Federal Court  Cour fédérale

Date: 20190729

Docket: T-700-17

Citation: 2019 FC 1015

Ottawa, Ontario, July 29, 2019

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

NIRINT INC, d/b/a NIRINT CANADA

Plaintiff

and

MEGA TROPHY LTD
and
ISTANBUL DENIZCILIK VE DENIZ TASIMACILIGI AS
and
THE VESSEL M/V "SEREN"
and
THE OWNERS AND ALL OTHER INTERESTED IN THE VESSEL M/V "SEREN"

Defendants

JUDGEMENT AND REASONS

I. OVERVIEW

[1] On Friday, December 23, 2016, late in the afternoon, the vessel "Seren" departed the Port of Québec. She had been at the port since early November 2016, her ability to leave hindered by a succession of necessary repairs, detention orders and ship arrests.

[2] The Plaintiff in this simplified action, Nirint Inc., was at all times the vessel and her owners' agent in Canada. Nirint personally guaranteed and paid a number of invoices and charges issued against the vessel, as part of its efforts to ensure her departure before the Christmas holidays. The vessel owners have reimbursed Nirint for all of its expenses, with the exception of two charges, totaling $21,046.88 in capital, which they dispute having authorized Nirint to pay.

[3] Nirint brought this action to recover these amounts, plus accrued interest and its costs.

[4] The parties and their counsel are to be commended for their work in narrowing and streamlining the factual issues for trial, by producing a comprehensive agreed statement of facts and joint book of documents. As a result, the trial of this matter was completed in one half-day. Testimony, led through witnesses' affidavit evidence in chief with cross-examination in person, focused on the truly controversial facts, while counsel made thorough and helpful submissions as to how, in their respective view, the contested and the agreed facts should be reconciled and the law applied to arrive at a final determination as to the liability of the owners.

II. THE AGREED FACTS

[5] Below is a summary of the relevant facts, drawn from the much more detailed agreed statement of facts, supplemented by documents from the joint book of documents.

[6] The vessel is a general cargo ship. Although owned by the Defendant Mega Trophy Ltd., all instructions given to Nirint on behalf of the vessel and her owners were given by their manager, the Defendant Istanbul Denizcilik ve Deniz Tasimaciligi. For readability, these reasons will only refer to "Owners", given that there is no issue as to the manager's authority to bind the vessel or her owner. All instructions from the Owners were issued out of Istanbul, Turkey, which in December is eight hours ahead of Québec time.

[7] Nirint, for the purpose of this matter, acted as a ship agent. As the Owners' agents, Nirint was tasked with interacting with regulatory and port authorities and with arranging for services for the vessel and her crew when she was in Canada. Nirint is based in Montréal. While it always communicated directly with the Owners, it often carried out its duties as ship agent through its own sub-agent in Québec City, Lower Saint-Lawrence Ocean Agencies Inc. ("LOLA"). Again, for readability, steps that might have been taken by LOLA will in these reasons be referred to as having been taken by Nirint, as there is no issue between the parties as to LOLA's authority to bind Nirint in the steps that it took.

[8] The vessel's troubles began when she failed a Port State Control inspection completed by Transport Canada in Québec on November 11, 2016. A list of deficiencies was established that

needed to be corrected before she would be allowed to sail. The Owners asked Nirint to obtain and submit, for the Owners' written approval, quotes to correct these deficiencies. The quotes as obtained were approved by the Owners.

[9] In the course of performing their work, some of the workers contracted through Groupe Ocean Inc. considered that substantial additional work was necessary. They performed that additional work with the knowledge of the Master and crew, but had not submitted estimates or sought approval from Nirint or the Owners before doing so.

[10] All work was eventually completed and approved by the vessel's Master, following which the vessel was reinspected and Transport Canada lifted its detention.

[11] On December 20, 2016, Nirint submitted its "Pro-Forma Disbursement Account" and requested funds from the Owners. This account listed Groupe Ocean's initial quotes for the services it performed, identifying them as "Hot water calorifier - $9,360.00" and "Works in HFO service tank #2 - $1,110.00".

[12] On December 21, 2016, Nirint submitted a "Revised Pro-Forma Disbursement Account" and again requested funds from the Owners. This revised account showed revised amounts for the services of Groupe Ocean to include the additional work. The same two items identified in the previous paragraph now read as follows: "Hot water calorifier - $18,365.95" and "Cleaning & Welding in HFO service tank #2 - $20,166.00" (the exact amount by which the additional

work exceeds the initial quote is the subject of some variations in the documents, but the parties eventually agreed that the dispute charges amount to $21,046.88).

