Federal Court  Cour fédérale

Date: 20170217

Docket: T-1613-16

Citation: 2017 FC 198

Ottawa, Ontario, February 17, 2017

PRESENT: The Honourable Mr. Justice Harrington

Docket: T-1613-16

ACTION *IN PERSONAM* AND *IN REM*

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Plaintiff

and

HANJIN SHIPPING CO LTD
-AND-
THE OWNERS AND ALL THOSE INTERESTED IN THE SHIPS LISTED IN SCHEDULE "A"
-AND-
THE SHIPS LISTED IN SCHEDULE "A"

Defendants

ORDER AND REASONS

[1] Before the Court is a motion by Conti 24, Alemania Schiffahrts-GMBH & Co KG MS "Conti Lissabon", the owners of the ship *Hanjin Vienna*, to dismiss Canadian National Railway Co.'s action as against it on the grounds that the amended statement of claim discloses no reasonable cause of action within the subject-matter jurisdiction of this Court. In the alternative it submits that the action as against the *Hanjin Vienna* and her owners is scandalous, frivolous, and vexatious.

[2] Hanjin Shipping Co. Ltd., recently defunct and insolvent, operated a worldwide multimodal, door-to-door, liner container service. It chartered in various ships, including the defendant *Hanjin Vienna*, to perform the sea leg of the carriage. It hired the plaintiff, Canadian National Railway Co. (CNR), to perform the North-American inland leg thereof. CNR would pick-up inbound containers at Vancouver and Prince Rupert terminals and deliver them to consignees at destination. It would also carry containers to the Vancouver and Prince Rupert terminals for export.

[3] CNR asserts that Hanjin is indebted to it for approximately $20,000,000, a portion of which relates to the *Hanjin Vienna*. It alleges that it is in a contractual relationship not only with Hanjin but also with the owners of the ships it chartered, more particularly, the owners of the *Hanjin Vienna*.

Decision

[4] In order to succeed, the owners must persuade me that it is plain and obvious that this action should proceed no further.

[5] Accordingly, it is not plain and obvious to me that this Court does not have jurisdiction to adjudicate CNR's claim on the merits because it is arguable:

(a) CNR enjoys a maritime lien by virtue of s 139 of the *Marine Liability Act*;

(b) its claim is governed by Canadian Maritime Law; and

(c) its claim falls within the *Canadian Transportation Act*, a federal statute, and is in relation to a work and undertaking extending beyond the limits of a single province.

[6] However, it is plain and obvious to me that CNR's claim is not scandalous, frivolous, nor vexatious.

Federal Courts Rule 221

[7] *Federal Courts Rule* 221, which is an example of the Court's power to control its own process, provides that the Court may strike out a pleading, in this case CNR's statement of claim, on a number of grounds. Two grounds are invoked by the owners of the *Hanjin Vienna*. The first is that the statement of claim discloses no reasonable cause of action, and the second is that it is scandalous, frivolous, or vexatious. The rule goes on to provide that no evidence shall be heard on a motion for dismissal on the grounds that no reasonable cause of action was disclosed. Nevertheless, the courts have allowed affidavit evidence if the basis of the motion is that the Court does not have jurisdiction over the subject-matter of the action (*MIL Davie v Ibernia Management & Development Co*, 1988 FCJ No 614, 226 NR 369). Therefore, the owners have filed an affidavit from Eckart Möller, the Nautical Director of the *Hanjin Vienna*'s managers, and CNR has filed the affidavit of Bruce Yi, the Account Manager responsible for Hanjin. As a result, the Court has been provided with

(a) The contract between Hanjin and the owners of the *Hanjin Vienna* (a time charter party in the New York Produce Exchange form, with deletions and amendments);

(b) The contract between Hanjin and CNR; and

(c) Hanjin's Bill of Lading form (under the owners' objection).

