Federal Court  Cour fédérale

Date: 20160930

Docket: T-1106-12

Citation: 2016 FC 1096

Ottawa, Ontario, September 30, 2016

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

LAKELAND BANK

Plaintiff/
Cross-Defendant

and

THE SHIP *NEVER E NUFF*, HULL NO. DNAZ8012C303 AND PATRICK SALVAIL SAINT-GERMAIN

Defendants/
Cross-Plaintiffs

and

BREEN P. MCMAHON

Defendant

AND BETWEEN:

THE SHIP *NEVER E NUFF*, HULL NO. DNAZ8012C303 AND PATRICK SALVAIL SAINT-GERMAIN

Plaintiffs in
Warranty

and

LOCATION HOLAND (1995) LTÉE

Defendant in Warranty

JUDGMENT AND REASONS

[1] In essence, this is a case concerning the enforcement in Canada of an American mortgage on the "*Never E Nuff*" a 38-foot pleasure craft. Many of the relevant facts are found in an Agreed Statement.

I. Lakeland's Case

[2] In 2007, the plaintiff, Lakeland, an American bank, lent the American defendant McMahon US $146,390 so he could purchase the "*Never E Nuff*". As security, the Bank took out a First Preferred Ship's Mortgage registered at the National Vessel Document Center, United States Coast Guard.

[3] Mr. McMahon stopped making payments on the loan in March 2008. The Bank instituted proceedings *in personam* against Mr. McMahon and *in rem* against the "*Never E Nuff*" in the United States District Court, Northern District of New York. However, it could not proceed *in rem* as the ship could not be found, served and arrested. Unbeknownst to the Bank, the ship had been sold and exported to Canada. The Bank obtained a judgment against Mr. McMahon personally in the amount of US $190,948.79. However, it has been unable to collect thereon.

[4] It came to learn that the "*Never E Nuff*" was in the ownership of Patrick Salvail St-Germain, and was to be found near Montreal.

[5] In June 2012, it instituted proceedings in this Court *in personam* against Mr. McMahon and Mr. St-Germain (sometimes simply known as Mr. Salvail) and *in rem* against the "*Never E Nuff*". It obtained a Warrant for Arrest and not only arrested the ship but obtained an order putting the Bailiff (acting Marshal) in possession. The amount of the action is for the Canadian equivalent of US $190,948.79, the amount of the American judgment, plus interest and costs. It seeks judgment against the defendants jointly and severally.

II. The Case against Mr. McMahon

[6] Mr. McMahon was never served with these Canadian proceedings, be it personally or by court ordered substitutional service. Consequently, the action as against him must be dismissed. In any event, the action would have been dismissed against him on the principle of *res judicata*. Although the pleadings are somewhat ambiguous, the action against Mr. McMahon is on the loan. It is not an application to enforce a foreign judgment, which under the rules of this Court is subject to a completely different procedure.

III. The Case against Mr. St-Germain

[7] Mr. St-Germain was sued jointly and severally with Mr. McMahon and with the ship. The only alleged basis of his personal liability is that he was, and still is, the current owner of the "*Never E Nuff*". There is no allegation in the Statement of Claim as filed, or as amended shortly

before trial, that Mr. McMahon was a prête-nom for Mr. St-Germain, or that they were otherwise in cahoots so that Mr. St-Germain would be responsible for Mr. McMahon's indebtedness to the Bank.

[8] In my opinion, Mr. St-Germain should have immediately moved under Rule 221 to have the action struck against him on the basis that the pleadings disclosed no reasonable cause of action. An innocent purchaser for value, without notice of an existing lien or encumbrance, is not personally liable. However, Mr. St-Germain filed a Statement of Defence in which he denied liability both personally, and on behalf of the ship.

IV. Mr. St-Germain as Claimant

[9] Mr. St-Germain submits that the Bank's proceedings were an abuse of process and counterclaims in the amount of $50,000.00. His counterclaim includes damages for stress occasioned by the risk of being found personally liable, the fact that the arrest was illegal (which shall be covered in the case against the ship) and that in any event the Bailiff arrested more than simply the "*Never E Nuff*". He also arrested the trailer on which the she sat on land, the on board fuel which he had purchased, which he valued at $1,000.00 and various personal items such as safety equipment, crockery and the like.

