priority security interest to the Vessel, including all work, materials, machinery, and equipment relating to the Vessel, to secure any sums advanced or paid to Builder under this Agreement; provided, however, that such security interest shall be subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant to this Agreement. In support of Owner's security interest in the Vessel Builder agrees to register a Ship's Mortgage in favour of Owner or Owner's construction lender (the form of the mortgage document is to be agreed upon between the parties acting reasonably) if Owner requests that this be done for any purpose.

[19] The Affidavit dated October 14, 2011 filed by Sargeant pursuant to the Order of Prothonotary Lafrenière dated August 29, 2011[Federal Claims Process Order], setting out the process for asserting *in rem* claims against the Defendant Vessel [the Vessel], refers to US $20,945,924.05 and CDN $20,000.00 in payments advanced by Sargeant to Worldspan for the construction of the Vessel and a Builder's Mortgage granted by Worldspan to Sargeant and

registered under the *Canada Shipping Act, 2001*, SC 2001, c 26 to secure such payments [the Mortgage].

[20] The Affidavit of Michael Nesbitt, filed by Worldspan on October 14, 2011 pursuant to the Federal Claim Process Order and relied upon by Worldspan in its motion, refers to claims under the VCA for payments due by Sargeant, and states that outstanding amounts due as of April 2010 totalled US $4,920,798.11 plus interest for a total of US $6,643,082.59 due and owing to the date of the Affidavit. Worldspan's October 31, 2014 written representations in this motion update this figure to US $6,757,362.36.

B. ***Issues***

[21] As will be explained in more detail below, the parties' arguments raise the following issues to be decided on the Worldspan Motion:

A. Is the declaration of priority sought by Worldspan precluded by the doctrine of *res judicata*, issue estoppel or abuse of process?

B. Does the interpretation of Section 12.1 of the VCA support the declaration of priority sought by Worldspan?

C. Does the doctrine of equitable set-off affect the declaration of priority sought by Worldspan?

C. ***Position of Worldspan***

[22] Worldspan filed Written Representations in support of its motion, and supplemented its argument with oral submissions at the hearing. Two *in rem* claimants, Capri Insurance Services Ltd. and Raider-Hansen Inc., also filed written submissions adopting the submissions of Worldspan.

[23] Worldspan's position is that the effect of Section 12.1 of the VCA is to give the amounts said to be owing by Sargent to Worldspan priority over the Mortgage. It refers in particular to the fact that Section 12.1 states:

> …that such security interest shall be subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant to this Agreement. [Worldspan's emphasis]

[24] Worldspan notes that the $6,757,362.36 it is claiming from Sargeant exceeds the proceeds of sale of the Vessel and argues that Section 12.1 represents an agreement between it and Sargeant that amounts due from Sargeant would be paid prior to any exercise of rights under the Mortgage. Worldspan's position is that Sargeant is entitled to delivery of the Vessel once it has paid all amounts owing to Worldspan, that the sale proceeds have now replaced the *res* as a result of the Order of Prothonotary Lafreniere dated June 23, 2014 approving the judicial sale of the Vessel [the Sale Order], and that Sargeant is now entitled to delivery of the proceeds but only once it has paid Worldspan in full.

[25] Worldspan argues that this interpretation of Section 12.1 is consistent with other provisions of the VCA. In particular, Section 3.2 provides that the date by which Worldspan is obliged to deliver the Vessel to Sargeant is to be extended to account for any delays caused by Sargeant's failure to comply with its obligations under the VCA, including failure to make timely payment. Section 4.3(e) also contains an acknowledgment by the parties that the payment arrangements prescribed by the VCA are intended to maintain positive cash flow to Worldspan.

[26] In addition to the wording of Section 12.1 and other provisions of the VCA, Worldspan relies on the decision of Justice Mosely in his interlocutory decision in this matter on July 4, 2014, dismissing Sargeant's appeal of the Sale Order [the Sale Appeal Decision]. Worldspan refers to paragraphs 6 and 7 of the Sale Appeal Decision, in which Justice Mosley quotes from the VCA and adds emphasis as follows:

> [6] Section 12.1 of the VCA reads as follows:
>
> Builder will retain title to the Vessel until delivery to the Owner. Builder grants to Owner a continuing first priority security interest in the Vessel, including all work, materials, machinery, and equipment relating to the Vessel, to secure any sums advanced or paid to Builder under this Agreement; provided however, that **such security interest shall be subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant to this Agreement.** In support of Owner's security interest in the Vessel Builder agrees to register a Ship's Mortgage in favour of Owner or Owner's construction lender (the form of the mortgage document is to be agreed upon between the parties acting reasonably) if Owner requests that this be done for any purpose. [Emphasis added]

> [7] Worldspan's *in personam* rights under section 12.1 of the VCA have yet to be adjudicated. It remains open to Worldspan to participate in the Claims Process and challenge the *in rem* claims, as owners of the Vessel.

[27] Worldspan argues that the emphasis by Justice Mosley in the above passage represents a judicial recognition that Sargeant's security interest is subordinate to Worldspan's right to payment.

D. ***Position of Sargeant and Comerica***

[28] Sargeant filed substantive written submissions in response to the Worldspan Motion, and Comerica concurred with those submissions. In addition to arguing their interpretation of the effect of Section 12.1 of the VCA, Sargeant takes the position that the relief sought in the Worldspan Motion is *res judicata*, subject to issue estoppel, or an abuse of process. He also argues the application of the doctrine of equitable set-off.

(1) Res Judicata, Estoppel and Abuse of Process

[29] Citing *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*], Sargeant submits that the purpose of the doctrine of *res judicata* and its related branches, issue estoppel and abuse of process, is to bring finality to litigation. Sargeant argues that the meaning of Section 12.1 and whether it gave Worldspan a priority claim was argued by Worldspan when it sought a declaration of priority over the Builder's Mortgage in a motion heard on November 18, 2011. That motion was dismissed by Prothonotary Lafrenière on November 30, 2011 [the Priority

Decision], and its appeal was dismissed by Justice Lemieux on January 18, 2012 [the Priority Appeal Decision]. Therefore, Sargeant argues that Worldspan's claim for priority is *res judicata*.