[13] On December 22, 2016, the Owners requested explanations and justifications for these extra charges, which Nirint obtained from Groupe Ocean and transmitted to the Owners. Nirint also requested Groupe Ocean's formal invoices, which it obtained and transmitted to the Owners on December 23, 2016.

[14] Meanwhile, on December 22, 2016, the Port of Québec issued a Detention Order against the vessel and one of the vessel's other suppliers, Clipper Ship Supply Ltd., caused a Statement of Claim to be issued and served on the vessel, together with a Warrant of Arrest, for its unpaid accounts. Other suppliers were also threatening arrests.

[15] Still questioning the validity of Groupe Ocean's charges for extra work, the Owners advised, in the early morning of December 23, 2016, that they were transferring the funds necessary to pay all suppliers, but not the disputed charges. They also asked that the correspondence and disputed invoices be referred to the vessel's P&I correspondents for assistance and advice.

[16] The P&I representatives for the Owners contacted Nirint in the late morning of December 23, suggesting that as Groupe Ocean's invoices showed payment terms of 30 days, the charges for the additional work were not immediately due and payable, such that Groupe Ocean "should not be taking any action". This, they suggested, should allow time for the vessel to sail as

planned later that day and for the Owners to "sort things out" in respect of the disputed invoices "in the coming weeks or two".

[17] During the course of the afternoon of December 23, 2016, Nirint arranged to pay or guarantee payment to all creditors other than Groupe Ocean, securing the release of the vessel from arrest and the withdrawal of the Detention Order. By 3:30 pm, the only outstanding threat to the vessel's departure was Groupe Ocean's advice that it had retained a lawyer and intended to arrest the vessel unless it obtained a guarantee that Nirint would pay its invoices in full.

[18] Between 3:45 pm and 4:09 pm, through several email exchanges, Nirint agreed to guarantee Groupe Ocean's invoices and obtained confirmation from its lawyer that he would discontinue arrest proceedings.

[19] At 4:24 pm, the Owners sent the following message to Nirint by email:

> "Ref to the attached quotations / supporting docs and proforma D.A , it seems and understood that in your PDA , the service rendered costs for the hot water calorifier and fuel service tank welding might have been inserted mistakenly , that is why the difference of the amount for CAD2561.95 (sic) has been deducted from the PDA and the rest for CAD54003 has been remitted to your account , in view of above and ref to our Tel.Con minutes ago , it will highly be appreciated if you pls kindly:
>
> 1- Clarify the final balance along with supporting documents in order to be processed and finalized by this office at soonest.
>
> 2- Pls take necessary and needful action for vessel release and departure in order to prevent any further delay."

[20] At 5:33 pm, Nirint confirmed to the Owners that it had had "no choice" but to guarantee all charges, including the disputed invoices, and that the vessel was clear to sail. The vessel left Québec later that day.

[21] The parties agree that Saturday, December 24th, Sunday, the 25th, Monday the 26th and Tuesday the 27th in 2016 constituted the "Christmas holidays" for most financial institutions and businesses in Québec, and that the vessel would not have been able to depart from the Port of Québec prior to Wednesday, December 28, 2016, had she not left on Friday, December 23rd.

III. THE PARTIES' POSITIONS AND ISSUES TO BE DETERMINED

[22] There is little dispute between the parties as to the applicable legal principles. Under Canadian maritime law, which on the subject of agency is not materially different to Canadian common Law and Québec civil Law, an agent is entitled to be reimbursed by its principal for all expenses reasonably incurred in carrying out its mandate. An agent is, however, responsible to indemnify its principal for any loss the latter suffers as a result of the agent's negligence in carrying out its mandate.

[23] Nirint submits that it was expressly authorized by the Owners to guarantee and pay Groupe Ocean's claims for additional charges, or at least, that having been instructed by the Owners to do what was necessary to ensure that the vessel left Québec without further delay, it was reasonable for it to do so. Nirint submits that had it not guaranteed Groupe Ocean's charges, Groupe Ocean would have arrested the vessel, delaying her departure by four days and causing substantial damage to the Owners.

[24] Nirint therefore submits that its payment of the disputed charges constitutes a reasonable expense of carrying out its mandate, for which it is entitled to be reimbursed.