[10] He also instituted third party proceedings against Holand, a leasing company. Holand, at Mr. St-Germain's request, had purchased the "*Never E Nuff*" from Mr. McMahon in April 2007. This purchase was without the knowledge or consent of the Bank. Indeed, Mr. McMahon kept up his payments on the loan for almost another year.

[11] Holand then leased the "*Never E Nuff*" to Modes CSG Inc., a company wholly owned by Mr. St-Germain. After extensions of and the expiry of the lease, on August 31, 2010, Mr. St-Germain purchased the "*Never E Nuff*" from Holand.

[12] The third-party proceedings against Holand are narrow in scope. They only provide that if Mr. St-Germain is found personally liable to the Bank he then claims indemnity. It is not a claim based on the fact that Holand may have sold him a ship which was not free and clear of liens and encumbrances. I was informed that there are pending proceedings between Mr. St-Germain and Holand in the Quebec Superior Court.

V. The Case against the "*Never E Nuff*"

[13] The claim is based on s 22(3)(d) of the *Federal Courts Act* which gives this Court jurisdiction in relation to all mortgages on a ship, registered or not, whether legal or equitable, and whether created under foreign law or not.

[14] Mr. St-Germain has mounted a vigorous defence on the ship's behalf. He submits:

a) Lakeland failed to prove American law. Consequently it failed to prove that the mortgage is valid;

b) Lakeland's claim is time-barred or prescribed under American law;

c) that Quebec law is applicable as the "*Never E Nuff*" was not, and need not have been, registered federally pursuant to the *Canada Shipping Act, 2001*. In order to enforce the mortgage against him, a purchaser in good faith, for value, and without notice, the Bank's interest had to be registered in accordance with provisions of the *Quebec Civil Code*. It was not.

[15] Mr. St-Germain also alleged that Holand was obliged to guarantee him title free and clear of liens and encumbrances. However, as aforesaid, this allegation is beyond the conclusions sought in this Court. Holand's position, again not relevant to this action, is that it was Mr. St-Germain who was supposed to take care of title issues.

VI. The Trial

[16] Upon confirmation that Mr. McMahon had never been served, I immediately dismissed the action as against him, without costs.

[17] As regards Mr. St-Germain, at some point before trial the Bank indicated that it would limit its claim against him to the costs incurred by the Bailiff in storing the "*Never E Nuff*". Nevertheless, on its motion to amend its Statement of Claim, which was heard the week before trial, it was still claiming US $190,748.79 against the ship, Mr. McMahon and Mr. St-Germain jointly and severally. However, during the the Bank's opening statement, counsel reconfirmed that the claim against Mr. St-Germain personally was limited to the storage costs incurred by the Bailiff. He went on to say that following his cross-examination of Mr. St-Germain, the Bank might drop that storage claim as well.

[18] Mr. St-Germain was cross-examined by the Bank, to be followed by Holand. After the Bank's cross-examination it stated it was discontinuing its entire action against Mr. St-Germain. The result is that Mr. St-Germain's third party action against Holand in this Court also falls.

[19] There are obviously cost consequences. I stated that I would deal with costs after these reasons and judgment were issued. Holand's counsel, with my leave, did not participate further.

[20] This leaves the "*Never E Nuff*" as the only defendant.

[21] I begin with what the action against her is not. It is not an action in this Court as Canada's Admiralty Court to enforce an *in rem* judgment of a Foreign Admiralty Court. In the *City of Mecca* (1879), 5 P D 28, Sir Robert Phillimore held that the English Court of Admiralty could and ought to enforce an *in rem* judgment of a Foreign Admiralty Court. This was done on the grounds of international comity. He was reversed in the Court of Appeal, (1881), 6 P D106, not on the point of law, but rather because the foreign judgment in issue, a judgment of a Portuguese Court, was *in personam* only. Likewise in this case the decision in the United States District Court was *in personam* only.