[30] Sargeant also argues that the Worldspan Motion is precluded by the doctrine of issue estoppel, which is similar to *res judicata* and prevents parties from relitigating "any right, question or fact distinctly put in and directly determined by a court of competent jurisdiction" (*Danyluk* at para 25). Its application requires that the earlier decision which is said to create the estoppel: (a) involved the same question; (b) is final; and (c) was between the same parties. Any discretion afforded to the Court not to apply the doctrine is limited to instances of fraud or dishonesty.

[31] Sargeant submits that the Priority Appeal Decision was based upon, *inter alia*, Section 12.1 of the VCA. Applying the three criteria for issue estoppel, it submits that the question before Justice Lemieux was the same question now raised in the Worldspan Motion, that the decision was final and that it involved the same parties. Sargeant argues that there are no circumstances that warrant the Court exercising discretion to not apply the doctrine.

[32] Finally, Sargeant argues that if issue estoppel does not apply, Worldspan should still not be allowed to raise its argument as a result of the doctrine of abuse of process. Sargeant refers to a requirement that a party bring forward its whole case with all relevant arguments at the same time and that an unsuccessful litigant cannot return to litigate a question with a new legal theory.

[33] In support of this argument, Sargeant refers to a course of interlocutory litigation that commenced with a motion by the Plaintiff, Offshore Interiors Inc. [Offshore], on February 9, 2012, seeking a declaration that the Mortgage does not create a charge or lien over the Vessel other than to secure delivery. Prothonotary Lafrenière granted the motion on March 5, 2013, but this decision was set aside on appeal by Justice Strickland on December 19, 2013 [the First Mortgage Appeal Decision]. Offshore's appeal of Justice Strickland's decision was dismissed by the Federal Court of Appeal on February 16, 2015 [the Second Mortgage Appeal Decision]. While that challenge to the Mortgage was brought by Offshore rather than Worldspan, Sargeant notes that Worldspan's current counsel was then representing Offshore and was appointed as counsel for Worldspan on February 15, 2013, in the early stages of this interlocutory litigation.

[34] Sargeant accordingly argues that the parties opposed to the priority of the Mortgage were required to bring forward all relevant challenges at the same time and that, given the previous litigation both on the priority of Section 12.1, culminating in the Priority Appeal Decision, and on the challenge to the Mortgage, culminating in the Second Mortgage Appeal Decision, it would be an abuse of process to permit Worldspan now to relitigate its position under new legal theories.

[35] Worldspan's response to Sargeant's *res judicata*, estoppel, and abuse of process arguments is that the Priority Decision decided only that, because Worldspan was the Vessel's owner and therefore not able to establish *in personam* liability against itself, it did not have an *in rem* claim against the Vessel. It argues that both the Priority Decision and the Priority Appeal

Decision contain language the effect of which is to preserve Worldspan's right to raise arguments, such as are being made in the present motion, in defence of Sargeant's claim.

(2) Effect of Section 12.1 of the VCA

[36] Sargeant's position on the interpretation of Section 12.1 is that the purpose of the subordination language was to delay delivery of the Vessel until Worldspan was paid what it was owed but that, if money was owed to Worldspan and Sargeant was also owed money, there would be a set-off of these amounts. However, in the current circumstances, with the Vessel having been sold by judicial sale, Sargeant takes the position that it does not owe any money pursuant to the VCA and therefore the question of priority between its and Worldspan's claims does not arise.

[37] Sargeant also argues that Worldspan's interpretation of Section 12.1 would result in commercial absurdity because, for example, if Sargeant owed one dollar to Worldspan and Worldspan owed $20,000,000 to Sargeant, Sargeant would on Worldspan's interpretation be unable to enforce his security interest.

[38] Sargeant's arguments in support of its interpretation of Section 12.1 focus on the termination clauses of the VCA. In the case of default by Worldspan, Section 13 of the VCA provides that Sargeant that has the right to terminate the VCA and take possession of the Vessel and complete it or alternatively sell it. Section 24 then sets out a formula governing the distribution of the sale proceeds and the settlement of accounts between the owner and the builder. Without descending into the detail of the formula, in circumstances where a loss results

from the sale price being less than the intended purchase price under the VCA, the formula prescribes the calculation of an amount to be paid by Worldspan to Sargeant to take into account such loss. Section 24 further contemplates each party being entitled to set-off any amounts owing by it against amounts owing to it by the other party.

[39] Sargeant also notes that, in the case of default by Sargeant and termination by Worldspan, Section 13.5 of the VCA requires Worldspan to repay to Sargeant all the advances paid by Sargeant, less Worldspan's costs of storage and sale and an amount calculated by another formula which takes into account losses resulting from sale of the Vessel for less than the intended purchase price under the VCA.

[40] Sargeant argues that, regardless of which party breached and which terminated the VCA, these formulae applied to the amounts at issue result in Sargeant being entitled to claim the entirety of the proceeds from the judicial sale of the Vessel. Moreover, neither termination regime contemplates that amounts owing from Sargeant to Worldspan would bar Sargeant from receiving monies owing to it, other than though the application of a set-off. Sargeant also argues that its interpretations of Sections 13 and 24 of the VCA were endorsed by the Federal Court of Appeal in the Second Mortgage Appeal Decision.

[41] Worldspan responds to these arguments by submitting that none of the provisions in Section 13 or 24 have been invoked or apply to the circumstances of this case and that Sargeant's argument amounts to a position that those Sections override Section 12.1, which would result in the subordination referenced in Section 12.1 having no effect. It also takes issue with the figures

used by Sargeant to support the conclusion that the formulae prescribed by Section 13 and 24 would result in Sargeant being entitled to claim the entirety of the proceeds of sale.

(3) Equitable Set-Off

[42] Finally, Sargeant argues in the alternative that, even if it is wrong in its interpretation of Section 12.1, the doctrine of equitable set-off allows Sargeant to enforce the Mortgage, as it would not be equitable to allow Worldspan to prevent enforcement of the Mortgage when the debt it owes is so much larger than any amount that Sargeant may owe it.

