Federal Court Cour fédérale

Date: 20160504

Docket: T-1833-15

Citation: 2016 FC 501

Vancouver, British Columbia, May 4, 2016

PRESENT: The Honourable Mr. Justice Hughes

ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

PLATYPUS MARINE, INC.

Plaintiff

and

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

Defendants

JUDGMENT AND REASONS

[1] This action was commenced on October 29, 2015 wherein the Plaintiff, a Washington State corporation doing business in Port Angeles, Washington, USA claimed *in rem* and *in personam* against the Ship Tatu and its owners. That ship is now in Canadian waters in or near Vancouver, British Columbia. The claim was for the Canadian dollar equivalent of

US $385,508.92 plus interest at Admiralty rates or pursuant to the British Columbia or Canadian *Interest Act*, costs, condemnation of the vessel, if required, and other relief.

[2] On an *ex parte* motion brought by the Plaintiff for payment in the Canadian dollar equivalent of US $385, 508.92, costs and other relief, Justice Fothergill of this Court made an Order dated December 15, 2015 providing:

> *THIS COURT ORDERS that:*
>
> *The motion is allowed in part.*
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> 1. *Judgment is granted to the Plaintiff against the Defendants in the amount of $363,455.61, representing the Canadian dollar equivalent (on January 30, 2015) of the amounts shown on the invoices issued to the Defendants by the Plaintiff between the dates May 28, 2014 and September 19, 2014, exclusive of interest.*
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> 2. *The Defendants' motion for an extension of time to file a statement of defence to the Plaintiff's claim for interest in the Canadian dollar equivalent of US$100,000.00, or such other amount as may be payable on account of interest, shall be served and filed no later than December 31, 2015, and shall be heard at the General Sittings at Vancouver, B.C. on Tuesday, January 12, 2016, unless the parties consent to an adjournment or the Court directs otherwise.*
>
> 3. *Costs of the motion, hereby fixed in the amount of $1,500.00, inclusive of disbursements and taxes, shall be paid by the Defendants to the Plaintiff.*

[3] The motion before me is that contemplated by paragraph 2 of Justice Fothergill's Order, albeit not heard until now, respecting the claim for interest in the Canadian dollar equivalent of US $100,000.00. It is common ground between the parties that Justice Fothergill's Order was not

appealed and that the amount of $363,455.61 contemplated by paragraph 1 of his Order has been paid.

[4] The Notice of Motion before me says that the Defendants seek the following:

> *THE MOTION is for the following:*
>
> 1. *An Order pursuant to Rules 213 and 216 dismissing the remainder of the Plaintiff's claim, being its claim for US $100,000.00 for interest and any other claims to interest;*
> 2. *Costs of this motion in the fixed amount of $1500.00;*
> 3. *Such further and alternative relief as this Honourable Court deems just.*

[5] The Defendants, in their Memorandum filed in support of their motion requested the following relief:

> *36. Following the decision in Canmerica Mortgage Corp. the Plaintiff ought to receive no interest at all. In the alternative, if the Plaintiff is held to have any entitlement to interest at all, it should be limited to its further alternative pleading for interest under the Court Order Interest Act; R.S.B.C. 1996 c. 79 from January 31, 2015 to present.*

[6] The Plaintiff in its Memorandum makes the following request:

> *VII CONCLUSION:*
>
> *46. The Plaintiff submits that the Defendant's motion should be denied and asks the Court to grant judgment in favour of the Plaintiff in the amount of $100,000 pursuant to the agreement, or such further or other alternative amount that this Honourable Court deems just.*

[7] In effect, therefor, the motion before me is for judgment either in the amount of the Canadian equivalent of the US $100,000 or in some other amount such as that provided in Admiralty or under a British Columbia or Canadian *Interest Act*. The issues are therefor:

1. Is the Plaintiff entitled to Judgment for interest in the amount of the Canadian equivalent of US $100,000?

2. If not, is the Plaintiff entitled to some other amount by way of interest and, if so, what is that amount?

[8] The evidence before me is scant. The Plaintiff did provide repairs, maintenance and refurbishment to the ship Tatu, at the Plaintiff's facilities in Port Angeles, Washington, USA. The Plaintiff provided an Estimate dated September 11, 2015 outlining the work to be done. That estimate was accepted and signed on behalf of the Owner of the Tatu. That estimate, while addressing many issues, makes no reference to interest.