[22] The Bank emphasized at trial that it seeks a judgment *in rem* against the ship followed by a Marshal's sale and payment out of the proceeds thereof. This is, and always has been, the classic conclusion of a successful action *in rem*. This is what Lord Watson had to say in *Northcote v the Owners of The Henrich Björn* (1886), 11 App Cas 270 (*The Henrich Björn)* at pp 276-277:

> The action is *in rem*, that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims.

[23] The Bank called one witness, a Vice-President, Tarik Hussain, who joined it some four and a half years ago, after the events in the United States took place. However, he had access to the Bank's business records. He produced a number of exhibits, which were subject to objection on various grounds such that they were photocopies, not originals, not certified, not produced by a competent witness and did not meet the requirements of the *Canada Evidence Act*. These objections were taken under advisement.

[24] The Bank's involvement began in January 2007 with a Retail Instalment Contract between First Choice Marine as seller and Mr. McMahon as buyer of the "*Never E Nuff*". The cash price was US $245,695.00 with $146,390.00 to be financed, at an annual percentage rate of 9.99%. It would appear that this contract was assigned to the Bank although the assignment portions thereof were not signed.

[25] The ties between the Bank and Mr. McMahon became tighter with another document on Lakeland's letterhead titled "Indirect Dealer Loan Application", signed by Mr. McMahon. The loan requested was US $149,900.00.

[26] The best evidence rule has to be tempered these days by a sense of proportionality. Given the admission that the Bank lent US $146,390.00 to Mr. McMahon, objection to the production

of these documents does not sit well. I dismiss the objections thereto. The Bank was given leave to replace a copy with the original Retail Instalment Contract, which it did. However, I disallow a page which was not in the copy produced by Mr. Hussain.

[27] On January 17, 2007, a First Preferred Ship's Mortgage given by Mr. McMahon to Lakeland was registered at the National Vessel Documentation Center, United States Coastguard. The total amount of the mortgage was US $146,390.00, plus interest. The mortgage was to mature January 6, 2027. There is no suggestion whatsoever that this certified copy is not the document specified in the Agreed Statement of Facts and so I dismiss the objections to its production.

[28] After Mr. McMahon failed to maintain his payments, the Bank took action in the United States District Court, Northern District of New York, but as aforesaid, could not proceed *in rem* against the ship. Although Mr. McMahon did not defend, upon being threatened with contempt for not appearing for a deposition, he did appear and on or about January 13, 2009, deposed that he had sold the "*Never E Nuff*" to a man named "Patrick" whose last name he did not know, that Patrick had written him a cheque for $146,000.00 and had taken the "*Never E Nuff*" to Canada. All this had occurred more than one year before his deposition. The US judgment against Mr. McMahon was certified and so is certainly receivable as an exhibit pursuant to the *Canada Evidence Act*.

[29] Since the Bank relies upon the judgment, it is certainly taken to know in January 2009 that the ship had been previously exported to Canada.

[30] Mr. St-Germain's version of events coincides with what the Bank had learned. He was interested in buying a pleasure craft and through internet searches came across Mr. McMahon. Through a financing arrangement with Holand, with whom he had done business in the past, it was actually Holand who purchased the ship on April 23, 2007, as per the Agreed Statement of Facts. The sales contract was not produced.

[31] This brings us to Mr. St-Germain's defences asserted on behalf of the ship.

[32] The first is that the Bank has not established that it holds a valid US mortgage on the ship. It led no evidence as to American law.

[33] In my opinion, the Bank does hold a valid US mortgage. It did not have to prove American law. This is not a case in which the Bank was trying to assert greater rights under a foreign law than to which it would be entitled under Canadian domestic maritime law. For instance, necessaries men, for the most part, have no preferred status in Canada while in some countries they enjoy a maritime lien. See *World Fuel Services Corp v Nordems (The)*, 2010 FC 332, affm'd 2011 FCA 73, [2012] 4 FCR 183.