[25] If the Court finds that it was not authorized to guarantee or pay Groupe Ocean's charges, Nirint submits that it should nevertheless be compensated under the principles of quantum meruit or unjust enrichment. Nirint argues that, in paying Groupe Ocean, it discharged a debt that the Owners would have been required to pay, enriching the Owners at its own expense.

[26] The Owners submit that they did not expressly authorize Nirint to pay Groupe Ocean, and that their instructions, to the contrary, were expressly to the effect that Groupe Ocean could only be paid if and when appropriate supporting documents were provided. The Owners argue that Groupe Ocean's threat to arrest the vessel was not credible, given the 30 day payment terms contained in Groupe Ocean's invoices. Citing *Armada Lines v Chaleur Fertilisers* [1997] SCR 617 and *Mondel Transport v Afram Lines* [1990] 3 FC 701, they argue that Groupe Ocean should have known that an arrest in the circumstances was an abuse of process and would have exposed it to liability for the Owners' losses. The Owners thus argue that it was not reasonable for Nirint to guarantee the payment of the invoices in the circumstances.

[27] The Owners further argue that the additional charges were in any event never properly claimable. They point to clause 7 of Groupe Ocean's original proposal, which provides as follows:

> "Whenever possible and in the absence of a specific agreement related to this issue in the Contract, Additional Work that may be required will be done by the Repairer or its Subcontractors in consideration of payment of additional compensation established

> as follows: cost of Material + 15% + workforce at applicable hourly rates, which rates are available upon request. Prior to executing the Additional Work, a work order including a summary of Additional Work to be performed and the cost estimate will be completed and submitted by the Repairer for signature by the Client's Representative or directly by the Client. Should the signed order not be returned within the next business day from the transmission by the Repairer, the Client will be responsible for all consequences of any delay caused thereby and be deemed to have accepted the performance of the Additional Work carried out between the expiry of this delay and the date of receipt by the Repairer of a written notice of disagreement or refusal by the Client that such Additional Work be performed."
>
> (Emphasis added)

[28] Since Groupe Ocean did not submit a cost estimate for the additional work, the Owners argue that it is foreclosed from seeking payment.

[29] The Owners answer Nirint's unjust enrichment argument by pointing out that the existence of an agency contract between the parties precludes the application of the principles of unjust enrichment, Nirint's failure to comply with the Owners' instructions providing a juristic reason for any loss it might have suffered. They also add that to the extent Groupe Ocean's claim for additional work is not valid by the application of clause 7 its proposal, they have in any event not been enriched by Nirint's payment.

[30] The factual and legal issues to be determined in this action are therefore as follows:

1) What, if any, instructions were expressly given by the Owners to Nirint in respect of the payment or guarantee of Group Ocean's invoices?

2) If no express instructions were given by the Owners in respect of the payment or guarantee of Groupe Ocean's invoices, was it reasonable for Nirint to guarantee their payment?

3) If Nirint was not authorized to guarantee Groupe Ocean's invoices, is it entitled to be compensated by the Owners under the principles of quantum meruit or unjust enrichment?

IV. TESTIMONIAL EVIDENCE LED AT THE TRIAL

[31] As previously mentioned, testimonial evidence was adduced at trial in addition to the agreed statement of facts and joint book of documents.

[32] Nirint introduced the evidence of two of its representatives, Elias Hage, its sole director, and Nick Cailis, its operation manager, as well as the evidence of Mario Lebel, a representative of Groupe Ocean, by way of affidavit as contemplated by Rule 299 of the *Federal Courts Rules*. The Owners cross-examined Messrs. Hage and Cailis on their affidavits, but chose not to cross-examine Mr. Lebel. The Owners did not call any witness.

[33] Much of the subject matter of the affidavits of Messrs. Hage and Cailis overlap with that of the agreed statement of facts, without adding to or contradicting it. What additional facts there are in their affidavits and were drawn out in cross examinations are as follows:

[34] Mr. Hage was aware of and participated in Nirint's decisions with respect to the events at issue, but it was Mr. Cailis who was directly involved in all exchanges with the owners and most exchanges with LOLA and the suppliers. Mr. Hage however spoke with Mr. Lebel of Groupe Ocean and its lawyer on December 23, 2016. Both advised him verbally that Groupe Ocean intended to arrest the vessel unless it was paid in full for all invoices. Mr. Lebel further advised that Groupe Ocean would cease to provide tug services to the vessel.

