

Federal Court



Cour fédérale

Date: 20170731

Docket: T-1455-16

Citation: 2017 FC 745

Ottawa, Ontario, July 31, 2017

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**SAAM SMIT CANADA INC.
AND SAAM SMIT VANCOUVER INC.**

Plaintiffs

and

**OWNERS AND ALL OTHERS INTERESTED IN
THE SHIP “HANJIN VIENNA”, THE SHIP
“HANJIN VIENNA”, CONTI 24 CONTI
LISSABON, OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP “HANJIN
GENEVA”, THE SHIP “HANJIN GENEVA”,
CONTI 15 CONTI PORTO, AND CONTI
HOLDING GMBH & CO KG AND EACH OF THE
SHIPS AS SISTERSHIPS OF EACH OTHER**

Defendants

ORDER AND REASONS

(On Owners’ Motion for Partial Payment Out)

[1] The *Hanjin Vienna* was sold by Order of this Court for US\$ 6,676,000.00, to be deducted therefrom US\$ 157,284.47 covering the Marshal’s fees and expenses. In addition, the fuel on board was sold for US\$ 939,727.66. The principal amount of the claims against the proceeds

(leaving aside the former shipowners' own claim) is, as expressed in U.S. Dollars, about US\$ 3,600,000. The former owners have moved for payment out to them of the proceeds they submit are surplus to and are not required to secure the alleged creditors' claims.

[2] It is common ground that sufficient funds should be held under Court control to secure the claimants' best reasonably arguable cases in principal, interest and costs; (see *The Moschanthy*, [1971] 1 Lloyd's Rep 37; and *Amican Navigation Inc v Densen Shipping Co*, (1997) 137 FTR 132).

[3] However, there are five issues requiring a decision:

- a) Should the proceeds of the sale of the bunkers and other fuel be taken into account at the present time in determining if there is a surplus?
- b) What are the best reasonably arguable cases on the principal amounts claimed?
- c) What are the best reasonably arguable cases as to the award of interest?
- d) What are the best reasonably arguable cases as to the award of costs?
- e) What should be done with the owners' claim of US\$ 2,068,643.80 against the proceeds of the sale of their own ship and the bunkers?

I. The Bunkers

[4] At the time the *Hanjin Vienna* was arrested, it is likely that the bunkers and other fuel then on board belonged to her time-charterer, Hanjin Shipping Co. Ltd., which has gone bankrupt in South Korea. The ship remained on charter for several months, even though hire was not paid. In the normal course, under the terms of the charter party, on redelivery, the owners took over the bunkers. This is said to have occurred in late November 2016. Thus, whatever the

prior situation, in the normal course, the bunkers and other fuel belonged to the shipowners at the time of the Marshal's sale. Furthermore, the shipowners submit that when all is said and done, for all intents and purposes, most of the bunkers and fuel on board had been purchased and paid for by them.

[5] This begs the question: can the bunkers, in effect, be sold while the ship and its appurtenances are under arrest (*Ballantrae Holdings Inc v The Phoenix Sun*, 2016 FC 570 at paras 25 and following)?

[6] In any event, the record is far too murky to reach a final decision as to ownership of the bunkers at relevant times.

[7] All those who assert claims *in rem* against the *Hanjin Vienna* certainly have claims *in personam* against Hanjin Shipping Co. Ltd. The issue on the merits will be whether they have maritime liens, statutory liens, or actions *in rem* against the *Hanjin Vienna*. Her former owners are contesting the validity of all of these claims. Should they be successful, it is certainly arguable that the bunkers and other fuel may have been owned by Hanjin Shipping Co. Ltd. and constitute a separate fund available to those creditors. Consequently, at the present time, I will only consider the proceeds of the sale of the ship.

II. The Principal Amounts Claimed

[8] Although the former owners of the *Hanjin Vienna* hope in due course to defeat all the claims of the alleged creditors, I am accepting for the moment that the claimants have a

reasonably arguable case on the merits. All I have done is taken the administration fee of one of them, World Fuel Services Inc., into my calculation of interest.

