

Date: 20090113

Docket: T-949-06

Citation: 2009 FC 32

Montréal, Quebec, January 13, 2009

PRESENT: Richard Morneau, Prothonotary

**ACTION *IN REM* AGAINST THE SHIP M.V. "LUKEY'S BOAT"
AND *IN PERSONAM* AGAINST THE OWNERS, CHARTERERS
AND ALL OTHERS INTERESTED IN THE SHIP M.V. "LUKEY'S BOAT"**

BETWEEN:

**SEALAND MARINE ELECTRONICS SALES & SERVICES LTD.,
a company carrying on business at the City of Mount Pearl,
in the Province of Newfoundland and Labrador**

Plaintiff

and

**THE OWNERS, CHARTERERS AND ALL OTHERS
INTERESTED IN THE SHIP M.V. "LUKEY'S BOAT"**

and

ADVENTURE TOURS INC.

and

CHARLES ANONSEN

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] Judgment is to be rendered in this matter following a hearing on the merits of a simplified action instituted by the plaintiff Sealand Marine Electronics Sales & Services Ltd. (Sealand) by which it is asking the Court to allow its action and to order the defendants, which are *inter alia* the ship M.V. "Lukey's Boat" (the Ship) and its owner, Adventure Tours Inc. (ATI), to pay an amount of \$4,352.75 plus interest at a commercial rate and costs. According to Sealand, the amount of \$4,352.75 is the balance owing on a total invoice of \$15,236.35 following the sale by Sealand to ATI of various items and electronic equipment.

Procedural context

[2] In an order dated July 25, 2008, following various pre-trial conferences held in this case, it was decided that the issues to be determined at trial were the following:

1. The issues to be determined at trial are as follows:
 - a) What equipment and services were supplied and invoiced to the defendants by the plaintiff?
 - b) Were the supplied equipment and services good and merchantable?
 - c) Were the supplied equipment and services as represented by the plaintiff to the defendants?
 - d) What amount, if any, are the defendants liable to pay the plaintiff for the equipment and services supplied and invoiced to them?

- e) What damages, if any, are owed to the plaintiff by the defendants?

[3] At the hearing, the persons who had signed detailed affidavits were cross-examined by counsel for the opposing party and they answered some additional questions of their own counsel. Harold Young, director of Sealand, testified for the plaintiff Sealand and Charles Anonsen, director of ATI, testified for the defendants.

Factual context and analysis

[4] The factual context involving the significant aspects of this case may be summarized as follows.

[5] With the intention of purchasing certain electronic equipment to be installed in the Ship that ATI had just acquired in November 2003, its director, Mr. Anonsen, visited the Sealand premises in January 2004. During this visit, Mr. Young described certain pieces of equipment and showed them to Mr. Anonsen (hereafter the January 2004 visit).

[6] One of the items that was looked at and which we must specifically study is a multifunctional apparatus (the Apparatus) that among other things, could perform three functions: GPS, chart plotter and sounder. The litigation between the parties actually arose in connection with the sounding function of the Apparatus.

[7] The Court understands from the testimonies of Mr. Young and of Mr. Anonsen that at the time of the January 2004 visit, Mr. Anonsen had in-depth knowledge of the maritime field, of navigational instruments and of the operation of a sounder.

[8] The parties therefore knew at that time that for a sounder to operate properly, a ship's hull had to be equipped with a transducer. A sounder is used to detect the marine environment under the ship. The Court understands that the transducer, which is installed on the hull's exterior when the ship is out of the water, that is to say, in dry dock, is used to transmit and receive radio waves that it converts into a graphic image on the sounder's screen.

[9] The main issue is to determine what was agreed between Mr. Young and Mr. Anonsen during the January 2004 visit as to whether or not the transducer was included at no extra cost with the sounder function of the Apparatus.

[10] On this point, there was considerable discrepancy between the versions given by Mr. Young and by Mr. Anonsen.

[11] According to Mr. Anonsen, he did not have to discuss the separate purchase of a transducer because it was Mr. Young – possibly to promote the sale of the Apparatus – who clearly told him that Sealand would supply an appropriate transducer at no charge as soon as the ship was in dry dock. As stated at paragraph 4 of the defence and at paragraphs 4 and 5 of the defendants' pre-trial conference memorandum, because Mr. Anonsen considered that the transducer was necessary for the three functions of the Apparatus, he withheld an amount of

\$4,352.75 from the invoice he received on or about August 10, 2004. This amount was the cost of the Apparatus as quoted in an estimate sent to Mr. Anonsen on February 3, 2004 (\$3,785 plus applicable taxes).

[12] Mr. Young's testimony was to the effect that at the January 2004 visit, Mr. Anonsen clearly told him that because of its previous use the Ship was already equipped with one or two transducers and he did not have to purchase one from Sealand. This is why the estimate he forwarded to Mr. Anonsen on February 3, 2004, did not list a transducer. Accordingly, this estimate, just like the invoice that was sent on or about August 10, 2004, to Mr. Anonsen, listed only what was included in the purchase, in this case a sounder without the addition of a transducer.