[35] Mr. Hage admitted that while Groupe Ocean's invoices do provide a 30 day payment term, he did not challenge either Mr. Lebel or his lawyer as to the possible illegality of an arrest. He expressed the view that notwithstanding agreed payment terms, it is a practice in the industry for suppliers to "change their minds" and demand payment before the vessel sails when they perceive it to be a "bad debtor". Mr. Hage testified that his offer to put the disputed funds in trust was rebuffed. He maintained, throughout, that he believed the vessel would be arrested unless Groupe Ocean's disputed invoices were guaranteed in full. He estimated at $12,000 per day the demurrage the vessel would have incurred had she been detained over the Christmas holiday.

[36] Mr. Hage testified that he was present in the office, but not personally on the line, when Mr. Cailis had a telephone conversation with a Mr. Sana, representing the Owners. Mr. Cailis reported to Mr. Hage that Mr. Sana had agreed that Groupe Ocean's disputed invoices should be paid to allow the vessel to sail and that these instructions would be confirmed in writing. Mr. Hage believes that the email received from the Owners at 4:24 pm was that confirmation.

[37] Mr. Cailis acknowledged having received the P&I representative's advice about Groupe Ocean's payment terms, but admits that he did not convey it to Mr. Hage or discuss it with the Owners. Of his conversation with Mr. Sana, Mr. Cailis testified that Mr. Sana explained that the Owners had initially believed Groupe Ocean's charges to have been erroneously stated in Nirint's Revised Pro Forma Account (the result of a "typo") but now agreed that they should be paid to allow the vessel to sail without further delay. Repeatedly pressed on cross-examination, Mr. Cailis was adamant that the provision of "supporting documents" mentioned in the 4:24 pm email of the Owners was never mentioned in his conversation with Mr. Sana.

[38] He further testified that Nirint would not have paid the disputed invoices had he not been instructed to do so by Mr. Sana.

[39] The affidavit of Mr. Lebel sets out the circumstances in which Groupe Ocean was retained, introduces a report prepared by its subcontractor explaining the need for additional work relating to the installation of hot water tanks, explains the need for additional work relating to the cleaning and welding of the HFO service tank # 2, and introduces various other supporting documents. All of the documents introduced by Mr. Lebel's affidavit had already been provided to Nirint in December 2016, with the exception of exhibit ML-8, consisting of work orders and other supporting documents emanating from the subcontractor who effected the additional work on the HFO service tank.

V. ANALYSIS

[40] The Court has no hesitation in accepting the evidence of Messrs. Hage and Cailis as truthful and credible. In particular, and with respect to the all-important telephone conversation Mr. Cailis had with Mr. Sana, Mr. Cailis' recollection of the events was precise and unwavering, without however being contrived or appearing rehearsed.

[41] The Court further finds that there is no inconsistency or contradiction in Mr. Cailis' account of his conversation with Mr. Sana and the content of the confirmation email sent by the Owners at 4:24 pm. The email acknowledges the Owners' initial belief that the cost of services rendered "might have been inserted mistakenly" in the Revised Pro Forma Disbursement Account, explaining why the remittance made earlier did not include those amounts. Referring to the recent telephone conversation, the email then instructs Nirint to clarify the final balance along with supporting documents so that the owners can finalize and process it, but also to take the necessary and needful action to ensure the vessel's release and departure without further delay.

[42] There is nothing contradictory with instructing an agent to effect immediate payment of a previously disputed account while still requesting that the transaction be properly documented in rendering final accounts. Nirint eventually did remit to the Owners its final Disbursement Account, with supporting documents.

[43] The Court does not accept the Owners' theory to the effect that the Owners' written instructions sent at 4:24 pm required Nirint to withhold payment of the disputed amounts unless and until the account was legally due and payable or until documents could be obtained showing that the additional work had been the subject of written cost estimates. Given Groupe Ocean's stated intention to have the vessel arrested, such instructions would have been contrary to the explicit instructions otherwise contained in the email, requiring Nirint to "take necessarily and needful action" for the vessel to depart without further delay.

[44] The Court finds that the Owners expressly instructed Nirint, verbally in the conversation between Mr. Sana and Mr. Cailis, to effect payment of Groupe Ocean's invoices. That finding is entirely dispositive of the Owners' liability to reimburse Nirint for these expenses. Given these express instructions, the question of whether the Owners were legally required to pay Groupe Ocean's invoices is irrelevant.

