

Federal Court



Cour fédérale

Date: 20170809

Docket: T-1512-16

Citation: 2017 FC 761

Ottawa, Ontario, August 9, 2017

PRESENT: The Honourable Mr. Justice Harrington

**ACTION *IN REM* AGAINST THE SHIP
"HANJIN VIENNA" AND *IN PERSONAM***

BETWEEN:

DP WORLD PRINCE RUPERT INC.

Plaintiff

and

**OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP "HANJIN VIENNA", CONTI 24
CONTI LISSABON, OWNERS AND CONTI
HOLDING GMBH & CO KG**

Defendants

**ORDER AND REASONS
(Former Owners' Motion for Production of Documents)**

[1] This motion for the better production of documents by the Defendant former owners of the container ship *Hanjin Vienna*, which was sold by Order of this Court, arises from the bankruptcy of the ship's long term time-charterer, Hanjin Shipping Co., Ltd., which operated a

worldwide, multi-model container liner service. The bankruptcy caused many of Hanjin's creditors to pursue the ship *in rem*, on any number of bases, more particularly, maritime liens and statutory liens equivalent thereto.

[2] In order to appreciate the context of the former owners' motion, a brief recital of the timeline is in order.

[3] The former owners, Conti 24, Alemania Schiffahrts-GmbH & Co. KG MS "Conti Lissabon", let out the *Hanjin Vienna* on a long term time-charter to Hanjin Shipping Co. Ltd., on a charterparty, which goes back to 1999.

[4] The last charter hire payment was in April 2016. Although the owners could have withdrawn the ship, they permitted her to continue to trade in Hanjin's service until she was arrested in early September 2016 by Saam Smit Canada Inc. and Saam Smit Vancouver Inc., Plaintiffs in T-1455-16. They had allegedly provided towage services and assert a maritime lien. Other service creditors followed suit. Those who are still pursuing their claims are the Plaintiff in this action, DP World Prince Rupert Inc., the Saam Smit companies, Prince Rupert Port Authority, Plaintiff in T-1516-16, Canadian National Railway, Plaintiff in T-1613-16, Mr. Ali El-Husseini, Plaintiff in T-1144-17 as well as World Fuel Services Inc. and the Pacific Pilotage Authority, which have so far proceeded by way of affidavits of claim.

[5] The ship remained under arrest and apparently subject to the time-charter, until redelivered to her owners in late November 2016. The ship was eventually sold by Court Order in February 2017.

[6] Meanwhile, in December 2016 the Defendant shipowners moved that the action of DP World Prince Rupert Inc., and other actions, be dismissed on a summary judgment basis.

[7] Before these motions were set down for hearing (they have yet to be heard) DP World Prince Rupert Inc., unsatisfied with the owners' production of documents moved for better production. It had provided stevedore and terminal operation services. In order to succeed in its claim against the proceeds of the sale of the ship it must establish that its services were provided at the request of the owners of the *Hanjin Vienna*, or by a person acting on their behalf. As the owners had the right to withdraw the ship upon non-payment of hire, DP was of the view that Hanjin and the owners would logically have had discussions about the continued service over and above the terms and conditions of the time-charter party. Production of documents relating thereto might establish that its services were indeed requested by a person acting on the owners' behalf. I granted that motion in part, 2017 FC 187. As other alleged creditors had intended to bring on similar motions, I held that the motion, and my Order, enured for their benefit as well.

[8] The owners have produced further documentation in accordance with that Order. There are still some ongoing discussions. In due course they will have to file a formal affidavit.

[9] In like fashion, the owners were not satisfied with the productions of the various claimants. Essentially, they had produced contracts and invoices. The owners have produced evidence that trade magazines had been reporting on Hanjin's perilous financial situation for some months before the actual bankruptcy. They assert that Hanjin's creditors knew or should have known of this situation. In this motion they seek production of documentation which might show their awareness of the situation and the steps they took to deal with it. In my opinion, this is as reasonable a concern as was DP World's.

[10] *Federal Courts Rule 222* and following require the parties, at the close of pleadings, to provide an affidavit listing all the documents they have, or had, in their possession which are relevant to the case. There can be legitimate differences of opinion as to what is relevant.

[11] Owners' motion serves as notice of what they consider relevant. It is difficult for the Court at this stage to determine what is relevant and what is not. Nevertheless, the motion appears to be too broad in some respects. Furthermore, the parties must produce relevant documents, even if not covered in the owners' motion.

[12] During the hearing, I adjourned the motion *sine die* against three creditors. Mr. Ali El-Husseini is a different category of claimant. He asserts a cargo claim, now by simplified action. Unless otherwise ordered there is no affidavit of documents (*Federal Courts Rule 295*). The claim of the Pacific Pilotage Authority, which so far has been advanced by way of an affidavit of claim, is based on services rendered to the *Hanjin Geneva*. It must first be established that the *Hanjin Geneva* and *Hanjin Vienna* are sister ships. If not, the claim falls. World Fuel Services

Inc. has also proceeded by way of affidavit of claim. It asserts an American maritime lien for bunkers supplied in the United States. Once affidavits of experts versed in American law are exchanged by the end of October, the matter can be reassessed.