[8] To understand what this motion is, it is important to understand what it is not. It is not a motion to dismiss CNR's action on the basis that there is no merit to it. If CNR establishes the facts alleged, and those facts are taken to be true at this stage, there is merit to its claim (*Operation Dismantle v The Queen*, [1985] 1 SCR 441, [1985] SCJ No 22). Much of Mr. Möller's affidavit relates to that issue. However, no evidence shall be led on the merits, and the jurisdiction of this Court cannot be used as an excuse to circumvent that rule. Consequently, much of what he says cannot be taken into account.

[9] Neither is it a motion for summary judgment or on a stated case for a definitive ruling on the Court's jurisdiction. All I have held is that it is not plain and obvious that this Court is without jurisdiction. When the merits of the case are heard, it is still open to the owners to argue that CNR's action is beyond this Court's subject-matter jurisdiction (see *Toney v Canada (Royal Canadian Mounted Police)*, [2011] FCJ No 1740, [2012] FCJ No 705, [2012] FCJ No 1691, and [2013] FCJ No 1011).

[10] It cannot be said that CNR's action is scandalous, frivolous, or vexatious, should it ultimately turn out that this Court is without jurisdiction – the only ground alleged by the owners. The action is not so clearly futile that it does not have the slightest chance of success.

[11] The burden upon the owners of the *Hanjin Vienna* is a heavy one: "If there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'" (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959, [1990] SCJ No 93). It is certainly not for the Court, at this stage, to weigh CNR's chances of success.

[12] As Madam Justice Wilson explained it in *Operation Dismantle*, above, at pp 486 and 487:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (*Drummond−Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "**plain and obvious** that the action cannot succeed?" [my emphasis]

Marine Liability Act

[13] Section 139 of the *Marine Liability Act*, which came into force in 2009, gives a person, such as CNR, carrying on business in Canada, a maritime lien on a foreign ship:

(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or	a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage;
(b) out of a contract relating to the repair or equipping of the foreign vessel.	b) celle fondée sur un contrat de réparation ou d'équipement du bâtiment étranger.

[14] However, if the claim is with respect to stevedoring or lighterage, the services must have been provided at the request of the shipowner or a person acting on the owner's behalf.

[15] It is clear that the services rendered by CNR were not by way of stevedoring or lighterage. Although the law as it was before the enactment of s 139 in 2009 was such that there was no action *in rem* in the circumstances contemplated therein unless there was personal liability on the part of the shipowner (*Mount Royal/Walsh Inc v Jensen Star (The)*, [1990] 1 FC 199, [1989] FCJ No 450), it has not yet been decided, as a matter of law, whether, apart from stevedoring or lighterage services, the personal liability of the shipowner must still be engaged (*Comfact Corporation v Hull 717 (The)*, 2012 FC 1161, [2012] FCJ No 1228, aff'd 2013 FCA 93, [2013] FCJ No 93).

[16] As Lord Justice Fletcher Moulton held in *Dyson v Attorney-General*, [2011] 1 KB 410 at 419:

> Differences of law, just as differences of fact, are normally to be decided by trial after hearing Court and not to be refused a hearing in Court by an order of the judge in chambers.

[17] The issue is whether the services allegedly rendered to the *Hanjin Vienna*, a German ship, were supplied for its operation. It would appear that the supply of containers falls within that category (*Textainer Equipment Management BV v Baltic Shipping Co*, 84 FTR 108, [1994] FCJ No 1267).

[18] It must also be kept in mind that Hanjin, and arguably the owners of the *Hanjin Vienna*, operated an international liner service which forms part of Canadian Maritime Law in virtue of s 92(10) of the *Constitution Act*.

[19] As was held by the Supreme Court in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 46, a claim will only be dismissed on a motion to strike if it is plain and obvious that there is no cause of action. The approach must be generous and air on the side of permitting a novel but arguable claim to proceed to trial.

Canadian Maritime Law

[20] The owners of the *Hanjin Vienna* submit that CNR and they were both sub-contractors of Hanjin and had nothing to do one with the other. CNR's activities were entirely land-based. They neither loaded the containers onboard nor discharged them from the *Hanjin Vienna*. That fact is not contested. CNR took containers from, or delivered them to, the terminals at Vancouver and Prince Rupert.

