

Federal Court



Cour fédérale

Date: 20100610

Docket: T-1606-08

Citation: 2010 FC 634

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

ST. ANTHONY SEAFOODS LIMITED PARTNERSHIP

Plaintiff

and

**THE SHIP “F.V. “INDEPENDENCE”,
THE OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP F.V. “INDEPENDENCE”, AND
VSP ENTERPRISES LIMITED**

Defendants

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] This is a motion by the plaintiff St. Anthony Seafoods Limited Partnership (the plaintiff St. Anthony or the Company) for an order from this Court approving the taking into possession of the defendant vessel “F.V. Independence” (the Vessel) in order to thereafter sell it as set out, *inter alia*, in section 69 of the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 (the Act). The Vessel is the property of the defendant VSP Enterprises Limited (the defendant VSP).

Background

[2] It appears that on December 18, 2006, the plaintiff St. Anthony agreed to loan \$375,000 to the defendant VSP and its principal director and shareholder, Bruce Hiscock, in a loan agreement entitled “Loan and Assignment of Catch Agreement” (the Loan).

[3] To guarantee this Loan, the defendant VSP agreed, in return, to a marine mortgage in favour of the plaintiff St. Anthony. The terms and conditions of the mortgage are contained in a Deed of Covenants.

[4] Clause 3.01(vii) of the Deed of Covenants provides essentially that, in the event of default, the plaintiff St. Anthony may, in accordance with the Act, sell the Vessel by private sale. Section 3.01(vii) reads as follows:

3.01 ACCELERATION AND REMEDIES IN EVENT OF DEFAULT - In case any Event of Default shall occur under the terms of this Deed of Covenants, the other Security Documents, or any other agreement or security granted to the Lender in respect of the Loan whether or not delay may have been granted to the Company, the Lender, in addition to all other rights and remedies herein or by law provided and without previous notice or demand, may in its discretion:

...

(vii) in accordance with the Canada Shipping Act, sell the Vessel or any or all of the shares therein upon such terms and conditions as the Lender may determine, free from any claim of or by the Company, at public or private sale, by sealed bids or otherwise. Any such sale may be held at such place and at such time as the Lender may determine and may be conducted without bringing the Vessel to the place designated for such sale and the Lender may become the

purchaser at any public sale and shall have the right to credit on the purchase price any and all sums of money due under this Deed of Covenants, the Security Documents, or under the security therefore, in favour of the Lender including any Protective Disbursements and any disbursements made by the Lender on behalf of the Company or for the protection of the Lender's security;

[5] The relevant section of the Act, section 69, reads as follows:

69. (1) A mortgagee of a vessel or a share in a vessel has the absolute power, subject to any limitation set out in the registered mortgage, to sell the vessel or the share.

(2) If there is more than one registered mortgage of the same vessel or share, a subsequent mortgagee may not, except under an order of the Federal Court or of a court of competent jurisdiction whose rules provide for *in rem* procedure in respect of vessels, sell the vessel or share without the agreement of every prior mortgagee.

69. (1) Tout créancier hypothécaire d'un bâtiment ou d'une part dans un bâtiment a le pouvoir absolu, sous réserve des restrictions prévues dans l'hypothèque enregistrée, de vendre le bâtiment ou la part.

(2) S'il y a plus d'une hypothèque enregistrée à l'égard d'un même bâtiment ou d'une même part, le créancier hypothécaire subséquent ne peut, sauf en vertu de l'ordonnance de la Cour fédérale ou d'un tribunal compétent dont les règles permettent les actions réelles à l'égard des bâtiments, vendre le bâtiment ou la part sans le consentement de chaque créancier hypothécaire antérieur.

[6] On August 1, 2008, counsel for the plaintiff St. Anthony sent the defendant VSP and Mr. Hiscock a letter (the letter of August 1, 2008) stating that the Borrowers were in breach or default under the Loan. The relevant part of the letter reads as follows:

REGISTERED AND REGULAR MAIL

PERSONAL AND CONFIDENTIAL

VSP Enterprises Limited
and Bruce Hiscock
P.O. Box 574
Spaniard's Bay, NL A0K 3X0

Dear Sir:

**RE: Our Client – St. Anthony Seafoods Limited
Partnership (the “Company”)
Loan and Assignment of Catch Agreement made
18 December 2006
VSP Enterprises Limited and Bruce Hiscock
(collectively the “Borrowers”)**

We are the solicitors for the Company, and have been retained by it in connection with the above-noted Loan and Assignment of Catch Agreement executed on 18 December, 2006 (the “**Agreement**”).

We are advised by the Company that the Borrowers are indebted to the Company in the amount of \$420,785.56, which amount is secured against:

- a) the Agreement which includes a security interest granted in favour of the Company against fishing enterprise C502575 (the “**Licenses**”);
- b) Marine Mortgage on the vessel the M.V. “Independence” (the “**Vessel**”);
- c) Deed of Covenants executed on 18th December 2006;
- d) an assignment of marine insurance on the Vessel; and
- e) a personal guarantee by Bruce Hiscock.

