

Federal Court



Cour fédérale

**Date: 20160929**

**Docket: T-1833-15**

**Citation: 2016 FC 1095**

**Mont-Tremblant, Quebec, September 29, 2016**

**PRESENT: Prothonotary Roger R. Lafrenière**

***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**

**ORDER AND REASONS**

[1] The Defendant, Platinum Premier Corporation Limited (Platinum), owner of the Defendant, The Ship "TATU" (the Vessel), has moved for an order pursuant to Rule 488 of the *Federal Courts Rules*, or alternatively Rule 487 or 495(4), striking the Caveat Release filed by the Plaintiff, Platypus Marine, Inc. (Platypus), and for the release of the Vessel. Platinum and the Vessel are collectively referred to in these reasons as the Defendants.

[2] The background facts are not in dispute and are neatly summarized in the reasons of Mr. Justice Marc Nadon of the Federal Court of Appeal in *Platypus Marine, Inc. v Tatu (Ship)*, 2016 FCA 224 [*Platypus FCA*]. I will simply repeat them below with the necessary modifications.

### Background Facts

[3] In an action commenced by Lorelee B. Vogel in Federal Court File No. T-1615-15, the Vessel, a 90-foot luxury yacht insured for U.S. \$5.8 million, was arrested in Vancouver on September 23, 2015 pursuant to a warrant for its arrest issued by this Court.

[4] On October 29, 2015, Platypus, a ship repairer based in Port Angeles, Washington, commenced the underlying action *in personam* and *in rem* against the Defendants and served and filed a Caveat Release pursuant to Rule 493(2). By its action, Platypus claimed the sum of U.S. \$285,508.92 pertaining to the costs of moorage, storage, repair and other services rendered to the Vessel. Platypus further claimed the sum of U.S. \$100,000 representing an interest charge agreed to by the parties.

[5] On December 15, 2015, in the absence of any defence being filed by the Defendants regarding the principal amount of U.S. \$285,508.92, Mr. Justice Simon Fothergill granted judgment in full to Platypus for the Canadian equivalent of U.S. \$285,508.92 (Canadian \$363,455.61) plus costs in the amount of \$1,500. However, with respect to the agreed interest charge of U.S. \$100,000, Mr. Justice Fothergill granted leave to the Defendants to serve and file a statement of defence and directed that the matter be dealt with by the Court at a later date.

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

[7] On May 3, 2016, Mr. Justice Roger Hughes heard a motion brought by the Defendants seeking summary dismissal of Platypus' claim for interest in the sum of U.S. \$100,000.

[8] On the following day, Mr. Justice Hughes dismissed Platypus' claim for interest in the amount of U.S. \$100,000, concluding that the agreed interest charge violated the criminal interest provisions found in section 347 of the *Criminal Code*, RSC 1985, c C-46. As a result, he refused to enforce the parties' agreement regarding interest and, in lieu thereof, awarded Platypus interest in the amount of Canadian \$35,000, i.e. interest at a rate of five percent per annum as provided by the *Interest Act*, RSC 1985, c I-15, section 4.

[9] Platypus filed a Notice of Appeal in the Federal Court of Appeal on May 11, 2016, challenging the validity of Mr. Justice Hughes' decision (Court File No. A-146-16) on the basis that:

- (a) The Court erred in finding that the U.S. \$100,000.00 in interest agreed to by the parties represented an interest rate in excess of 60% per annum and was contrary to the *Criminal Code*. This was an error of arithmetic.
- (b) The Court erred in finding Platypus agreed to abandon its stated alternative position that if the interest rate was in excess of 60% per annum then interest should be awarded at 60% per annum. Platypus disputes that any such concession was made.

- (c) The Court erred in failing to apply the doctrine of notional severance and in not awarding 60% per annum, if the interest agreed was at a criminal rate.
- (d) Alternatively, if Platypus' alternative position was considered by the Court and rejected, the Court erred in failing to make a finding on that issue in its reasons.

[10] The Defendants filed a Notice of Cross-Appeal on May 24, 2016.