[34] In *JP Morgan Chase Bank v the Lanner*, 2006 FC 409, [2007] 1 FCR 289, Madam Justice Gauthier, as she then was, had to deal with a foreign mortgage. She said at paras 33 and 34:

> [33] Moreover, as mentioned, where foreign law is relevant, it is a question of fact that needs to be established. As indicated in *The Golden Trinity*, above, and in *Backman v. Canada*, [1999] F.C.J. No. 1327 at paragraphs 38-41 (F.C.A.) (QL), aff'd [2001] 1 S.C.R.

> 367, "if foreign law is not pleaded and proved or insufficiently proved, it is assumed to be the same as the *lex fori*".
>
> [34] A review of the documentation produced satisfies the Court that under Canadian law, the loan agreement and the registered mortgage are valid. Like the Prothonotary, I am satisfied that the plaintiffs have established the basis of their claim.

[35] Although the judgment was varied in appeal, 2008 FCA 399, [2009] 4 FCR 109, her opinion that in the absence of proof of foreign law the *lex fori* applies, was not challenged.

[36] The mortgage document, on its face, would have been perfectly valid under Canadian Maritime Law, more particularly the *Canada Shipping Act, 2001*. In accordance with sections 46 and 47 of that Act, the "*Never E Nuff*", as a "pleasure craft", was not subject to mandatory registration, but rather, at the option of a qualified owner, could have been registered. If it had been registered, then the mortgage could have been registered. It follows, however, that if title was not registered, then the mortgage could not have been registered.

[37] Absent registration, and indeed should I be wrong in holding that the Bank held a valid registered US mortgage, the Bank holds a legal unregistered mortgage which under Canadian Maritime Law is opposable to Mr. St-Germain as a *bona fide* purchaser for value without notice. I so held in *Ballantrae Holdings Inc v The Phoenix Sun,* 2016 FC 570, which dealt with a mortgage which should have been, but was not, registered in Panama. Reliance was placed in that case upon *The Shizelle*, [1992] 2 Lloyd's Rep 444, a decision of the English Admiralty Court.

[38] Mr. St-Germain submits that my reliance in *The Pheonix Sun* on *The Shizelle* was misplaced. While it is true that Canadian Maritime Law includes those principles of English common law administered by the English Admiralty Courts, (*ITO-International Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 (*The Buenos Aires Maru*)), that law can be displaced by subsequent Canadian jurisprudence or legislation.

[39] At common law, the mortgage is a security device wherein legal title to the chattel is transferred to the lender, with the borrower maintaining the equitable right of redemption.

[40] Now s 65 and following of the *Canada Shipping Act, 2001*, deal with mortgages registered thereunder.

[41] Sections 68 and 69(1) read:

68 A mortgage of a vessel or a share in a vessel does not have the effect of the mortgagee becoming, or the mortgagor ceasing to be, the owner of the vessel, except to the extent necessary to make the vessel or share available as security under the mortgage.	68 Sous réserve de ce qui peut être nécessaire pour faire du bâtiment ou de la part hypothéqué une garantie de la dette hypothécaire, le créancier hypothécaire n'est pas, du fait de l'hypothèque, réputé être propriétaire du bâtiment ou de la part. Le débiteur hypothécaire n'est pas non plus réputé avoir cessé d'en être le propriétaire.
69 (1) A mortgagee of a vessel or a share in a vessel has the absolute power, subject to any limitation set out in the registered mortgage, to sell the vessel or the share.	69 (1) Tout créancier hypothécaire d'un bâtiment ou d'une part dans un bâtiment a le pouvoir absolu, sous réserve des restrictions prévues dans l'hypothèque enregistrée, de vendre le bâtiment ou la part.

[42] I very much doubt that ss 68 and 69 are applicable as the ship was not registered under the Act. However, all s 68 does is make it clear that the mortgage creditor is not the owner, except to the extent necessary to make the ship available as security. For example, a shipowner faces strict or quasi-strict liability in a number of areas including oil pollution and wreck removal. Section 68 makes it clear that a mortgage creditor, as such, is not liable in respect thereof.