[21] The Federal Court, unlike the superior courts of the provinces, is a statutory court. It was established pursuant to s 101 of the *Constitution Act, 1867* which provides that Parliament may establish courts for the better administration of the laws of Canada, which means federal law, be it statute, regulation, or common law. Thus, the Federal Court only has jurisdiction if (a) the cause of action is based upon a federal legislative class of subject as opposed to a provincial legislative class of subject; (b) there is actual federal law to administer which is essential, not incidental, to the disposition of the case; and (c) Parliament gave the court jurisdiction. (*ITO-*

International Terminal Operators Ltd v Miida Electronics Inc, [1986] 1 SCR 752 (the *Buenos Aires Maru*)).

[22] By way of illustration, bankruptcy is a federal legislative class of subject and there is a federal statute, however, jurisdiction remains with the superior courts of the provinces as it has not been given either exclusively or concurrently to the Federal Court.

[23] Canadian Maritime Law is referred to in ss 2, 22, 42 and 43 of the *Federal Courts Act*.

[24] It is defined in s 2 as follows:

Canadian maritime law means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.	droit maritime canadien Droit — compte tenu des modifications y apportées par la présente loi ou par toute autre loi fédérale — dont l'application relevait de la Cour de l'Échiquier du Canada, en sa qualité de juridiction de l'Amirauté, aux termes de la Loi sur l'Amirauté, chapitre A-1 des Statuts revisés du Canada de 1970, ou de toute autre loi, ou qui en aurait relevé si ce tribunal avait eu, en cette qualité, compétence illimitée en matière maritime et d'amirauté.

[25] The second part of the definition – the law which would have been administered – is so broad that for all intents and purposes it is co-extensive with the Federal legislative class of subject of "navigation and shipping" (the *Buenos Aires Maru*, above).

[26] Section 22(1) confers jurisdiction upon this Court in any matter coming within the class of navigation and shipping, unless otherwise assigned.

[27] Section 22(2) provides specific instances over which the Court has jurisdiction, including e.g.:

> f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;
>
> f) une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route;

[28] CNR's claim is not a claim relating to loss or damage to goods but rather one for non payment of freight.

[29] Section 42 provides that Canadian Maritime Law, as it was before the enactment of the *Federal Courts Act*, continues, while s 43 deals with this Court's Admiralty jurisdiction *in rem* and *in personam*.

[30] The leading case on the content of Canadian Maritime Law is the *Buenos Aires Maru*, above. The Supreme Court held that the Federal Court had jurisdiction over a claim for loss of cargo carried under a port-to-port Bill of Lading from Caen, France, to Montréal where it was stolen in the hands of the terminal operator after discharge from the ship but before delivery. In speaking for the majority, Mr. Justice McIntyre stated at para 23:

> At the risk of repeating myself, I would stress that the maritime nature of this case depends upon three significant factors. The first is the proximity of the terminal operation to the sea, that is, it is within the area which constitutes the port of Montreal. The second is the connection between the terminal operator's activities within the port area and the contract of carriage by sea. The third is the fact that the storage at issue was short-term pending final delivery to the consignee. In my view, it is these factors, taken together, which characterize this case as one involving Canadian maritime law.

[31] At first blush, this quote appears to favour the owners of the *Hanjin Vienna* as CNR's activities only began where the terminal operators' ended. However, earlier in his decision, Mr. Justice McIntyre also said:

> I would agree that the historical jurisdiction of the Admiralty courts is significant in determining whether a particular claim is a maritime matter within the definition of Canadian maritime law in s. 2 of the *Federal Court Act*. I do not go so far, however, as to restrict the definition of maritime and admiralty matters only to those claims which fit within such historical limits. An historical approach may serve to enlighten, but it must not be permitted to confine. In my view the second part of the s. 2 definition of Canadian maritime law was adopted for the purpose of assuring that Canadian maritime law would include an unlimited jurisdiction in relation to maritime and admiralty matters. As such, it constitutes a statutory recognition of Canadian maritime law as a body of federal law dealing with all claims in respect of maritime and admiralty matters. Those matters are not to be considered as having been frozen by *The Admiralty Act, 1934*. <u>On the contrary, the words "maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping</u>. In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the *Constitution Act, 1867*. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in "pith and substance" a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867*. It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime

> matters as to be legitimate Canadian maritime law within federal legislative competence. [my emphasis]

[32] In the *Buenos Aires Maru*, the claim by cargo interests against the terminal operator did not fall within any of the instances set forth in s 22(2) of the *Federal Courts Act*. Rather, it fell within s 22(1) and the law to be administered was the law the Exchequer Court would have administered had it had unlimited jurisdiction in maritime and admiralty matters.

[33] The division between sea and shore is not nearly as clear as the owners of the *Hanjin Vienna* would like. If they were sued under a through Bill of Lading for cargo damage, this Court would have jurisdiction over their indemnity claim against CNR (see *Quebec Liquor Corp v The Dark Europe*, [1979] FCJ 518, [1979] 3 ACWS 10, and *Boutique Jacob Inc v Paintainer Inc*, 2008 FCA 85, 375 NR 160).

[34] CNR's claim is for unpaid freight and thus does not fall within s 22(2)(f). It may, however, fall within s 22(1). Is it reasonable that CNR would have to defend a cargo claim in the Federal Court but would have to go to a provincial court to sue its shipper for freight? As Mr. Justice Binnie stated in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585, at para 18:

> This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

[35] The ocean carrier is the shipper *vis-à-vis* CNR (*Boutique Jacob*, above). One of its obligations is not to ship undeclared, dangerous goods. Another is to pay freight. It seems peculiar to me that CNR could defend a claim for damage to dangerous goods in this Court, but could not sue for unpaid freight.

[36] CNR has invoked the Hanjin form of Bill of Lading which it took from the Hanjin website. The owners object. However, it was they that raised the jurisdiction of the Court. Bills of Lading are relevant. While a Bill of Lading form taken from the Internet may not be the best evidence, it is the only evidence available to the Court at this time, and shall be considered.

[37] The Bill of Lading defines the carrier as not only meaning Hanjin Shipping Co. Ltd. but also its "vessels, agents and subcontractors at all stages of carriage; in context of Multimodal Transportation". Thus, it is certainly arguable that there is, in fact and in law, a contractual relationship between CNR and the owners of the *Hanjin Vienna*.

[38] As stated in the *Buenos Aires Maru*, above, "the words 'maritime' and 'admiralty' should be interpreted within the modern context of commerce and shipping". The Bill of Lading at issue in the *Buenos Aires Maru* was a port-to-port Bill. CNR only becomes involved in multimodal, through Bills of Lading. In 2009, the United Nations Commission on International Trade Law enacted the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*. The preamble refers to the *Hague Rules* and *Hamburg Rules* but notes that technological and commercial developments have taken place since then. Chapter 1 of the Convention defines a contract of carriage as meaning a contract in which a carrier, against a

payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport.

[39] The Convention, commonly known as the *Rotterdam Rules*, has been signed but, as yet, is not in force because it has not been ratified by a sufficient number of states. Canada is not a party thereto.

[40] I do not suggest that the *Rotterdam Rules* are part of international law and enforceable in Canada. Even if the Convention had been signed by Canada, it would not form part of our domestic law unless implemented by legislation (*Reference as to Powers to Levy Rates on Foreign Legations*, [1943] SCR 208, *Chung Chi Cheung v The King*, [1939] AC 160; and *Laane & Baltser v Estonian SS Line*, [1949] SCR 530. However, in *Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1, the Court held that international instruments, although not incorporated into Canadian domestic law, could influence the Court's interpretation of our Charter. If our Constitution is a living tree, our understanding of navigation and shipping, and lines of steamships, may evolve from time to time.