[43] Sargeant relies on the test for equitable set-off as prescribed in *Telford v Holt*, [1987] 2 SCR 193 at para 35:

A. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands;

B. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;

C. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;

D. The plaintiff's claim and the cross-claim need not arise out of the same contract;

E. Unliquidated claims are on the same footing as liquidated claims.

[44] In reply, Worldspan takes the position that the Worldspan Motion is seeking a decision on the interpretation of Section 12.1 of the VCA and that the doctrine of equitable set-off cannot be relevant to contractual interpretation. It also argues that Sargeant cannot in any event rely on equitable set-off because his hands are "not clean". Worldspan refers to Sargeant stopping paying claims certificates in December of 2009 but not terminating the VCA until November of 2010. Worldspan argues that in the intervening months. Worldspan and its subcontractors were expending substantial time and materials on the Vessel, with the effect of "feeding" Sargeant's security. In response, Sargeant says that there is no evidence to support the allegation of unclean hands and that, even if there was such evidence, the parties that would be affected would be the trade creditors rather than Worldspan. He argues that such considerations may have some relevance in an application to reorder priorities but are not relevant to an application to determine the meaning the VCA.

E. ***Analysis***

[45] Reduced to simple terms, Worldspan's proposed interpretation of the relevant language of Section 12.1 of the VCA is that payment of any amounts owing by Sargeant to Worldspan represents a contractual condition which must be satisfied before Sargeant has the right to invoke its security under its Mortgage. In contrast, Sargeant's interpretation is that Section 12.1 operates in the present circumstances to give Worldspan a contractual right of set-off, such that Worldspan can deduct, from the amount of Sargeant's Mortgage claim, any amounts that Sargeant owes Worldspan for unpaid installments under the VCA. I note that it is Sargeant's position that no such amounts are owing by it to Worldspan, but the determination of that issue is not before me on the Worldspan Motion.

[46] Against the backdrop of these competing interpretations of Section 12.1, I have considered the three issues raised on this motion.

(1) Res Judicata, Estoppel and Abuse of Process

[47] Sargeant's arguments on r*es judicata* and estoppel are based on the fact that the Notice of Motion filed by Worldspan is framed as seeking a declaration of priority, which is the same manner Worldspan framed its motion that was dismissed by Prothonotary Lafrenière and then Justice Lemieux in, respectively, the Priority Decision and the Priority Appeal Decision. If I were to consider these arguments based strictly on the words used to frame the relief sought in the relevant Notice of Motion, I might agree with Sargeant that this issue has already been decided by the Court. However, it is clear from Worldspan's written and oral submissions that, despite being framed as a priority determination in its Notice of Motion, the issue raised by the Worldspan Motion is not the same one that the Court has previously adjudicated.

[48] The Priority Decision and the Priority Appeal Decision were based on the conclusion that Worldspan, as the owner of the Vessel, cannot have an *in rem* claim against its own property. While not expressly stated in either the Priority Decision or the Priority Appeal Decision, it naturally follows that Worldspan has no claim capable of being afforded any particular priority among competing *in rem* claims against the process of sale. However, the Worldspan Motion does not seek a priority determination in that sense. Rather, it asks the Court to interpret Section 12.1 of the VCA in a manner which would give it a defence to the *in rem* claim by Sargeant, i.e. that the mechanism contractually agreed by the parties is that Sargeant cannot assert its claim under its Mortgage until it has made all outstanding installment payments.

[49] My conclusion is that this question, the interpretation of Section 12.1, and in particular its reference to Sargeant's security interest being subordinate to Worldspan's right to receive payments under the VCA, has not previously been decided by the Court. This conclusion is consistent with the language that Worldspan points to in the Priority Decision and the Priority Appeal Decision. In his Reasons for the Priority Decision, Prothonotary Lafrenière stated that "… such other remedies as Worldspan may have are not before me and are not affected by the decision." Similarly, in the Priority Appeal Decision, Justice Lemieux noted that statement by the Prothonotary, as well as the position expressed by Offshore that Worldspan as owner of the Vessel will be entitled to participate in the Federal Court claims process to challenge the *in rem* claims and their *in personam* basis and will be the principal beneficiary of whatever is available from the proceeds of sale after the *in rem* distribution.

[50] While neither the Priority Decision nor the Priority Appeal Decision expressly refers to the particular remedies or challenges that are available to Worldspan to be raised in defending the *in rem* claims, I consider Worldspan's present argument on the interpretation of Section 12.1 to be the sort of defence argument that remained available to Worldspan to assert following these decisions.

[51] I have considered separately Sargeant's abuse of process argument. Even though the Court has not previously ruled on the interpretation of Section 12.1 that Worldspan advocates in the present motion, it is still available for Sargeant to argue that this interpretation and the defence position it supports should have been raised by Worldspan in earlier interlocutory litigation in this proceeding. Sargeant's Written Representations focus in particular on the

motion and subsequent appeals related to the question of whether the Mortgage secures advances made by Sargeant to Worldspan, as opposed to securing just delivery of the Vessel as had been argued by Offshore on that motion.

[52] I note first that the motion on the effect of the Mortgage was brought by Offshore, not by Worldspan. Notwithstanding Sargeant's argument that, in the course of the litigation of this issue (but subsequent to the argument on the motion before Prothonotary Lafrenière), Offshore's counsel Mr. Wharton also assumed representation of Worldspan, I find it difficult to conclude that Worldspan should have been expected to raise its present argument on the interpretation of Section 12.1 in the context of Offshore's challenge of the Mortgage.