[9] Commencing May 28, 2014 through to September 19, 2014, the Plaintiff sent a number of invoices, ten in all, to the Defendants in respect of ongoing work done on the Tatu. Each invoice bears the note "INVOICE DUE UPON RECEIPT", no mention is made of interest in any of them. Tellingly, a Statement dated August 27, 2014 prepared by the Plaintiff references each of the invoices to date with a total of all outstanding amounts but no claim for interest is included.

[10] The evidence in respect of an agreement to pay interest is scant. There appears to have been an oral agreement of some kind entered into between the President of the Plaintiff

(Linnabary) and the owner of the Tatu (Sims). The evidence is set out in two affidavits of Linnabary which evidence is uncontradicted. He said in his December 3, 2015 affidavit:

> *9. After the work had been provided, Mr. Sims agreed to pay an additional US $100,000.00 as interest for work provided as referred to in paragraphs 4 and 6 in exchange for Platypus agreeing to defer payment until January 2015. He agreed that the interest would be secured by the "TATU".*

[11] That evidence was supplemented by Linnabary in his April 21, 2016 affidavit:

> *4. With respect to the agreement referred to in paragraph 9 of my December 3, 2015 Affidavit, it was Mr. Sims who offered the arrangement. He advised that he was low on cash and wanted additional time to pay the invoices and I agreed.*

[12] While at least some of the transactions took place in the State of Washington, USA, I have no evidence before me as to the relevant laws of that State. The parties agreed that I may determine this matter under the relevant laws of Canada and British Columbia.

[13] The Defendants argue that the agreement to pay interest in the amount of US $100,000.00, is in breach of the provisions of section 347 of the *Canadian Criminal Code*, RSC 1985, c. C-46 which provide that it is a criminal offence to charge interest that exceeds an effective annual rate of sixty percent. Defendants' Counsel submits that if the rate of interest exceeds sixty percent, I may strike down the contract to pay the amount, or substitute a reduced rate appropriate in the circumstances.

[14] The leading authority is the decision of the Supreme Court of Canada in *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7. That decision has been

followed by several Courts. I accept R. J. Sewell J's summary as provided in *Canmerica Mortgage Corp v Yu*, [2015] B.C.J. No 9 at paragraphs 116 to 120:

> *[116] Historically, a finding of illegality of a contract resulted in the contract being void. However, in Transport North American Express Inc. v. New Solutions Financial Corp., 2004 SCC 7 (CanLII), the Supreme Court decided that courts that find that an agreement has violated s. 347 of the Criminal Code must consider what remedy is appropriate on a spectrum from striking down the entire contract at one extreme to reducing the interest payable to the maximum rate of 60% at the other.*
>
> *[117] At para. 6 of Transport North American, Arbour J. articulated the correct approach:*
>
>> *6 A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the Code. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitive loan-sharking arrangements and contracts that have a criminal object should be declared void ab initio. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. The agreement in this case is an example of such a contract. In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved.*
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> *[118] At para 24., Arbour J. approved the process for analyzing what remedy is appropriate set out in the judgment of Blair J.A. in William E .Thomson Associates Inc. v. Carpenter (1989), 1989 CanLII 185 (ON CA), 61 D.L.R. (4th) 1:*
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>> *24 In Thomson, at p. 8, Blair J.A. considered the following four factors in deciding between partial enforcement and declaring a contract void ab initio: (i) whether the purpose or the policy of s. 347 would be subverted by severance; (ii) whether*