We are further advised by the Company that the Borrowers are in breach of the Agreement in that they have:

1. Failed to diligently use all fishing opportunities available to them during the term, contrary to section 2.01 of the Agreement and constituting a default under sections 5.01 (c) and (e) of the Agreement.
2. Failed to offer to sell 100% of shrimp, crab, all other crustaceans and all fish species of any nature or kind made or landed under the conditions set forth in section 2.02 (i) and (ii) to the Company contrary to section 2.02 of the Agreement and constituting a default under sections 5.01(a) and (c) of the Agreement. Further for landings that were made to alternate processors no funds were forwarded to

St. Anthony in compliance with the Borrowers obligations under the Agreement.

We have been instructed by the Company to demand payment from you of the total amount due and owing. This amount must be paid in full with 14 days from the date hereof. . . .

[7] Given that the defendant VSP and Mr. Hiscock did not comply with the requirement in the letter of August 1, 2008, the plaintiff St. Anthony commenced an action in this Court in this docket on October 17, 2008, and simultaneously had the Vessel arrested. The Vessel has been under arrest since that date. The defendant VSP did not or could not provide a bond to obtain a release from the arrest.

[8] On May 21, 2009, the plaintiff St. Anthony filed this motion because it believed that the authorization of this Court was necessary to legally take possession of the Vessel since the defendant VSP and Mr. Hiscock refused to voluntarily hand over the keys to the Vessel.

[9] In support of this motion, the plaintiff St. Anthony submitted an affidavit dated May 15, 2009, of Ms. Caroline Davis (the Davis I affidavit), who is the General Manager of the plaintiff St. Anthony and who appears to have been the key player in the relevant steps that the plaintiff St. Anthony took.

[10] Upon receipt of this motion, the defendants filed a reply record containing an affidavit of Mr. Hiscock (the Hiscock I affidavit) dated June 1, 2009. Subsequently, through the Court's various directives and orders, there were, *inter alia*, the September 9, 2009, cross-examinations on the Davis I and Hiscock I affidavits and supplementary written representations filed by the defendants on November 23, 2009, including an affidavit of Mr. Hiscock dated

November 13, 2009 (the Hiscock II affidavit), and an affidavit of Mr. Hiscock's son, one Shannon Hiscock, dated November 13, 2009 (the Shannon Hiscock affidavit). On December 7, 2009, the plaintiff St. Anthony filed supplementary written representations that included an affidavit of Ms. Davis dated December 4, 2009 (the Davis II affidavit), and an affidavit of one Edgar J. Coffey (the Coffey affidavit). The deponents of those two affidavits were also subsequently, at different times, possibly cross-examined on their affidavit.

Analysis

[11] It seems that the success of this motion depends on whether the evidence establishes a default or breach of the Loan.

[12] With respect to any default on the Loan, the Davis I affidavit in support of the motion refers us to the breaches specified in the letter of August 1, 2008.

[13] It appears from reading and analysing the transcript of the September 9, 2009, cross-examination of Ms. Davis on her affidavit I that, in fact, the plaintiff St. Anthony ultimately did not have, as of August 1, 2008, concrete evidence of a default under clauses 2.01 and 2.02 of the Loan, clauses summarized in the letter of August 1, 2008, which letter is reproduced above at paragraph [6].

[14] Similarly, the letter of August 1, 2008, alleges the following as a default:

. . . Further for landings that were made to alternate processors no funds were forwarded to St. Anthony in compliance with the Borrowers obligations under the Agreement.

[15] This default appears to refer to clause 2.07 of the Loan, which reads as follows:

2.07 If the Company does not purchase the catch of any trip of the Vessel, the Borrower and Hiscock agree that they will immediately on sale of the catch of the Vessel to another processing company or buyer remit to the Company the amounts set forth in paragraph 2.05 of this Agreement. Hiscock and the Borrower shall also remit to the Company 10% of the Gross Landed Value on (i) the sale of any catch from the Licences or any other licence held by or on behalf of Hiscock or the Borrower regardless of whether or not such licence is fished by the Vessel, and (ii) of the catch of another vessel owned or fished by Hiscock or the Borrower.

[16] In short, clause 2.07 requires that the defendant VSP remit to the plaintiff St. Anthony “10% of gross landed value respecting catch sold to another processing company or buyer”.

[17] The cross-examination of Ms. Davis on September 9, 2009, demonstrated that the allegation in the letter of August 1, 2008, that “. . . for landings that were made to alternate processors no funds were forwarded to St. Anthony in compliance with the Borrowers obligations under the Agreement” was not founded because it appears that, on or about July 23, 2008, Mr. Hiscock’s wife sent a payment of \$9,000 to Ms. Davis. In this regard, although Mr. Hiscock’s cross-examination on September 9, 2009, revealed that the instructions he gave to the other processing plant, i.e., in this case, Labrador Sea Products Inc. (a member of

the Quinlan Group of Companies), were that the 10% be transferred directly from the company to the plaintiff St. Anthony, it appears that the 10% was deposited into Mr. Hiscock's personal account and that it was Mr. Hiscock's wife, who in fact was the member of the couple with business knowledge, who wrote a cheque for \$9,000 to Ms. Davis.