Canada Transportation Act

[41] CNR operates a railway that connects British Columbia with other provinces and the United States. This Court was given jurisdiction under s 23(c) of its enabling Act. The question is whether there is federal law to be administered. Section 23(c) was invoked both in *Quebec North Shore Paper v Canadian Pacific. Ltd*, [1977] 2 SCR 1054 and more recently in *Corporation of the City of Windsor v Canadian Transit Company*, 2016 SCC 54. In both cases,

the Supreme Court held that the Federal Court did not have jurisdiction because there was no actual existing federal law to administer.

[42] In *Quebec North Shore*, the governing law was that of the Province of Quebec, not federal law. This is unlike the subsequent decision of the Supreme Court in *Tropwood A G et al v Sivaco Wire & Nail Co et al*, [1979] 2 SCR 157, in which the contract of carriage was governed by the laws of France. The Federal Court had jurisdiction because Canadian Maritime Law includes common law conflict of law rules which allow foreign law to be proven as a fact.

[43] In *City of Windsor*, the Canadian Transport Company was federally incorporated. The Act empowered the company to construct, maintain, and operate a bridge across the Detroit River from Windsor to Detroit and to, *inter alia*, purchase land and buildings for that purpose. The Act declared its works and undertakings to be for the general advantage of Canada. However, the Supreme Court held that the company was not seeking relief "under an Act of Parliament or otherwise" as required by s 23(c) of the *Federal Courts Act*, but rather sought a declaration that it was not bound by a city of Windsor by-law.

[44] The contract between Hanjin, and arguably the shipowners, is contemplated by Division IV of the *Canada Transportation Act* and the *Railway Traffic Liability Regulations*. The owners submit that the federal statute must create the cause of action. This is not so. As stated in *The Tropwood*, above, the issue was whether there was a body of law, competently enacted or recognized by Parliament, upon which jurisdiction could be exercised. It is not correct to say that without the federal statute there would be no cause of action. There was a detailed statutory

framework and this appears to be all that is required. This case is similar to *Rhine v The Queen*, [1980] 2 SCR 442. That case reminds us that concepts such as "contract" or "tort" cannot be invariably attributed to sole provincial legislative competence or deemed to be, as common law, solely matters of provincial law. It has been held time and time again that there is indeed federal common law.

[45] The *Canadian Transport Act* was applied in the through Bill of Lading context by the Federal Court of Appeal in *Boutique Jacob*, above (see also *Cami Automotive Inc v Westwood Shipping Lines Inc*, 2009 FC 664, aff'd 2012 FCA 16).

[46] Quite apart from a through Bill of Lading which includes a sea leg, this Court has taken jurisdiction over a cargo claim against a railway which had no maritime connection. (*Herreandknecht Tunneling Systems USA Inc v Canadian Pacific Railway Company*, [2003] 2 FC 434, [2002] FCJ No 1447).

Claims Against the Proceeds of the Sale

[47] At the time of writing, the Acting Sheriff has found a buyer for the *Hanjin Vienna*. The sale is pending. On the basis of the jurisprudence as it currently stands, even if CNR's claim were to be beyond the jurisdiction of this Court, CNR's would still be entitled to claim against the proceeds of the sale (*Eurobulk Ltd v Wood Preservation Industries Ltd*, [1985] FCJ No 44; and *Scott Steel Ltd v Alarissa (The)*, [1996] 2 FC 883, [1996] FCJ No 534 ; however, see *Nordea Bank Norge ASA v Kinguk (Ship)*, 2007 FC 434, [2007] FCJ No 593, at paras 21-23). Thus, the owners of the *Hanjin Vienna* will still have to come to grips with the merits of CNR's action.

ORDER

For reasons given, this motion is dismissed with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1613-16
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v HANJIN SHIPPING CO LTD ET AL
PLACE OF HEARING:	VANCOUER, BC.
DATE OF HEARING:	FEBRUARY 9, 2017
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	FEBRUARY 17, 2017

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