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

[12] On August 22, 2016, Platypus brought a motion before the Federal Court of Appeal seeking an order declaring that the Vessel remain under arrest pending disposition of the appeal or until such time as security or bail for Platypus' claim is posted. The motion was dismissed by Mr. Justice Nadon on September 8, 2016, in *Platypus FCA* on the basis that there was no basis in law to grant the relief. At paragraph 19 of his reasons, he concluded that:

... whether a ship under arrest should be released is a matter that is governed by the *Federal Court Rules* and stands to be adjudicated by the Federal Court. This Court does not have original jurisdiction to order the arrest, the continuance of an arrest, or the release of a vessel. That power belongs to the Federal Court.

[13] Platypus filed a requisition for hearing in A-146-16; however, the appeal has yet to be scheduled for hearing. There is no indication on the material before me whether Platypus requested an expedited hearing of the appeal.

Platinum's Motion

[14] On September 18, 2016, Platinum brought the present motion before this Court to strike the Caveat Release filed by Platypus and for the release of the Vessel.

[15] It is common ground that the Vessel is presently under arrest pursuant to a warrant issued by this Court in T-1615-15 and that Platypus filed a Caveat Release pursuant to Rule 493(2). Platypus was asked to consent to the release of the Vessel following transmittal of the second payment on August 19, 2016, but has refused to consent on the basis that it is appealing the decision of Mr. Justice Hughes.

[16] Platinum submits that both Judgments issued by this Court have now been satisfied and that they are accordingly entitled to have the Vessel released.

[17] Platypus opposes the relief sought by Platinum on the grounds that the release of the Vessel prior to the outcome of the appeal would cause it irreparable harm and effectively render any appeal judgment in its favour moot. Platypus submits that Platinum is a foreign owner with a lengthy history of not paying debts and delaying payment of judgments. It further submits that the Vessel is a foreign flagged and registered yacht that is likely to leave Canadian waters if released. As a result, Platypus claims that it would be left with no assets in Canada against which the Judgment, if overturned on appeal, may be satisfied.

[18] The issue on this motion is whether the Court should order the release of the arrested Vessel.

### Rules Applicable to this Motion

[19] The following are the relevant rules as they relate to the release of arrested property in *in rem* and *in personam* actions and caveat releases:

<b>Release of arrested property</b>	<b>Mainlevée par le fonctionnaire désigné</b>
<b>487</b> (1) Unless a <i>caveat</i> has been filed under subsection 493(2), a designated officer may issue a release of arrested property in Form 487	<b>487</b> (1) Sauf si un <i>caveat</i> a été déposé aux termes du paragraphe 493(2), le fonctionnaire désigné peut délivrer la mainlevée de la saisie de biens, établie selon la formule 487 :
(a) on payment into court of	a) sur consignation à la Cour de l'un des montants suivants :
(i) the amount claimed,	(i) le montant réclamé,
(ii) the appraised value of the property arrested, or	(ii) le montant correspondant à la valeur estimée des biens saisis,
(iii) where cargo is arrested for freight only, the amount of the freight, verified by affidavit;	(iii) lorsque la cargaison est saisie pour le fret seulement, le montant du fret attesté par affidavit;
(b) if bail has been given in an amount fixed under rule 485 and in accordance with subsections 486(1) and (2) and no objection under subsection 486(3) is outstanding;	b) si une garantie d'exécution a été donnée conformément à la règle 485 et aux paragraphes 486(1) et (2) et qu'aucun avis d'opposition fait aux termes du paragraphe 486(3) n'est pendant;
(c) on the consent in writing of	c) sur consentement écrit de la

the party at whose instance the property was arrested; or

partie qui a fait procéder à la saisie des biens;

(d) on the discontinuance or dismissal of the action in respect of which the property was arrested.

d) sur désistement ou rejet de l'action dans laquelle les biens ont été saisis.

### **Referral to judge or prothonotary**

### **Renvoi**

(2) Where a release is sought under subsection (1), a designated officer may refer the matter to a judge or prothonotary.

(2) Le fonctionnaire désigné peut déférer toute demande de mainlevée de la saisie visée au paragraphe (1) à un juge ou un protonotaire.

### **Release at any time**

### **Ordonnance de mainlevée**

488 (1) On motion, the Court may, at any time, order the release of arrested property.

488 (1) La Cour peut, sur requête, ordonner la mainlevée de la saisie de biens à tout moment.