[43] Section 69(1) confirms the traditional right of a mortgage creditor to sell the ship. However, in this case, as is common, were the Bank to sell the "*Never E Nuff*" it would only be selling Mr. McMahon's interest therein. If it is going to recover anything, it wants a Marshal's sale which would give title to a purchaser free and clear of all liens and encumbrances.

[44] Anyway one looks at it, the Bank continues to enjoy a *droit de suite* which allowed it to arrest the "*Never E Nuff*" in Mr. St-Germain's hands.

[45] Based on a textbook, Mr. St-Germain submits that under US law the Bank's claim was subject to a three-year limitation. He did not prove US law. In any event in this Court, except perhaps with respect to matters arising wholly in Quebec, time-bar is a matter of procedure governed by the *lex fori*, and must be pleaded, as it does not extinguish a right.

[46] The earliest possible date on which time would have begun to run is 2007 when Mr. McMahon sold the ship without the Bank's permission. The Bank's claim was subject to a six-

year time-bar under s 39(2) of the *Federal Courts Act* as a cause of action arising otherwise than in a province. Thus the action was timely when instituted in June 2012.

[47] Section 140 of the *Marine Liability Act* came into force September 21, 2009 and has established a general limitation period of three years, subject to any overriding Act of Parliament, for all causes of action arising under Canadian Maritime Law. This would displace the six-year limitation period under s 39(2) of the *Federal Courts Act*.

[48] Unlike other procedural statutes, statutes of limitation of actions are not interpreted retrospectively so as to deprive a party of an acquired right (*Angus v Sun Alliance Insurance Co,* [1988] 2 SCR 256; P.A. Côté, "Interprétation des Lois", 4^{e} ed. (Toronto Carswell, 2011 at para 711 and 712); R. Sullivan, "Sullivan on the Construction of Statutes", 5th ed (LexisNexis 2008 at p 700).

[49] Mr. St-Germain further submits that since registration was not required under the *Canada Shipping Act 2001,* and in fact was not registered while the ship was in his ownership, or Holand's, Quebec law applies. There is no question that under Quebec law (leaving aside conflict provisions) the Bank's mortgage is not opposable to Mr. St-Germain because it was not registered pursuant to the provisions of the *Quebec Civil Code*.

[50] I have no hesitation in saying that if this were purely a Quebec matter, a lender could register security on a pleasure craft under Quebec law, which security would certainly be enforceable in the Federal Court in virtue of s 22(3) of the *Federal Courts Act*. It does not

follow, however, that in the absence of such registration the security would not have been enforceable. Furthermore, registration by the Bank of its mortgage under the provisions of the *Quebec Civil Code* after Mr. McMahon had sold the ship to Holand would have had no value.

[51] The Federal Court was created by Parliament under s 101 of the *Constitution Act, 1867* for the better administration of the federal laws of Canada be they statute, regulation or common law (*Quebec NorthShore Paper Co v CP Ltd*, [1977] 2 SCR 1054).

[52] Canadian Maritime Law is uniform throughout the country, is not provincial law and includes those English statutes and principles of English common law applied in the English admiralty courts until 1934. The Federal Court only applies such provincial law as may be incidentally relevant (*The Buenos Aires Maru*, above).

[53] In order to determine whether a provincial statute of general application is incidental to a claim based on Canadian Maritime Law, one must consider *Ordon Estate v Grail*, [1998] 3 SCR 437 as modified by *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 (*The Ryan's Commander*). They set out four factors.

[54] The first issue is whether a mortgage on a ship is a claim under the exclusive federal legislative competence over navigation and shipping. The answer is yes. The focus is on the object of the transaction, not the transaction itself. Although in the abstract contracts of sale and insurance fall within provincial legislative competence as matters of property and civil rights, the sale of a ship and a marine insurance contract are matters of navigation and shipping and form

part of Canadian Maritime Law (*Antares Shipping Corp v The Capricorn*, [1980] 1 SCR 553; *Skaarup Shipping Corp v Hawker Industries Ltd*, [1980] 2 FC 746 (FCA); and *Zavarovalna Skupnost Triglav v Terrasses Jewellers Inc.*, [1983] 1 SCR 283). Mortgages on maritime property clearly fall within Canadian Maritime Law.