[18] At Mr. Hiscock's September 9, 2009, cross-examination on his affidavit I, the plaintiff St. Anthony gave Mr. Hiscock the Coffey affidavit. Mr. Coffey described himself as follows in his affidavit:

I am the Fleet and Procurement Manager with the Quinlan Group of Companies. Labrador Sea Products Inc. is a member of the Quinlan Group of Companies.

[19] Essentially, the Coffey affidavit was submitted to establish that the total number of pounds of crabs landed by the defendants at Labrador Sea Products Inc. had a value of \$132,402.90 and that, therefore, based on the 10%, the plaintiff St. Anthony should have received \$13, 240.29, not just \$9,000.

[20] The plaintiff St. Anthony regards that as the first default or breach of the Loan to obtain possession of the Vessel.

[21] However, the plaintiff St. Anthony only became aware of the information in the Coffey affidavit on or about September 9, 2009, and, therefore, the Court does not consider that this information and the conclusions that the plaintiff St. Anthony seeks to draw from it were within

the knowledge of the plaintiff St. Anthony and informed its decision for purposes of the letter of August 1, 2008, the statement of claim of October 17, 2008, and this motion of May 21, 2009.

[22] Similarly, the plaintiff St. Anthony also relies on two other breaches (the 2nd and 3rd breaches), which were based on information it obtained from Mr. Hiscock's cross-examination on his affidavit I on September 9, 2009, and which the plaintiff St. Anthony noted in its supplementary representations dated December 7, 2009.

[23] With respect to the second breach, it appears that during Mr. Hiscock's cross-examination, he acknowledged that, in November 2008, he had entered into an agreement with another fisher, one Tony Noble, whereby Noble could fish for shrimp using Hiscock's licence. The consideration for this permission was that Mr. Noble would pay Mr. Hiscock 8% of the value of the catch landed by Mr. Noble, after expenses. Mr. Hiscock acknowledged that the agreement was put to some use and that he had not remitted any amount in return to the plaintiff St. Anthony.

[24] The third breach resulted from a situation similar to the second breach but occurred in September 2009.

[25] Mr. Hiscock's testimony itself on the alleged 2nd and 3rd breaches could, in principle, lead us to conclude that those events constituted defaults or breaches of the Loan. The sometimes contradictory evidence between Mr. Hiscock's and Mr. Coffey's version on the first breach is less certain.

[26] However, even if these three breaches could be positively established, I do not intend, for the following reasons, to grant the plaintiff St. Anthony's motion and allow it to take possession of the Vessel.

[27] As already mentioned more specifically with respect to the first breach of the Loan, it is clear in the Court's view that the plaintiff St. Anthony did not, at the time of its letter of August 1, 2008, or at the time of its statement of claim of October 2008 or even at the time of its motion in May 2009, have the information that supported, that informed its conclusion regarding the three breaches. I think that Mr. Hiscock's cross-examination on September 9, 2009, enabled the plaintiff St. Anthony to "play catch up in its litigation".

[28] The plaintiff St. Anthony's lack of concrete information about any breach of the Loan at the time of its letter of August 1, 2008, left the field open, to a certain extent, to the allegations in Shannon Hiscock's affidavit and in the Hiscock II affidavit that the underlying reason why the plaintiff St. Anthony concluded that the Loan had been breached was the fact that Mr. Hiscock and his son refused—given that this was not a condition of the Loan—to land their catches at St. Anthony, despite the insistence of Ms. Davis.

[29] Shannon Hiscock's affidavit reveals that, faced with the defendants' refusal to travel to St. Anthony: ". . . she said [Ms. Davis] that she would take action against our Enterprise".

[30] Although the evidence tends to indicate that the defendants would have benefited from an additional 3% had they gone to St. Anthony, the fact remains that the requirement to land at St. Anthony was not in the Loan and that St. Anthony, compared to the usual places where the

defendants landed their catches, is located much further north in Newfoundland, about 1,000 km from St. John's, Newfoundland.

[31] Accordingly, the Court cannot exclude from the equation that this requirement, which was not set out in the Loan—and could not therefore constitute a default or breach of it—played a role in the decision by the plaintiff St. Anthony to send the letter of August 1, 2008, and to subsequently commence an action.

[32] For all these reasons, the Court's order will dismiss the plaintiff St. Anthony's motion, with costs.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1606-08

STYLE OF CAUSE: ST. ANTHONY SEAFOODS LIMITED
PARTNERSHIP and THE F.V.
“INDEPENDENCE” ET AL

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

DATE OF HEARING: June 1, 2010

REASONS FOR ORDER: MORNEAU P.

DATED: June 10, 2010

APPEARANCES:

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