III. Interest

[9] In this Court, interest, in Admiralty matters, is a function of damages left to the discretion of the Court (*The Phoenix Sun*, above at paras 147 and following, together with the authorities cited therein). The Court may decide not to apply the rate agreed between the immediate parties to the contract. In cases where the claims exceed the proceeds, the Court may not award any interest prior to the sale of the ship, even on claims carrying with them a maritime lien, and thereafter only at the rate of interest earned by the proceeds.

[10] It is common to markup the principal amount of the claim by 30% to cover interest and costs. In times when commercial interest rates were much higher, the markup was usually 50%. I accept what the late Prothonotary Hargrave said in *Bank of Scotland v The Nel*, (1998) 144 FTR 47 at para 20, that the rule of thumb may by chance be appropriate but that the amount of security should be determined by the times and circumstances of each case.

[11] It may well be that a 30% markup is not enough on smaller claims, and too much on larger claims. Nevertheless, although I have to look at the claims one by one, in a cursory manner, it must be kept in mind that the security remains a common pledge of the alleged creditors. Consequently, I have begun my analysis with a 30% markup.

[12] Only two of the claimants had pitched their claims in U.S. Dollars: World Fuel Services Inc. and Ali El-Husseini. The others all provided services in Canada and had billed Hanjin in Canadian Dollars. This Court must give judgment in that currency. However, since the proceeds are currently being held in U.S. Dollars, I have converted the Canadian claims into that currency at the rate of 0.79, which is the approximate current rate of exchange. It should be noted that the Canadian Dollar has strengthened about 2.5% against the U.S. Dollar since the sale was approved in February of this year.

[13] Four creditors claim a contractual annual interest rate: World Fuel Services Inc. 24%; the Saam Smit companies 26.85%; DP World Prince Rupert Inc. 19.56%; and Canadian National Railway 12%. This is to be contrasted with the current Canadian bank prime rate of 2.95% and the legal rate under the *Interest Act* of 5%.

[14] Those parties also suggest that three years will pass before these matters are finally resolved. That may be so, but I venture to say it will only take approximately one year for decisions on the merits in first instance. Thereafter, and in accordance with s. 37 of the *Federal Courts Act*, judgment interest is calculated on the laws enforced in the Province where the cause of action arose or, if the cause of action arose outside or in more than one Province, at a rate the Court considers reasonable.

[15] To the extent some of the causes of action solely arose in British Columbia, ss. 7 and 8 of the *Court Order Interest Act*, RSBC 1996 c.79, provide for post-judgment interest at the annual

simple interest rate that is equal to the prime lending rate of a bank to the government, which currently is 2.7%. However, s. 8 provides that the Court may vary that rate.

[16] In my calculations, I am allowing for post-judgment interest at the simple rate of 5%. On that basis, World Fuel Services Inc.'s claim for interest is 34% (24%, plus 5%, plus 5%). In like fashion, the Saam Smit companies' interest claim, all in, is 36.85%; DP World Prince Rupert Inc.'s is 19.56%; and Canadian National Railway's is 22%.

[17] The following three columns set out my calculations in U.S. Dollars:

	Principal	Principal +30%	Principal + 30% or contractual interest
World Fuel Services Inc.	788,694.29	1,025,302.58	1,056,850.35
Ali El-Husseini	29,868.04	38,828.45	38,828.45
Pacific Pilotage Authority	27,303.25	35,494.23	35,494.23
Saam Smit Cos.	128,957.94	167,645.32	176,478.94
DP World Prince Rupert Inc.	779,443.76	1,013,276.89	1,009,874.34
Canadian National Railway	1,712,025.07	2,225,632.59	2,088,670.59
Prince Rupert Port Authority	120,482.49	156,627.24	156,627.24
Total	3,586,774.84	4,662,807.30	4,562,824.14

[18] On that basis, the claim of Canadian National Railway actually falls by over \$135,000, and the claims overall by about \$100,000.