[53] I would also consider such a conclusion to be contrary to the rationale which sometimes underlies an early determination being sought on certain issues relevant to a priorities dispute in an *in rem* proceeding. An early determination on a particular issue can sometimes eliminate the necessity for the litigation of other issues. There are various arguments which can potentially be raised by a vessel owner or unsecured *in rem* creditors to challenge a mortgage claim, including for instance seeking a reordering of the traditional priorities on equitable grounds, which Sargeant acknowledges in the present case is an issue that, depending on the outcome of the Worldspan Motion, even now still remains to be addressed. In the case at hand, if the motion on the nature of the Mortgage had resulted in Offshore's position being accepted by the Court, it may have eliminated the need for various other issues to be litigated including the interpretation of Section 12.1 of the VCA. I am therefore not prepared to conclude that it represents an abuse of process for Worldspan not to have raised all possible issues that might have favoured its position

over that of Sargeant, in particular seeking a contractual interpretation of Section 12.1 of the VCA, in the context of Offshore's motion on the nature of the Mortgage.

[54] Sargeant also raises the abuse of process argument in the context of the motion leading to the Priority Decision and the Priority Appeal Decision, arguing that the contractual interpretation question should have been raised in that motion. In relation to that motion, Sargeant's argument benefits from the fact that the moving party was Worldspan, not Offshore. However, I note that Worldspan's motion appears to have been brought in response to a motion by Offshore seeking to dismiss Worldspan's *in rem* claim, both motions then being addressed by Prothonotary Lafreniere for the same reasons, granting Offshore's motion and dismissing that of Worldspan.

[55] Again, my conclusion is that the issue that was raised in those motions, being Worldspan's entitlement to assert an *in rem* claim, is discrete from the contractual interpretation question it is now raising. It should not be considered an abuse of process for Worldspan not to have raised the contractual interpretation in its earlier motion. To conclude this to be an abuse of process would also be inconsistent with the language in the Priority Decision and the Priority Appeal Decision to the effect that other remedies that Worldspan may have were not affected by the Prothonotary's decision and that Worldspan, as owner of the Vessel, will be entitled to participate in the Federal Court claims process to challenge the *in rem* claims.

(2) Effect of Section 12.1 of the VCA

[56] Sargeant notes that in the Second Mortgage Appeal Decision, the Federal Court of Appeal referred to the relevant principles of contractual interpretation. In *Offshore Interiors Inc.*

v. Harry Sargeant III et al., 2015 FCA 46 [*Offshore Interiors*], the Court stated as follows at paragraphs 85 to 87

> [85] It will be useful at this stage to say a few words concerning contractual interpretation. Most recently in *Sattva Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] S.C.J. No. 53 ("*Sattva*"), a unanimous Supreme Court reiterated the principles which should guide us in interpreting contractual documents. In determining whether contractual interpretation, i.e. the determination of rights and obligations under a written agreement, was a question of law or mixed fact and law (the Court answered that it was the latter), Rothstein J. wrote as follows at paragraph 46 to 48 of his reasons:
>
> > 46. The shift away from the historical approach in Canada [i.e. that determining rights of obligations under a written contract was a question of law] appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract -- often referred to as the factual matrix -- when interpreting a written contract […].
> >
> > 47. Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" […]. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
> >
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the

> context, the market in which the parties are operating.
>
> (*Reardon* Smith *Line*, at p. 574, *per* Lord Wilberforce)

48. The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement […]. As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115].
>
> [Emphasis added]

[86] At paragraphs 56 to 58 of his reasons, Rothstein J. indicated that it was proper to consider surrounding circumstances in interpreting the terms of a contract, but that the circumstances, "must never be allowed to overwhelm the words of that agreement," adding that the purpose of considering surrounding circumstances was to help the decision maker to obtain a better understanding of the mutual and objective intentions of the parties as these were expressed in the words of their contract. Further, "[t]he interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract" (*Sattva*, para. 57). Lastly, Rothstein J. made it clear that "surrounding circumstances" could only consist of, "objective evidence of the background and facts at the time of the execution of the contract" (*Sattva*, para. 58).

[87] While there has been some debate in the jurisprudence over what constitutes a "factual matrix," at a bare minimum it encompasses the contract's genesis, its purpose and its commercial context (*Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, 2012 ONCA 862, [2012] O.J. No. 5772 at para. 69, leave to appeal to S.C.C. refused, [2013] S.C.C.A. No. 68). As Chief Justice Winkler of the Ontario Court of Appeal held in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, [2010] O.J. No. 4336 at para. 16:

> 16. The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. Where a transaction involves the execution of several documents that form parts of a larger composite whole -- like a complex commercial transaction -- and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements […].
>
> [Emphasis added]

[57] In keeping with these principles, in interpreting Section 12.1, and in particular its use of the term “subordinate”, I must determine the intention of the parties, by considering the meaning of that term and the provision in which it is used, taking into account the words used, the context of the contract as a whole, and the necessity that the interpretation accord with sound commercial principles.

[58] The term "subordinate" on its face refers to a lower ranking. It was presumably on that basis that Worldspan argued, in its motion resulting in the Priority Decision, that it had a claim against the Vessel with "super priority", ranking above the Mortgage on the basis that Section 12.1 made the Mortgage subordinate to Worldspan's right to be paid under the VCA. As previously noted, that argument was rejected in the Priority Decision and the Priority Appeal Decision on the basis that Worldspan as owner of the Vessel has no *in rem* claim against it. It is therefore not possible to afford the term "subordinate" what I would consider to be the conventional meaning employed in commercial contracts, that of a lower priority ranking among competing claims to an asset.

[59] I must therefore consider whether the term "subordinate" can be interpreted either as Worldspan now argues (as creating a condition that Worldspan be paid in full before Sargeant can exercise its Mortgage security) or as Sargeant argues (creating a right by Worldspan to deduct amounts owed to it from any Mortgage claim by Sargeant). Neither party has advanced arguments that convince me that the other's interpretation is not an available interpretation based on the language used in Section 12.1.

[60] Nor do I consider either interpretation to be inconsistent with sound commercial principles. Sargeant argues that Worldspan's interpretation would result in a commercial absurdity because, if Sargeant owed one dollar to Worldspan and Worldspan owed $20,000,000 to Sargeant, Sargeant would be unable to enforce his security interest. I disagree with Sargeant's argument. As Worldspan points out in response, Sargeant in this extreme example would be able to enforce his mortgage by making the one dollar payment.

