

Federal Court



Cour fédérale

Date: 20101028

Docket: T-600-09

Citation: 2010 FC 1066

ADMIRALTY ACTION IN REM

BETWEEN:

F.C. YACHTS LTD.

Plaintiff

and

**P.R. YACHT BUILDERS LTD. AND
THE OWNERS AND ALL OTHERS INTERESTED
IN A 95 FOOT EXPEDITION MOTOR YACHT
BEARING HULL NO. QFY95001D810**

Defendants

REASONS FOR ORDER

Re Intervenor Status

PHELAN J.

[1] New World Yachts, LLC (New World), Gary Olsen (Olsen) and RS&I Inc. (RS&I – Olsen’s company), collectively the Respondent Intervenors, seek to be added to this litigation and to then apply to lift the current stay of proceedings and to take a number of interlocutory steps including seeking injunctive relief.

[2] New World was the yacht designer and had hired P.R. Yacht Builders Ltd. (PRYB) to construct the vessel. The funds for construction came from Olson and RS&I to New World who

passed them to PRYB. PRYB hired the Plaintiff (FCY) to provide services for the building of the yacht.

[3] In the within action, FCY sued PRYB for breach of contract in respect of the workers and goods supplied in constructing the yacht. The yacht was arrested but as a result of posting a Letter of Credit, the yacht was released and, the Court is advised, has been taken to the USA. Olsen supplied a \$1.9 million Letter of Credit; there is dispute as to whether it was in relation to a security agreement covering the yacht or in relation to the release of the yacht from arrest. In any event, the Letter of Credit related to the yacht.

[4] The dispute between FCY and PRYB has been dealt with under commercial arbitration and is the subject of proceedings in the Supreme Court of British Columbia. The Proposed Intervenors have been intervenors in the arbitration and in the Supreme Court. FCY has been successful in the arbitration. The proceedings in this Court have been stayed.

[5] The Proposed Intervenors informed this Court that they propose to:

- a) set aside the Warrant of Arrest despite the yacht having already been released;
- b) set aside the decision of the arbitrator as to the finding that FCY's interests under the Letter of Credit had priority over the marine mortgage held by New World but now assigned to RS&I; despite the fact that proceedings challenging the arbitrator are in the BC Supreme Court; and
- c) compel the return of the security posted by Olsen.

[6] The Proposed Intervenors contend that this litigation is a sham or a construct between father and son (the owners of PRYB and FCY respectively) and that the arrest was obtained by fraud on the Court.

[7] The matter of granting intervenor status is highly discretionary. Some of the factors to be considered include:

- a. is the intervenor directly affected by the outcome;
- b. does there exist a justiciable issue and a veritable public interest;
- c. is there an apparent lack of any other reasonable or efficient means to submit the question to the Court;
- d. is the position of the proposed intervenor adequately defended by one of the parties to the case;
- e. are the interests of justice better served by the intervention of the proposed third party;
- f. can the Court hear and decide the case on its merits without the proposed intervenor.

(See *CUPE v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220)

[8] The above is not an exhaustive list and factors such as delay, conduct, and effectiveness are also potentially relevant factors.

[9] It is an established principle, especially in private-party litigation, that an intervenor takes the case, the pleadings and matters in dispute as the parties have framed them. Intervenors are not to hijack the parties' dispute.

[10] The central theme of the Proposed Intervenors is that this is a sham case. It is evident that they wish to usurp PRYB's position so as to "get at FCY". As they said on more than one occasion, FCY is the target.

[11] The Proposed Intervenors clearly wish to raise issues well beyond those which the parties have put in issue. There is no indication that this Court cannot decide the issues as between the parties without the intervenors.

[12] By way of self-fulfilling prophecy, the Court cannot decide the issues which the Proposed Intervenors wish decided unless they are intervenors because the parties will not raise them. That is not the purpose of a true intervenor.

[13] The Proposed Intervenors have not described how they would be involved in the on-going litigation should their issues/motions not be decided in their favour.

[14] The proposed intervention has all the hallmarks of an end-run on the arbitration and BC Supreme Court processes. Further, the Proposed Intervenors have not shown any evidence of fraud on this Court.

[15] The Proposed Intervenors have not shown that their intervention is the most efficient way to have whatever their questions may be put to the Court.

[16] On their theory of the circumstances, they have not explained why they are not already defendants as being one of the persons described as “Owners and All Others Interested in a 95 foot Expedition Motor Yacht bearing hull no. QFY9500D810” nor why they cannot proceed by being added as a defendant or by way of third party proceedings. If there is any legitimacy to their theory it is strange that it would be more effective to have their interests controlled in sham litigation.

[17] For these reasons, it is the Court’s view that intervention status is not appropriate. The Proposed Intervenors really seek to be a true party (assuming that they can establish their entitlement to do so.)

[18] Therefore, the Court has dismissed their motion with costs, but without prejudice to the Proposed Intervenors’ rights as set forth in the formal order already issued.

“Michael L. Phelan”

Judge

Vancouver, BC
October 29, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-600-09

STYLE OF CAUSE: F.C. YACHTS LTD. v. P.R. YACHT BUILDERS LTD.
et al.

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: October 25, 2010

REASONS FOR ORDER: PHELAN J.

DATED: October 29, 2010

APPEARANCES:

Elyn Underhill	FOR THE PLAINTIFF
W. Gary Wharton	FOR THE DEFENDANTS
Rupert M. Shore Greg Palm	FOR PROPOSED INTERVENORS

SOLICITORS OF RECORD:

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