> *the parties entered into the agreement for an illegal purpose or with an evil intention; (iii) the relative bargaining positions of the parties and their conduct in reaching the agreement; and (iv) whether the debtor would be given an unjustified windfall. He did not foreclose the possibility of applying other considerations in other cases, however, and remarked (at p. 12) that whether "a contract tainted by illegality is completely unenforceable depends upon all the circumstances surrounding the contract and the balancing of the considerations discussed above and, in appropriate cases, other considerations".*

[119] The first consideration I must address is whether partial enforcement of the contract would subvert the purpose of s. 347. In my view, it would not. This is not a case in which the entire transaction should be tainted with illegality. In Transport North American, the Court directed that violations of s. 347 that do not involve loan sharking or contracts made for an illegal purpose should be approached cautiously.

[120] The second consideration I must address is whether the parties entered the agreement for an illegal purpose or with an illegal intention. I am satisfied that Canmerica was not engaged in loan sharking. Loan sharking involves some element of coercion or intimidation to collect the debt. While the Loan did require payment of interest at a usurious rate, there was no evidence that Canmerica engaged in any intimidation or coercion either in its formation or collection. However, I am satisfied that Canmerica knowingly charged interest at the criminal rate of more than 60%, and that the remedy in this case should reflect that fact.

[15] There is a threshold dispute between the parties as to whether the sum of $100,000.00 is an interest rate that exceeds 60%. The Plaintiff's Counsel has presented a chart where interest is calculated beginning at the date set out on the invoice for each of the ten invoices running from May 28, 2014 to September 19, 2014. Plaintiff's Counsel argued that these calculations show an interest rate just under 60%, that is, about 59.5%. I question calculations that use the invoice date as the basis for start time of accrual of interest, as the second affidavit of Linnabary, April 21,

2016, paragraph 3 says that the invoices were "usually" delivered on the date of the invoice and, in any event, all were e-mailed within two days of the invoice date. Even a change of two days would render a calculation of interest in excess of 60%.

[16] Defendants' Counsel calculates interest from the date of the oral agreement which he says is on or about September 19, 2014 until the end of January 2015, which is the agreed date of forbearance. Defendants' calculations come to an interest rate of about 95% per annum.

[17] I find that the sum of US $100,000.00 represents an interest rate in excess of 60% per annum. Even the Plaintiff's calculations, properly considered, would come to that. No demand for interest was made in the Statement date of August 27, 2014. No interest seems to have been discussed until on or after the date of the last invoice, September 19, 2014. Beginning on whichever of those dates, the interest rate is well in excess of 60% per annum.

[18] Turning to the four factors outlined by Blair J.A. in the *Thomson* case as set out in paragraph 18 of the *Canmerica* decision above, those four factors are directed to whether the contract as a whole can be declared void or whether there can be a severance of the interest portion from the rest. In this case a severance has already been effected by the Order of Justice Fothergill. The principal debt has been ordered to be paid and has been paid. The only question is whether the US $100,000.00 should be allowed as interest or some other amount, or none.

[19] Each party has presented certain alternative rates of interest and Counsel for each of the parties have agreed that, if I set aside the provision respecting the US $100.000.00, then a rate of

5% per annum as provided by the *Interest Act*, RSC 1985 c. I-15 section 4, would be the most appropriate rate.

[20] At the hearing, calculations were made as to the dollar figure, expressed in Canadian dollars, which 5% interest would represent. That figure was just under $35,000.00

[21] Accordingly, I will set aside the agreement to pay interest at sum of US $100,000.00 and order that the sum of $35,000.00 be paid.

[22] I will not award costs to any party as success is divided.

JUDGMENT

FOR THE REASONS PROVIDED, THIS COURT'S JUDGMENT is that:

1. The agreement to pay interest at the sum of US $100,000.00 is set aside.

2. The Defendants shall pay to the Plaintiff the sum of $35,000.00 as interest.

3. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1833-15
STYLE OF CAUSE:	PLATYPUS MARINE, INC. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "TATU" AND THE SHIP "TATU"
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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DATED:	MAY 4, 2016

APPEARANCES:

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Gary Wharton	FOR THE DEFENDANTS

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