[61] Similarly, I see no inconsistency between Sargeant's interpretation and sound commercial principles. Shipbuilding contracts inevitably involve the allocation of risk between the parties. Where the construction is being financed by the eventual purchaser through advances, as in the case at hand, I see nothing commercially unusual about the purchaser taking mortgage security for its advances and expecting to be able to exercise that mortgage, subject to a reconciliation of accounts, if the contract does not proceed to completion. The question is: what is the particular risk allocation that the parties intended in this case? I have therefore turned to other provisions of the VCA to assist in determining the intention of the parties by considering Section 12.1 in the context of the contract as a whole.

[62] In connection with this portion of the analysis, Worldspan refers to Section 3.2 (providing for extension of the delivery date to account for delays caused by Sargeant failing to make timely payment) and Section 4.3(e) (acknowledging that the payment arrangements prescribed by the VCA are intended to maintain positive cash flow to Worldspan). Sargeant refers to the default and termination provisions in Section 13 and 24 of the VCA. I consider Sargeant's arguments in this regard to be the more compelling, as they relate to the sort of circumstances in which enforcement of mortgage security would arise. I note that Justice Strickland in the First Mortgage Appeal Decision and the Federal Court of Appeal in the Second Mortgage Appeal Decision relied on the remedy provisions in Sections 13 and 24 in reaching the conclusion that the Mortgage secured advances made by Sargeant to Worldspan. In upholding Justice Strickland's decision, the Federal Court of Appeal in *Offshore Interiors* stated as follows in paragraphs 108 to 110:

> [108] I also agree with the Judge that the remedy provisions of the VCA support the view that Worldspan was required to return

> the advances to Sargeant, in particular through showing that Sargeant's rights in the Vessel, until payment of the Final Purchase Price, were defined by the amounts advanced.
>
> [109] Under section 13.5 of the VCA, if Sargeant were to default on his obligations under the VCA, Worldspan would have the right to terminate the VCA and sell the Vessel. However, as noted by the Judge, in the event of sale by Worldspan, Worldspan is still liable to return all "instalment payments" (i.e. advances) made by Sargeant if the sale price is higher than the Capped Purchase Price. Even if the sale price is lower than the Capped Purchase Price, Worldspan would still have to return the advances, less the difference between the Capped Purchase Price and the actual purchase price. This, in turn, suggests that Sargeant has a surviving interest in the Vessel equal to the amount of the advances paid.
>
> [110] Likewise, under section 24 of the VCA, in the event that Sargeant sells the Vessel within three years of the delivery date (whether complete or not), four different formulas are used to determine the amount of money owing between Sargeant and Worldspan. As noted by the Judge, whenever the sale results in a profit, Sargeant is liable to pay a portion of that profit to Worldspan. However, whenever the sale results in a loss, Worldspan is liable to indemnify Sargeant for a portion of that loss. Moreover, under section 24.8, when making a payment under any of the section 24 formulas, each party is entitled to deduct from the amount due the other any amount owing to them under the VCA. In light of these formulas, I entirely agree with the Judge that the proceeds from the sale of the Vessel that are payable to Sargeant are, in effect, a repayment of the advances.

[63] Worldspan correctly notes that these remedy provisions are not directly applicable to the circumstances of this case. Section 24 applies where Sargeant is selling the Vessel. Section 13.5 applies, following default by Sargeant in making payments, where Worldspan elects to terminate the VCA and is itself then selling the Vessel. Neither situation applies in the case at hand, where the Vessel was subjected to judicial sale following arrest by a creditor. However, what I do consider relevant is the fact that, in the circumstances that are governed by Sections 24 and 13.5, neither section contemplates Section 12.1 operating to bar Sargeant from receiving monies owed

to it until Worldspan has been paid in full. Rather, the formulae prescribed by those sections involve, in one form or another, a reconciliation of accounts between the parties.

[64] Section 24.8 expressly provides that, when making any payments under Section 24, each party will be entitled to set-off and deduct from the amount due to the other party any amount then owing by that party under the VCA. Particularly compelling is the fact that Section 13.5 applies in the situation where Sargeant has defaulted in making payments due to Worldspan. The formula that then applies does not preclude Sargeant from obtaining refund of its advances until it has paid Worldspan, but rather provides for refund of those advances subject to prescribed adjustments. It is difficult to reconcile these contractually prescribed mechanisms with Worldspan's proposed interpretation of Section 12.1. However, they can be reconciled with Sargeant's interpretation that Section 12.1 creates a right by Worldspan to deduct amounts owed to it pursuant to the VCA from any Mortgage claim by Sargeant.

[65] In preferring Sargeant's interpretation of Section 12.1, I am guided both by the Federal Court of Appeal's decision, which relies on the contractual remedy provisions to inform its conclusion that the Mortgage secures repayment of Sargeant's advances, and by the interpretation that I consider to result from construing the VCA as a whole, taking into account these remedy provisions.

[66] I have also considered Worldspan's argument that, as a result of the Sale Order, the sale proceeds have now replaced the vessel for purposes of the VCA, and that Sargeant is now entitled to delivery of the proceeds but only once it has paid Worldspan in full. I do not agree

that this is a correct interpretation of the Sale Order. The effect of an order for judicial sale of a vessel is that the proceeds replace the vessel as the subject of the competing *in rem* claims. It is not intended to be read as supplementing the terms of the VCA as Worldspan argues.

[67] Finally, I have considered Worldspan's argument that Justice Mosley's reasons in the Sale Appeal Decision represent a judicial recognition that Sargeant's security interest is subordinate to Worldspan's right to payment. In paragraphs 6 and 7 of the Sale Appeal Decision, Justice Mosley quotes from Section 12.1 of the VCA, following which he states that Worldspan's *in personam* rights under section 12.1 of the VCA have yet to be adjudicated and that it remains open to Worldspan to participate in the claims process and challenge the *in rem* claims as the owner of the Vessel. These paragraphs merely acknowledge that it remains available to Worldspan to raise the sort of arguments that it is asserting on the Worldspan Motion. I do not read these paragraphs as expressing any conclusion on such arguments.