[13] According to Mr. Young, it would have made no sense for him to give Mr. Anonsen a transducer of a value of nearly \$750 when his profit on the Apparatus was only approximately \$800.

[14] The Court had the opportunity to assess *de visu* the testimony given by Mr. Young and by Mr. Anonsen and, because it considers the answers given by Mr. Young throughout his testimony were clear, unhesitating and categorical, the Court accepts his version.

[15] The Court considers that the evidence allows it to conclude that in making the partial payment of the invoice dated August 10, 2004, Mr. Anonsen reneged on what was said during the January 2004 visit, most probably because when the Apparatus was installed on or about

August 10, 2004, neither one of the parties was able to find a transducer that was not already connected to a sounder and that was supposed to already be installed on the Ship.

[16] In addition, the Court cannot agree with the approach taken by the defendants in their defence or in their pre-trial conference memorandum concerning the importance a transducer may have in connection with the three functions of the Apparatus. On this point the evidence was clearly to the effect that the transducer has an impact only on one of the three functions of the Apparatus, that is to say, the sounder. As far as the chart-plotting and GPS functions are concerned, they operate together and do not require a transducer to do so.

[17] The same thing applies to the apparent second-hand condition of the Apparatus. Once again the evidence shows that the Apparatus described during the January 2004 visit and installed on August 10, 2004, had – to everyone's knowledge – never been previously installed but had only been used as a demonstrator at Sealand's business premises.

[18] The Court understands from the evidence that in the months following the installation of the Apparatus, the defendants nevertheless connected the sounder function of the Apparatus to a transducer that had already been connected to a sounder on the Ship. It seems that this arrangement or installation allowed the defendants and the Ship to make practical use of the sounding function of the Apparatus at an acceptable level of efficiency.

[19] Accordingly, the Court allows the action of the plaintiff Sealand and determines issues 1(a) to (e), which were identified at paragraph 2 above, as follows:

- In issue 1(a), it is the Apparatus, without a transducer, and its installation;
- To issues 1(b) and (c), the answer is "yes";
- To issue 1(d), the answer is the balance owing of \$4,352.75 plus pre- and post-judgment interest at the commercial rate of 2% per month as of August 20, 2004, as mentioned in the invoice dated August 10, 2004, and in the statement of claim of the plaintiff Sealand;
- To issue 1(e), the Court does not consider that any damages must be awarded under this head.

[20] As far as the above-mentioned interest is concerned, although it adds up to a significant amount, in the circumstances the Court does not see any reason to intervene.

[21] As far as costs are concerned, because the Court considers that the plaintiff's offer for an out-of-court settlement dated August 27, 2008, entails the application of subsection 420(1) of the *Federal Courts Rules*, the plaintiff is entitled to party-and-party costs in accordance with column III of the Tariff to the date of service of this offer and subsequently to costs calculated at double that rate, but not to double disbursements.

[22] Finally, when the judgment based on these reasons becomes final, in order to partially set off said judgment, the plaintiff may request the Court Registry to pay to it the amount of \$5,440.19, plus accrued interest, that was filed in the Court on June 23, 2006, by the defendants to obtain the release of the Ship.

JUDGMENT

THE COURT ALLOWS, with costs, the action of the plaintiff Sealand Marine Electronics Sales & Services Ltd. for a capital amount of \$4,352.75 plus pre- and post-judgment interest at the commercial rate of 2% per month as of August 20, 2004, as mentioned in the invoice dated August 10, 2004, and in the statement of claim of the plaintiff Sealand Marine Electronics Sales & Services Ltd.

As far as costs are concerned, because the Court considers that the plaintiff's offer of an out-of-court settlement dated August 27, 2008, entails the application of subsection 420(1) of the *Federal Courts Rules*, the plaintiff is entitled to party-and-party costs in accordance with column III of the Tariff to the date of service of this offer and subsequently to costs calculated at double that rate, but not to double disbursements.

Finally, when the judgment becomes final, in order to partially set off said judgment, the plaintiff may request the Court Registry to pay to it the amount of \$5,440.19, plus accrued interest, that was filed in the Court on June 23, 2006, by the defendants to obtain the release of the Ship.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-949-06

STYLE OF CAUSE: SEALAND MARINE ELECTRONICS SALES &
SERVICES LTD. v.
THE OWNERS, CHARTERERS AND ALL OTHERS
INTERESTED IN THE SHIP M.V. "LUKEY'S BOAT"
and
ADVENTURE TOURS INC. and
CHARLES ANONSEN

PLACE OF HEARING: St. John's, Newfoundland and Labrador

DATE OF HEARING: December 17, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** MORNEAU P.

DATED: January 13, 2009

APPEARANCES:

Randell L. Wellon

FOR THE PLAINTIFF

Ellen Turpin

FOR THE DEFENDANTS

SOLICITORS OF RECORD:

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FOR THE DEFENDANTS