[19] Had Hanjin Shipping Co. Ltd. gone bankrupt in Canada, claims for future interest would not be receivable. Any surplus of assets over liabilities would be paid out to the creditors at the annual rate of 5% (s.143 *Bankruptcy and Insolvency Act*).

[20] Although I very much doubt that the Court would award these unrealistic rates of interest which, at this stage at least, appear to have no bearing on making the claimants whole again, I am not yet prepared to drive them from the judgment seat. World Fuel Services Inc. claims a U.S. maritime lien. Although U.S. jurisprudence appears to be divided, there is at least one case which has held that the lien extends to contractual interest. The exchange of affidavits as to U.S. law has yet to take place. Furthermore, Prothonotary Hargrave awarded contractual interest rates in *Fraser Shipyard and Industrial Centre Ltd v Expedient Maritime Company Ltd*, (1999) 170 FTR 1 (the *Atlantis Two*).

IV. Costs

[21] In my opinion, a hold-back of the principal amounts claimed plus 30%, i.e. US\$ 4,662,807.30, more than adequately secures the claimants, without taking into account the proceeds of the sale of the bunkers and accrued interest on the proceeds which, as of July 18, 2017, was US\$ 13,624.43.

V. The Owners' Claim

[22] The owners claim that they expended US\$ 2,068,643.80 maintaining the ship for the benefit of all creditors. These expenses, they submit, should be paid out by priority. The owners cannot claim there is a surplus on hand, receive payment thereof and continue their claim against the balance. They would, in effect, be double-dipping. The only way they are entitled to receive payment of a surplus now is by reducing their priorities claim dollar for dollar. They have now

done so in writing with respect to the ship. They are entitled to maintain their full claim against the bunkers.

[23] Consequently, they are entitled to payment out of US\$ 1,855,908.23 (US\$ 6,676,000 minus US\$ 157,284.47 minus US\$ 4,662,807.30).

VI. Conversion Into Canadian Currency

[24] It was convenient for all concerned to maintain the proceeds of sale in U.S. Dollars. However, Pacific Pilotage Authority, the Saam Smit companies, DP World Prince Rupert Inc., Canadian National Railway and Prince Rupert Port Authority would like to have their security held in Canadian Dollars. Since this Court only renders judgment in Canadian Dollars, this request is reasonable. Mindful that all the proceeds of the sale of the ship and the bunkers are the pledge of all the creditors, irrespective of the currency in which they are held, I order that, when the U.S. term deposits become due, US\$ 4,662,807.30 be converted into Canadian currency and held on the same basis.

ORDER IN T-1455-16
(On Owners' Motion for Partial Payment Out)

THIS COURT ORDERS that:

1. For reasons given, the motion of Conti 24, Alemania Schiffahrts-GmbH & Co. KG MS "Conti Lissabon", the former owners of the ship *Hanjin Vienna*, for payment out of proceeds of her sale surplus to the secured claims of the creditors, is granted in part.
2. Their solicitors, who are holding the proceeds in trust, are ordered to pay to them the sum of US\$ 1,855,908.23.
3. Their solicitors are also ordered to convert US\$ 4,662,807.30 into Canadian currency on the same basis.
4. Costs in the cause.

"Sean Harrington"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1455-16

STYLE OF CAUSE: SAAM SMIT CANADA INC. AND SAAM SMIT VANCOUVER INC v OWNERS AND ALL OTHERS INTERESTED IN THE SHIP “HANJIN VIENNA”, THE SHIP “HANJIN VIENNA”, CONTI 24 CONTI LISSABON, OWNERS AND ALL OTHERS INTERESTED IN THE SHIP “HANJIN GENEVA”, THE SHIP “HANJIN GENEVA”, CONTI 15 CONTI PORTO, AND CONTI HOLDING GMBH & CO KG AND EACH OF THE SHIPS AS SISTERSHIPS OF EACH OTHER

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 18 AND 20, 2017

ORDER AND REASONS: HARRINGTON J.

DATED: JULY 31, 2017

APPEARANCES:

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Christopher Giaschi	FOR WORLD FUEL SERVICES INC.

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