(3) Equitable Set-Off

[68] I raised with Sargeant's counsel at the hearing the question how the doctrine of equitable set-off could be relevant to the contractual interpretation of Section 12.1. He explained that Sargeant has raised this argument in the alternative, because of the manner in which the Worldspan motion was framed, i.e. seeking a declaration of priority, not just a contractual interpretation. Regardless, having rejected Worldspan's interpretation of Section 12.1, and as such interpretation was the basis for Worldspan's request for a declaration of priority, the Worldspan Motion must be dismissed. It is accordingly unnecessary for me to consider Sargeant's arguments on equitable set-off.

V. **SARGEANT MOTION**

A. ***Facts***

[69] In addition to facts canvassed previously in these Reasons, the following facts related to proceedings in the British Columbia Supreme Court are relevant to the Sargeant Motion.

[70] On April 29, 2011, Sargeant commenced an action against Worldspan in the British Columbia Supreme Court [BCSC], alleging that he had advanced US $20,655,926.00 to Worldspan, alleging dishonest business practices on the part of Worldspan which inflated the cost of the Vessel, and alleging that Worldspan had breached the VCA, committed breach of trust, and defrauded Sargeant. Sargeant claimed various remedies including unquantified damages.

[71] On May 27, 2011, Worldspan filed a petition in the BCSC under the *Company Creditors' Arrangement Act* RSC 1985 c-36 [CCAA], and on July 22, 2011, Justice Pearlman of the BCSC issued an Order [the BC Claims Process Order] providing for a method for establishing claims in the CCAA proceeding and seeking the aid and recognition of the Federal Court with respect to *in rem* claims against the Vessel. On the same date, Justice Pearlman also issued an Order [the BC Civil Claims Order] granting leave to Worldspan to proceed against Sargeant and Comerica by way of civil claim in the BCSC and granting leave to Sargeant and Comerica to proceed against Worldspan by way of counterclaim to the civil claim.

[72] On May 30, 2011, Worldspan filed a Response to Civil Claim in the BCSC denying Sargeant's allegations and defending its claims, *inter alia*, on the basis that the VCA subordinates Sargeant's security interest to Worldspan's right to be paid and that Sargeant breached the VCA by failing to make payments due. Worldspan also filed a counterclaim against Sargeant in the BCSC on June 1, 2011, alleging that Sargeant had failed to make US$4,920,798.11 in payments due to Worldspan and that such failure represented a breach of the VCA, causing Worldspan various categories of damages. Worldspan claimed various remedies including unquantified damages

[73] On January 15, 2014, Sargeant also commenced an action against a principal of Worldspan, Steven Barnett [Barnett].

B. ***Issue***

[74] The sole issue raised by the Sargeant Motion is whether the Court should issue an Order that the *in personam* claims between Sargeant and Worldspan proceed in the BCSC, leaving the *in rem* claims under the Mortgage and any claim under section 22(2)(n) of the *Federal Courts Act* to be addressed in the within Federal Court proceeding.

C. ***Position of Sargeant***

[75] Sargeant submits that absent a substantive reason to the contrary, a party is entitled to choose the jurisdiction in which it wishes to proceed (*Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78 at para 75). He explains that, from the beginning, he had chosen the

BCSC, having commenced his action against Worldspan in that Court in 2011, and notes that the BCSC has *in personam* jurisdiction over that action, which it has exercised.

[76] Sargeant has also proceeded against Barnett in the BCSC and submits that the allegations against Barnett and against Worldspan are similar, such that a motion will be brought to have the two actions tried together. He submits that the Federal Court may not have jurisdiction over the claim against Barnett, as it is based on a guarantee and alleged tortious action of Barnett in directing Worldspan.

[77] Sargeant argues that the allegations against Worldspan and Barnett require extensive production of documentation from Worldspan and will also require examinations for discovery. He says these allegations are outside the scope of the Federal Claims Process Order established for the *in rem* claims in the within Federal Court proceeding and that his claims against Worldspan and Barnett are not within the scope of this proceeding.

[78] Sargeant also submits that turning an *in rem* proceeding between a lien claimant and the Vessel into an *in personam* proceeding between Worldspan and Sargeant, as he understands Worldspan to be proposing, is wrong in several ways:

A. It violates the principle of comity that exists between superior courts;

B. It is contrary to the Rules of Court as it denies Sargeant the usual rights of discovery and pleadings afforded to a defendant in an action;

C. It would create a "procedural fog", by which Sargeant means uncertainty as to how the other parties to the Federal Court proceeding would fit into the *in*

personam context, including whether each would have discovery rights and document production rights; and

D. It raises the question whether this Court proposes to issue a stay order in respect of the same *in personam* proceedings in the BCSC. Sargeant notes that, when Worldspan asked Justice Pearlman of the BCSC to stay aspects of the Federal Court proceedings, he declined to do so, citing comity.

[79] Sargeant takes the position that the issue of *in rem* entitlement would be delayed indefinitely if the BCSC actions were subsumed in the Federal Court. Sargeant submits this would require the initiation of a Federal Court action or some other proceeding with more robust rights of oral and documentary discovery than are available in the summary process typically used to adjudicate competing claims against the proceeds of sale of a vessel. His proposed way forward is that the Federal Court proceeding should be placed in abeyance while any *in personam* disputes, the resolution of which is necessary to adjudicate Sargeant's *in rem* entitlement, are litigated in the BCSC. He says this will avoid the potentially inconsistent results that could occur if some aspects of the *in personam* disputes are adjudicated in the Federal Court and others in the BCSC.

[80] Comerica supports Sargeant's position, arguing that the alternative would require this Court to stay the BCSC proceeding, which is relief that courts are typically very reluctant to entertain.