[55] The second issue is whether there is a federal statutory counterpart to the provisions of the *Quebec Civil Code*. Strictly speaking, it is not necessary to answer this question. The *Canada Shipping Act, 2001*, would not have applied to the "*Never E Nuff*" as an American ship and to the Bank's American mortgage. This Court's jurisdiction arises from its inherent conflict of law rules (*Tropwood AG et al v Sivaco Wire & Nail Co et al*, [1979] 2 SCR 157 (*The Tropwood*)), and since foreign law was not proved, the merits are governed by common law.

[56] If we take the position that there is no Canadian statute directly on point, the third question to be posed is whether the *lex non scripta* of Canadian Maritime Law should be altered. The answer, in my opinion, is no. Canadian Maritime Law recognizes unregistered mortgages (*The Phoenix Sun*, above*).*

[57] The fourth and final issue is if the *lex non scripta* should not be changed, does the provincial law trench upon a protected "core" of federal competence? In my opinion, it does. This is not a case such as *The Ryan's Commander* in which the Supreme Court noted that provincial Workers' Compensation statutes had been applied in maritime matters for more than a century. In the case of conflict, the federal law would be paramount.

[58] Having concluded that Lakeland holds a valid mortgage on the "*Never E Nuff*" which is opposable to Mr. St-Germain, the next issue is that of quantum, both principal and interest. This may be an exercise in futility as no evidence has been led as to the "*Never E Nuff's*" present value. There is no information as to the manner in which she has been maintained over the past four years.

[59] I begin with the conversion of the US dollar into Canadian dollars. This Court follows the breach-day rule (*Gatineau Power Co v Crown Life Insurance Co*, [1945] SCR 655; *NV Bocimar SA v Century Insurance Co* (1984), 53 NR 383, [1984] FCJ No 510, reversed, but not on this point at [1987] 1 SCR 1247).

[60] Although it could be said that Mr. McMahon breached the Retail Instalment Contract in 2007 when he sold the ship to Holand without the Bank's knowledge and consent, it only had knowledge of a breach in March 2008 when Mr. McMahon stopped making payments. The exchange rate at that time, which rate I shall use, is that the US dollar was worth 1.0028, at the Bank of Canada's noon day rate.

[61] The American judgment rendered in 2010 covered principal, interest and costs. The Statement of Claim filed in this Court in 2012 did not claim interest with respect to that two-year gap. I am not prepared to grant what the Bank did not ask. Mr. Hussein adopted the Bank's testimony in the US action. I accept that as of April 14, 2010, the principal amount owing on the loan was US $132,042.55 with accrued interest of $24,241.79. The balance of the judgment covered the transfer of monies from a reserve fund, costs and attorneys' fees which had been

covered in the loan application. No evidence has been led in this Court about the reserve fund and I am not prepared to award American costs which were awarded against Mr. McMahon, much less solicitor-client costs, against the ship. Costs are a matter of discretion.

[62] Thus, as of June 8, 2012, the date on which this action commenced, the amounts which could be levied against the ship were US $132,042.55 in principal and US $24,241.79 in interest or CAD $132,412.26 and $24,309.66.

[63] In Canadian Maritime Law, prejudgment interest is a function of damages, left to the discretion of the Court (*Bell Telephone Company of Canada v The Mar-Tirenno*, [1974] 1 FC 294 (FCTD); *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303). The Court in its discretion may decide not to apply the contractual rate agreed between the parties (*Mount Royal/Walsh Inc v The Jensen Star*, 17 FTR 289, [1988] FCJ No 141 (FCTD) (QL), varied but not on this point [1990] 1 FC 199, 1989 FCJ No 450 (FCA) (QL)).

[64] The Bank claims interest at commercial rates, but has made no proof thereof. Under the *Interest Act*, the legal rate is 5%. I will grant pre-judgment interest at that rate on the sum of $132,412.26 from June 8, 2012, *i.e.* $28,550.40.