[13] Consequently, the motion proceeded against Saam Smit Canada Inc. and Saam Smit Vancouver Inc. in T-1455-16; the Plaintiff in this case, DP World Prince Rupert Inc.; Prince Rupert Port Authority, Plaintiff in T-1516-16; and Canadian National Railway (CNR), Plaintiff in action T-1613-16.

[14] As is fairly common on the West Coast, draft affidavits of documents have been exchanged. In due course properly sworn affidavits must be exchanged. All relevant documents must be listed and made available for inspection even if, as aforesaid, not covered by this motion. On the other hand, if documents sought do not exist, the affidavit may remain silent.

[15] It is obvious that all contracts, credit arrangements, guarantees and waivers must be listed, irrespective of when they were created. However, the motion is too broad in that, among other things, it seeks all invoices on all Hanjin ships for the years 2015 and 2016. However, there is no evidence that Hanjin defaulted on its obligation to the owners, or to the various claimants prior to 2016. Invoices and matters relating thereto as to the manner in which the services were sought is therefore limited at this time to 2016. In addition, Hanjin used more than 100 ships in its service. Some were time- chartered, some bareboat chartered and some registered in its name. Invoices are limited to the *Hanjin Vienna* and in the case of the Saam Smit companies and Canadian National Railway, the *Hanjin Geneva*, as a sister ship.

[16] Subject to those restrictions, the motion is granted, save and except:

- 1. (d) internal memoranda and the like indicating what the Plaintiffs consider “stevedoring” is irrelevant. That point is to be decided by the Court;
- 1. (j) to the extent any of the parties have filed a claim in Korea, the parties do not have to provide English translations thereof if they do not already exist;
- 1.(k) relates to CNR’s bills of lading and the like. Before preparing an affidavit, if it wishes, it may call upon counsel for the former owners to attend at its head office in Montreal to review electronic documentation, as it may well be that samples will suffice;
- 1. (l) the lease agreement between Prince Rupert Port Authority and DP World Prince Rupert Inc. is clearly relevant, but also has many confidential aspects. Unless otherwise ordered, it shall only be made available to counsel for the former owners for inspection. It shall be treated in accordance with *Federal Courts Rule* 152, which arises from the implied undertaking that documents produced at the discovery stage can only be used for the purposes of the litigation at hand. See for instance, *Juman v Doucette*, 2008 SCC 8, [2008] 1 SCR 157.

ORDER IN T-1512-16
(Former Owners' Motion for Production of Documents)

For reasons given, which reasons form part of this Order, the motion is granted in part, costs in the cause.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1512-16

STYLE OF CAUSE: DP WORLD PRINCE RUPERT INC v THE SHIP
HANJIN VIENNA AND OTHERS

PLACE OF HEARING: VANCOUVER, BC.

DATE OF HEARING: JULY 19, 2017

ORDER AND REASONS: HARRINGTON J.

DATED: AUGUST 9, 2017

APPEARANCES:

Jason R. Kostyniuk and
Steve Carey FOR CONTI 24, ALEMANIA SCHIFFAHRSTS-GMBH &
CO. KG MS CONTI LISSABON, THE FORMER
OWNERS OF THE SHIP HANJIN VIENNA

Peter Swanson FOR DP WORLD PRINCE RUPERT INC AND
PACIFIC PILOTAGE AUTHORITY

J. William Perrett FOR CAVEATOR ALI-EL HUSSEINI

John Bromley FOR SAAM SMIT ET AL AND PRINCE RUPERT
PORT AUTHORITY

Richard Desgagnés FOR CANADIAN NATIONAL RAILWAY

Christopher Giaschi FOR CAVEATOR WORLD FUEL SERVICES INC

SOLICITORS OF RECORD:

Alexander Holburn Beaudin
+ Lang LLP FOR CONTI 24, ALEMANIA SCHIFFAHRSTS-GMBH &
Vancouver, B.C. CO. KG MS CONTI LISSABON, THE FORMER
OWNERS OF THE SHIP HANJIN VIENNA

Bernard, LLP
Vancouver, B.C.

FOR DP WORLD PRINCE RUPERT INC

Norton Rose Fulbright, LLP
Vancouver, B.C.

FOR SAAM SMIT ET AL AND PRINCE RUPERT
PORT AUTHORITY

Brisset Bishop
Montréal, Q.C.

FOR CANADIAN NATIONAL RAILWAY

J. William Perrett Law Corporation
Vancouver, B.C.

FOR ALI-EL HUSSEINI

Giaschi and Margolis
Vancouver, B.C.

FOR WORLD FUEL SERVICES INC.