D. ***Position of Worldspan***

[81] Worldspan notes that, in the Priority Appeal Decision, Justice Lemieux upheld Prothonotary Lafrenière's ruling, based on the Federal Court of Appeal's decision in *Maritima de Ecologica SA de CV v Maersk Defender (The)*, 2007 FCA 194 [*Maritima*], that the Federal Court's *in rem* jurisdiction can only be exercised against a ship where there is *in personam* liability on the part of the owner of that ship. Worldspan's position is that Sargeant is seeking to contradict the principle in *Maritima* by having the Federal Court proceed with the *in rem* claims without the establishment of the required underlying *in personam* liability.

[82] Worldspan also submits that Sargeant is seeking to have the Federal Court abandon its jurisdiction over the *in personam* claims for the purpose of circumventing the Federal Claims Process Order. It says that Sargeant wishes to litigate in the BCSC the *in personam* claims that are now barred by the Federal Claims Process Order and, after litigating the claims in the BCSC, he hopes to have the Federal Court rubber stamp the *in personam* findings of the BCSC and convert them to *in rem* claims.

[83] Worldspan's position is that it is entitled to defend the *in rem* claims in the Federal Court. In addition to its defence argument based on the interpretation of Section 12.1 of the VCA, which was the subject of the Worldspan Motion, Worldspan's counsel explained at the hearing that its defence is based on its claim of US$4,920,798.11 plus interest that it says is owing by Sargeant and an argument that Sargeant breached the VCA by failing to take delivery of the Vessel, which Worldspan says was motivated by an effort by Sargeant to avoid the effect of a US

$36 million fraud judgment issued against him by a Florida court. Worldspan says that the record in this proceeding contains the evidence necessary to support its defence arguments.

[84] It also appears to be common ground among the parties that, prior to a Federal Court priorities hearing, they would have the right in this proceeding to cross-examine the deponents of the relevant affidavits of claim. Sargeant's counsel expressed doubt that this right applies to cross-examination of Worldspan's deponent, as Worldspan is not an *in rem* claimant, which Sargeant argues to support his position that the summary Federal Court claims adjudication process is not robust enough to address the issues intended to be raised by Worldspan in defence of Sargeant's *in rem* claim. However, Worldspan's counsel advised that he took no issue with Worldspan's deponent being cross-examined.

E. ***Analysis***

[85] I acknowledge Sargeant's argument that, absent a substantive reason to the contrary, a party is entitled to choose the jurisdiction in which it wishes to proceed. Such reasons are often adjudicated based in part on *forum non conveniens* considerations, in the context of a motion to a court to stay its own proceeding or, more rarely, to enjoin a party from proceeding in another court. However, neither of the parties has moved for a stay or an injunction or argued the principles applicable to either of those remedies. Rather, the Sargeant's Motion is framed as a request for an Order that the *in personam* claims between Sargeant and Worldspan proceed in the BCSC, leaving the *in rem* claims under the Builder's Mortgage between those parties, and any claim under section 22(2)(n) of the *Federal Courts Act*, to be addressed in this proceeding.

[86] The relief sought by Sargeant raises a number of difficulties. First, the requested relief as framed reads as requiring the parties to pursue litigation in another court. No authority has been cited to support the request for an Order of this sort. The relief sought is in substance better characterized as prohibiting the parties from pursuing in the Federal Court the adjudication of any *in personam* disputes that are relevant to the determination of the *in rem* claims. However, as noted above, the Sargeant Motion has not been framed or argued as a request for a stay of the Federal Court proceeding.

[87] Second, while Sargeant relies on the proposition that a party is entitled to choose the jurisdiction in which it litigates, its position, that it commenced action in the BCSC and should be entitled to have certain disputes determined there, ignores the fact that Sargeant also chose the Federal Court as the jurisdiction for pursuit of its *in rem* claim against the Vessel. To the extent that resolution of any underlying *in personam* liability issues are necessary in order to adjudicate Sargeant's *in rem* claim, this follows from Sargeant invoking the Federal Court's *in rem* jurisdiction.

[88] Third, Sargeant's position, that the appropriate procedure is for the Federal Court's process for adjudication of *in rem* claims to be placed in abeyance pending adjudication of certain *in personam* disputes in the BCSC, is inconsistent with the objective that the Federal Court judicial sale process provide a relatively summary mechanism for adjudication of *in rem* claims and their competing priorities.

[89] Worldspan argues that Sargeant is seeking to contradict the principle in *Maritima* by having the Federal Court proceed with the *in rem* claims without the establishment of the required underlying *in personam* liability. I do not think this accurately captures Sargeant's position. It is trite law that most categories of *in rem* claims, including mortgage claims, must be supported by establishing underlying liability on the part of the vessel owner. Sargeant does not dispute this requirement. Indeed, it takes the position that such liability for its advances to Worldspan has already been found by the Federal Court of Appeal in the Second Mortgage Appeal Decision, at least to the extent of finding that the advances are repayable by Worldspan. This characterization of the Second Mortgage Appeal Decision is disputed by Worldspan, which argues that the Second Mortgage Appeal Decision represents a decision on contractual interpretation and not a finding of any liability. This dispute as to the significance of the Second Mortgage Appeal Decision may have to be addressed in a future motion. However, for present purposes, the point is that Sargeant is not disputing the requirement for underlying liability of Worldspan to be established in order to succeed in its *in rem* claim. Rather, its position is that any disputes surrounding that underlying liability, which must be resolved in order to establish its *in rem* claim, should be litigated in the BCSC.

[90] Specifically, Sargeant's position is that the arguments that Worldspan intends to raise in defence of its *in rem* claim are complex, requiring full rights of discovery and documentary production to be properly addressed. It also contends that Worldspan's defence arguments are sufficiently related to other *in personam* disputes in the BCSC, that are irrelevant to the *in rem* claims, that to have Worldspan's defence arguments adjudicated in the Federal Court risks inconsistent determinations from the two courts.