[65] Turning now to Mr. St-Germain's counterclaim, there are two elements thereto. He claims an abuse of process because the Bank sued him personally and a further abuse of process because the Bank seized items not covered by the mortgage and would not return them.

[66] I dismiss the counterclaim, but there may be cost elements. The claim against Mr. St-Germain personally had no merit. He should have moved at the outset to have that portion of the action struck, but he did not.

[67] Although he vigorously defended the claim against the ship, I have found that the Bank held a valid mortgage. There may well be costs consequences flowing therefrom.

[68] On the other hand, the Bank arrested more than what was covered by the mortgage. Although the mortgage, as is usual, includes accessories, a trailer, which is used to haul the ship on land, not in the water, cannot be considered an accessory. See *Isen v Simms*, 2006 SCC 41, [2006] SCR 349.

[69] Mr. St-Germain's uncontradicted evidence is that he demanded return of the trailer and other items but the Bank refused. On the other hand, he should have exercised his rights and promptly moved to have that portion of the arrest set aside.

[70] I do not consider the Bank's activities malicious, although they were ill-advised. The remedy for wrongful arrest absent such behaviour is costs. (*Armada Lines Ltd. v Chaleur Fertilizers Ltd.*, [1997] 2 SCR 617). The Bank is to return the trailer and Mr. St-Germain's other personal items. Nothing prevents Mr. St-Germain and the Bank entering into a purchase agreement.

[71] Finally, as aforesaid, Mr. St-Germain's claim against Holand falls because the Bank's claim against him is dismissed. Again, costs may be spoken to.

VII. *Official Languages Act*

[72] Mr. St-Germain's pleadings, evidence and submissions were in French. The other parties pleaded in English. Section 20 of the *Official Languages Act* provides a final judgment should be issued simultaneously in both English and French when the proceedings were conducted in whole or in part in both official languages. However, the section goes on to provide that a judgment may be first issued in one language if simultaneous publication would, among other things, result in an injustice or hardship to any party. The parties are most anxious to have a decision rendered as soon as possible and so agreed that it first be issued in one language, with a translation to follow. It should be noted that a similar situation arose in *The Phoenix Sun*, above. That decision was rendered May 26, 2016. A translation is not yet available.

JUDGMENT

THIS COURT ADJUDGES that:

1. The action against Breen P. McMahon is dismissed, without costs.

2. The action against Patrick Salvail St-Germain is dismissed, with costs to be addressed.

3. The counterclaim of Mr. St-Germain against Lakeland Bank is dismissed, with costs to be addressed.

4. The third party claim by Mr. St-Germain against Location Holand 1995 Ltée is dismissed, with costs to be addressed.

5. The action *in rem* against the ship "*Never E Nuff*" is maintained in the principal amount of $132.412.96, with accrued interest to date of $52,860.06 ($24,309.66, plus $28,550.40), for a total of $185,273.02. Post judgment interest shall run on that sum of $185,273.02 at the annual rate of 5% with costs to be addressed. Plaintiff shall promptly move for the sale of the "*Never E Nuff*". That motion shall include an appraisal of her value and, failing agreement with Mr. St-Germain, an inventory of other items on board.

6. The parties have thirty days to agree on costs, or to move for directions.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1106-12
STYLE OF CAUSE:	LAKELAND v THE SHIP "*NEVER E NUFF*", HULL NO DNAZ8012C303 AND PATRICK SALVAIL SAINT-GERMAIN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 6 AND 7, 2016
JUDGMENT AND REASONS:	HARRINGTON J.
DATED:	SEPTEMBER 30, 2016

APPEARANCES:

Mr. Matthew Hamerman	FOR THE PLAINTIFF
Mr. Xavier Mondor	FOR THE DEFENDANT
Mr. Harvey Shaffer	FOR THE DEFENDANT IN WARRANTY

SOLICITORS OF RECORD:

De Man, Pilet Barristers & Solicitors Montreal, QC	FOR THE PLAINTIFF
Charbonneau Avocats Conseils Greenfield Park, QC	FOR THE DEFENDANT
Shaffer & Associates Westmount, QC	FOR THE DEFENDANT IN WARRANTY