[45] That said, to the extent it can be argued that the written email confirmation of 4:24 pm introduced an ambiguity as to the Owners' instructions, the Court remains satisfied that Nirint properly carried out its mandate and acted reasonably in guaranteeing Groupe Ocean's charges.

[46] To the extent Nirint did not have clear instructions to pay the disputed invoices, its duty in the circumstances was to take reasonable steps to protect the Owners' interests. The Owners had identified these interests as clarifying the final balance, securing supporting documents for the Owners to be able to process the charges and ensuring that the vessel could leave without delay.

[47] As a ship agent, all that Nirint could reasonably do to try to stave off an arrest, short of guaranteeing full payment, was to raise the 30 day payment terms and to offer to put the disputed amount in trust pending later resolution. Nirint failed to do the former, but did do the latter.

[48] The Court is satisfied that Nirint was not negligent, and did not cause damage to the Owners by failing to raise the 30 day payment terms with Groupe Ocean or its lawyer.

[49] Nirint's mandate was that of a ship agent, not that of a legal advisor. While it is true that the Owners' P&I representatives had raised Groupe Ocean's 30 day payment terms, their advice on the matter was limited to a suggestion that Groupe Ocean "should" not take action. The Owners could not reasonably expect Nirint to assess the lawfulness of Groupe Ocean's proposed arrest of the vessel or the adequacy of the Owners' recourse in the event of an unlawful arrest. In any event, given Groupe Ocean's refusal to accept payment in trust, the Court is satisfied that raising the 30 day payment terms would have been equally ineffectual in ensuring that Groupe Ocean would not act upon its threat.

[50] The Court further finds that Nirint did not act negligently and did not cause loss or damage to the Owners by failing to take into account clause 7 of Groupe Ocean's initial proposal, requiring that prior written estimates be submitted for additional work. Assuming, but without deciding, that the effect of that clause is to invalidate Groupe Ocean's claim for the additional work, the existence of that clause was not raised by the P&I representatives or by the Owners. Nirint was not required or expected to comb through the contractual terms of Groupe Ocean's initial proposals in search of legal justification to pay or reject the invoices.

[51] Once it was clear that Groupe Ocean intended to arrest the vessel unless it was paid, Nirint's only choice to carry out its mandate was to pay the invoices to avoid the arrest, and to collect and provide to the Owners the usual documents to support the charges: i.e., documents of a nature to establish that the charges related to work that was actually performed. This, Nirint did. The Owners have not questioned, let alone established, that the additional work was not performed, was unnecessary, or that the amounts charged were excessive.

[52] The Court is satisfied that Nirint's payment of Groupe Ocean's invoices was a reasonably incurred expense in carrying out its mandate. Given that conclusion, it is unnecessary for the Court to consider the argument of unjustified enrichment.

VI. CONCLUSION, INTEREST AND COSTS

[53] The parties are in agreement that the outstanding balance for Nirint's account in respect of Groupe Ocean's invoices is in the amount of $21,046.88. The vessel and her owners are liable to Nirint for that amount, but not Istanbul Denizcilik ve Deniz Tasimaciligi, who acted throughout solely as the Owners' authorized agents.

[54] Nirint's statement of claim seeks pre-judgment and post-judgement interest at a commercial lending rate plus 2% compounded quarterly. No evidence was however led as to a commercial lending rate or Nirint's entitlement to a 2% increase on that rate. In the absence of such evidence, the legal interest rate of 5%, as prescribed in the *Interest Act* RSC 1985, c I-15, is applicable (*St. Lawrence Construction Ltd v Federal Commerce and Navigation Co.* [1985] 1 FC

767, leave to appeal to SCC refused (1985) 58 NR 236n, *Iron Mac Towing (1974) Ltd v "North Arm Highlander" (The)* (1979) 28 NR 348 (FCA)).

[55] Nirint being successful, it shall recover its costs of the action.

JUDGEMENT

THIS COURT'S JUDGMENT is that:

1. The Defendants Mega Trophy Ltd, the Vessel M/V "Seren", her Owners and all others interested in her are jointly and severally liable to pay to the Plaintiff the amount of $21,046.88, together with pre- and post-judgement interest at the rate of 5% per annum, running from December 23, 2016 until full payment.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Isabelle Chatigny	FOR THE PLAINTIFF
David Colford	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Benabou & Associates Barrister and Solicitor Montréal, Quebec	FOR THE PLAINTIFF
Brisset Bishop Barrister and Solicitor Montreal, Quebec	FOR THE DEFENDANTS