[91] While a multiplicity of proceedings can always raise a risk of the sort to which Sargeant refers, the Court has not been provided with enough information to assess how real that risk is in the case at hand. More significantly, Sargeant has referred to no precedent for this Court declining to permit the owner of a vessel, which was arrested and sold in this Court, to defend *in rem* claims in this Court through its claims adjudication process, notwithstanding that this process is less procedurally complex than that which applies to an action. The Supreme Court of Canada has recognized in *Holt Cargo Systems Inc v ABC Containerline N.V. (Trustee of)*, 2001 SCC 90, that the Federal Court retains its *in rem* jurisdiction, in relation to secured maritime claims, even in the context of an insolvency, and there is nothing in that decision that suggests that all determinations necessary to exercise such *in rem* jurisdiction should not be made in this Court.

[92] While the Court might in an appropriate case decline to exercise such jurisdiction, I would consider it necessary for the Court to be convinced that it is appropriate both (a) to deprive a vessel's owner of the right to defend in this Court against *in rem* claims that have been asserted in this Court and (b) to deprive other creditors of access to the benefits of the adjudication process that Federal Court practice provides. In that latter respect, I note Sargeant's acknowledgment that there are *in rem* claimants who may seek an equitable reordering of priorities in an effort to achieve some recovery notwithstanding the priority that would traditionally be afforded to the Mortgage. To accede to Sargeant's proposed process would not only place Sargeant's *in rem* claim in abeyance pending the conclusion of litigation in the BCSC, but would place the claims of the other *in rem* creditors in abeyance as well. Sargeant has not convinced me that the Worldspan defence arguments are so unusual or complex as to require

more robust litigation processes that would warrant a departure from the Court's usual process for adjudication of *in rem* claims.

[93] I emphasize that this conclusion is not intended to suggest that *in personam* proceedings should be commenced in this Court and therefore should not give rise to the "procedural fog" that Sargeant expressed concern would impact other claimants. Rather, my conclusion is that this Court's *in rem* jurisdiction includes whatever liability and quantification determinations, including defence arguments raised by the vessel owner, are necessary to adjudicate the *in rem* claims.

[94] I should also note that, in reaching this conclusion, I am conscious of the importance of comity between superior courts and the care that Justice Pearlman of the BCSC has taken to afford such comity to the Federal Court in issuing the BC Claims Process Order. I would not wish my reasons for this decision to be read as failing to be equally attentive to this principle. My reading of the BC Claims Process Order is that it recognized that for purposes of pursuing *in rem* claims, which the Order permitted to be pursued outside the process established by the Order, claimants would be required to establish *in personam* liabilities on the part of Worldspan. The relevant portion of paragraph 14 of the Order provides as follows:

> 14. Any Creditor that files a Proof of Claim asserting a Maritime Claim shall:
>
> (a) be entitled to pursue its claim against the Vessel outside of the process established by this Order;
>
> (b) for the purposes of pursuing its claim against the Vessel, have its right to proceed *in personam* against the Petitioners preserved; and

> (c) for the purposes of pursuing its claim against the Vessel, not be bound by any determination of the Petitioners or the Monitor
>
> ….

where "Maritime Claim" means an *in rem* claim against the Vessel under Canadian maritime law. Paragraph 15 of the BC Claims Process Order then requests the aid and recognition of the Federal Court in carrying out the terms of this Order.

[95] While paragraph 14 of the BC Claims Process Order does not expressly identify the forum for adjudication of either *in rem* claims or the *in personam* liability necessary to establish them, in my view it does represent a recognition that one depends on the other. My decision on this motion is premised simply on the Court continuing to exercise the entirety of its *in rem* jurisdiction. I intend this decision to be consistent with Justice Pearlman's Order and accordingly respectful of the jurisdiction of the BCSC.

[96] For these reasons, the Sargeant Motion will be dismissed.

VI. **COSTS**

[97] Worldspan and Sargeant each took the position at the hearing that $1500 is an appropriate costs award to be applied to each motion. I adopt this position.

ORDER

THIS COURT ORDERS THAT:

1. The preliminary evidentiary motion of Worldspan Marine Inc. is dismissed, with costs payable to Harry Sargeant III in the fixed amount, inclusive of disbursements, of $1500.

2. The motion of Worldspan Marine Inc. is dismissed, with costs payable to Harry Sargeant III in the fixed amount, inclusive of disbursements, of $1500.

3. The motion of Harry Sargeant III is dismissed, with costs payable to Worldspan Marine Inc. in the fixed amount, inclusive of disbursements, of $1500.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1226-10
STYLE OF CAUSE:	OFFSHORE INTERIORS INC. and WORLDSPAN MARINE INC., CRESCENT CUSTOM YACHTS INC., THE OWNERS AND ALL OTHER INTERSTED IN THE VESSEL "QE014226C010" and THE VESSEL "QE014226C010" and WOLRIGE MAHON LIMITED in its capacity as Appointed Vessel Construction Officer of the Defendant Vessel "QE014226C010" and HARRY SARGANT III, MOHAMMAD ANWAR FARID AL-SALEH, and 642385 B.C. LTD.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 14, 2015
REASONS FOR ORDER:	SOUTHCOTT J.
DATED:	JANUARY 8, 2016

APPEARANCES:

W. Gary Wharton	FOR THE PLAINTIFF (for Offshore Interiors Inc.)
W. Gary Wharton	FOR THE DEFENDANTS (for Worldspan Marine Inc. et al)
John W. Bromley Kieran E. Siddell	FOR THE INTERVENORS (for Harry Sargeant III)
John I. McLean	FOR THE INTERVENORS (for Comerica Bank)
Teresa M. Tomchak Jason K. Yamashita	FOR THE INTERVENORS (for Capri Insurance Services Ltd. And Raider-Hansen Inc.)

SOLICITORS OF RECORD:

Bernard LLP Barrister & Solicitors Vancouver, British Columbia	FOR THE PLAINTIFF (for Offshore Interiors Inc.)
Bernard LLP Barrister & Solicitors Vancouver, British Columbia	FOR THE DEFENDANTS (for Worldspan Marine Inc. et al)
Bull Houser &Tupper LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE INTERVENORS (for Henry Sargeant III)
Gowling Lafleur Henderson LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE INTERVENORS (for Comerica Bank)
Farris Vaughan Will & Murphy LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE INTERVENORS (for Capri Insurance Services Ltd. And Raider-Hansen Inc.)