### ***Caveat* release**

### ***Caveat-mainlevée***

493 (2) A person who desires to prevent the release of any property under arrest shall serve and file a *caveat* release in Form 493B.

493 (2) Quiconque désire empêcher la mainlevée de la saisie de biens signifie et dépose un *caveat-mainlevée* selon la formule 493B.

### **Expiration of *caveat***

### **Expiration du *caveat***

495 (1) A *caveat* expires one year after the day on which it was filed.

495 (1) Un *caveat* expire à la fin du douzième mois qui suit la date de son dépôt.

### **Filing of new *caveat***

### **Nouveau *caveat***

(2) A new *caveat* may be served and filed before or after the expiration of an existing *caveat*.

(2) Un nouveau *caveat* peut être signifié et déposé avant ou après l'expiration d'un *caveat*.

### **Withdrawal of *caveat***

### **Retrait d'un *caveat***

(3) A person who has filed a

(3) La personne qui a déposé

*caveat* may withdraw it at any time by filing a notice in Form 495. un *caveat* peut le retirer à tout moment en déposant un avis selon la formule 495.

### Analysis

[20] Rule 487(1) provides that a designated officer may issue a release of arrested property in Form 487 in certain cases, such as where a party posts sufficient bail, the consent of the arresting party is given, or the discontinuance or dismissal of the action in respect of which the property was arrested. However, the designated officer cannot act when a caveat has been filed under subsection 493(2). As a result, Platinum was required to bring a motion pursuant to Rules 488(1) and 495(4) to obtain the release of the Vessel.

[21] Counsel for the parties were unable to cite any case law setting out the factors that the Court should consider in exercising its discretion whether to release arrested property pending appeal.

[22] Platypus submits that the onus is on Platinum to establish that the Vessel should be released and that Court should apply the three pronged test formulated by the Supreme Court in *RJR -- MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.

[23] I agree that Platinum bore the initial burden of establishing that an order for release of the Vessel should be issued. In my view, it has met its burden. Platinum has satisfied the two Judgments in full and there is currently no legal basis to keep the Vessel under arrest. It is trite



law that an appeal of a judgment does not operate as a stay. In the circumstances, the burden shifted to Platypus to show why the Vessel should remain under arrest.

[24] Platypus asserts that there is a serious question to be decided on the appeal, that a refusal to grant its motion will likely cause irreparable harm and that the balance of convenience lies in its favour. However, it has filed no affidavit evidence in response to this motion that specifically addresses any of the three factors. Although the Platinum may have been seriously delinquent in the past in paying its debts, there is no evidence that it is currently experiencing financial difficulties. The fact that it ultimately paid the judgment amounts would suggest otherwise. Moreover, the submissions by counsel that the Platypus would be without any recourse in the event the Vessel is released are simply that – submissions, and not evidence.

[25] Platypus could have moved for a stay of the Judgment of Mr. Justice Hughes, but has elected not to do so. As Mr. Justice Nadon pointed out in *Platypus FCA*, at paragraph 17:

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

[26] On the basis of the material before me, I conclude that there is no legal basis to continue the arrest of the Vessel. In the circumstances the motion is granted, with costs in favour of Platinum fixed in the amount of \$1,500.00, inclusive of disbursements and taxes.

**ORDER**

**THIS COURT ORDERS that**

1. Pursuant to Rule 495(4) of the *Federal Courts Rules*, the Caveat Release filed by the Plaintiff is set aside.
2. Pursuant to Rules 488(1), the designated officer shall forthwith issue the release of the Defendant ship, "TATU" in the form attached to the Notice of Motion.
3. Costs of the motion, hereby fixed in the amount of \$1,500.00, shall be paid by the Plaintiff to the Defendant, Platinum Premier Corporation Limited.

"Roger R. Lafrenière"

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Prothonotary

**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

**DATE OF HEARING:** SEPTEMBER 20, 2016

**ORDER AND REASONS:** LAFRENIÈRE P.

**DATED:** SEPTEMBER 29, 2016

**APPEARANCES:**

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FOR THE PLAINTIFF

W. Gary Wharton

FOR THE DEFENDANTS

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FOR THE DEFENDANTS