

Federal Court



Cour fédérale

Date: 20120113

Docket: T-1495-07

Citation: 2012 FC 45

[ENGLISH TRANSLATION]

Montréal, Quebec, January 13, 2012

PRESENT: Richard Morneau, Esq., Prothonotary

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

NAVAMAR LTD.

Plaintiff

and

**RODEL ENTERPRISES INC.
and
THE SHIP *FEDON*
and
THE OWNERS AND ALL THOSE
INTERESTED IN THE SHIP *FEDON***

Defendants

REASONS FOR ORDER AND ORDER

[1] In this case, this is a motion by defendant Rodel Enterprises Inc. (Rodel) to strike an expert report that was submitted by the plaintiff Navamar Ltd. (Navamar) on the ground that said report, which is from Mr. Anastasios [Tassos] Chondromatidis dated September 8, 2011 (the

Chondromatidis Report) is not strictly one report in rebuttal to an expert report submitted by Rodel, which is the report from Mr. George D. Margetis dated May 3, 2010 (the Margetis Report). The Margetis report was submitted by Rodel in rebuttal to an initial expert report submitted by Navamar.

Background

[2] The essential background that underlies the motion under review appears to be as follows.

[3] Early in 2005, Rodel found that its ship, the *Fedon*, needed repairs and, with the help of the ship's manager, Machrimar Management SA (for which the technical manager was Mr. Kostokopoulos), Rodel prepared a "*Specification of Repairs*" on or around May 28, 2005, and later in early June 2005, and met with the senior representative of Navamar, Mr. Nicolas Apostolellis.

[4] Later, on June 13, 2005, Navamar gave a three (3)-page quotation or estimate (the quotation from June 13, 2005) in which we find, among other things, the following indications:

on the first page: "After our meeting we are pleased to offer you our best prices for steel plate renewal as following pages show."

on third page: "Price pre Kgr fitted as above mentioned: 2,9 ?"

[5] We know that due to various circumstances, additional repairs that were not listed on the quotation from June 13, 2005, were made on the *Fedon* later by Navamar.

[6] The central issue that appears to be dividing the parties on merits consists summarily of knowing whether all of the work done to the *Fedon* should be settled according to the price of €2.90 (even €2.75) per kilogram of steel installed (“*fitted*” in the quotation from June 13, 2005) or even if the work was not set forth in that quotation should be paid by Rodel in accordance with a “*Price List*” that Navamar says was allegedly sent to Rodel on or around July 5, 2005, but Rodel, in reply, says that they never received it.

[7] In light of that imbroglio, an action for the price was instituted in this Court by Navamar against Rodel for an amount of \$2,000,000.00 (Canadian dollars) on August 14, 2007.

[8] The case conference for this file was held on July 6, 2011. On July 7, 2011, the Court issued an order in which it listed as follows the issues to be determined at trial (on which the parties agreed, except for question 1f) below) and included a table (also reproduced below) that detailed the expert reports that were filed or would be filed by the parties:

Issues to be determined at trial and expert evidence of parties in relation thereto:

1. The parties agree that the following five questions are the issues to be determined at trial:
 - a) Was there a fully formed agreement between the parties concerning the amount that Navamar Ltd. (“Navamar”) would be entitled to charge Rodel Enterprises Inc. (“Rodel”) for the repair of the M.V. FEDON? If so, what are the contractual terms pursuant to which Machrimar, on behalf of Rodel, and Navamar agreed to carry out the steel renewals and other upgrades and repairs on the M.V. FEDON?
 - b) More particularly, did Navamar agree to reduce its initial offer made on June 13, 2005 to carry out the steel renewals

from €2,90 per kilogram of “fitted steel” to €2,75 per kilogram of “fitted steel”?

- c) Assuming that the term “fitted steel” is relevant to determining the value of the repair work performed by Navamar, what is its meaning in the industry practice of the Perama repair zone? More particularly:
- i) What costs or expenses are included in a bid made on the basis of a unit price per kilogram of “fitted steel”?
 - ii) What risks are assumed by the repair contractor when steel renewals are to be paid on the basis of a unit price per kilogram of “fitted steel”?
- d) What part of the work performed by Navamar is covered by the unit price per kilogram of “fitted steel”, assuming that this term is relevant to determining the value of the repair work performed by Navamar, and what part of the work falls outside the bid of June 13, 2005?
- e) As regards the portion of the work performed by Navamar that fell outside the parameters of the bid of June 13, 2005, how is the price of these “extras” to be determined and is there a balance outstanding to Navamar?

In addition to the foregoing, plaintiff submits the following consideration to which defendants object:

- f) In the absence of an express agreement between the parties as to how much the repair work would cost, the Court will have to determine how the repair work is to be valued. This will involve a consideration of Greek law, commercial practice as it existed at the relevant time in the Perama repair zone, prices charged by Navamar’s competitors for similar work and Navamar’s price lists.

In support of these issues, the parties intend to call the following expert witnesses:

PARTY CALLING THE WITNESS	AREA OF EXPERTISE	WITNESS	PRODUCTION STATUS
Navamar	Greek law.	Mr. George Iatridis of Ince & Co.	Report dated February 18, 2010

		(in chief)	and filed on February 19, 2010.
Navamar	Common practice for repair companies in the Perama repair zone and prices charged by Navamar to Rodel for the work that it carried out to the M.V. FEDON.	Mr. Tassos Eleftheriou of Theta Marine S.A. (in chief)	Report dated January 4, 2010 and filed on February 19, 2010.
Navamar	Fair costs of the repair work <u>in rebuttal to Mr. George D. Margetis</u> of Margetis Maritime Consulting expert report.	Mr. Tassos Chondromatidis (under Rule 263 c) iii) <i>F.C.R. and in strict rebuttal</i>)	Report to be filed and served on or before September 9, 2011.
Rodel	Common practice for repair companies in the Perama repair zone and prices charged by Navamar to Rodel for the work that it carried out to the M.V. FEDON.	Mr. George D. Margetis of Margetis Maritime Consulting (in chief)	Report dated and filed on May 3, 2010.

[Emphasis added.]

Analysis

[9] What stands out from the table reproduced above is that, according to the typical approach, the Margetis Report was produced by Rodel in May 2010 in rebuttal to the report from Theta Marine that was previously produced in chief by Navamar in February 2010. That sequence does not appear to present any difficulties.

[10] Where the difficulty arises, according to Rodel, is that, as is clearly indicated in that same table, the Chondromatidis Report from September 2011 strictly had to be a report in rebuttal to the Margetis Report.

[11] The following reasons that we find in the notice of motion under review from Rodel clearly summarizes the dynamic that the Court had understood, and which led this Court on July 7, 2011, to circumscribe what the Chondromatidis Report could cover:

- d) The dispute turns, in large part, of the nature of the agreement between the parties, the terms of art used by ship repairers and shipowners in Perama repair zone and the extent of the repairs that were covered by a quote given by the Plaintiff;
- e) Of particular importance is the meaning of the term “fitted steel” in the context of a steel repairs on a vessel;
- f) These issues were clearly raised by Rodel in its Statement of Defence;
- g) These issues were also canvassed at length in the course of the examinations for discovery;
- h) On January 4, 2010, the Plaintiff filed the expert report of THETA Marine S.A. (“Theta”) which purports to comment on the merits of the Plaintiff’s case;
- i) On May 3, 2010, Rodel filed the report of Margetis Maritime Consultants (“Margetis”) in rebuttal to the Theta report. In that report, Margetis analysed the evidence, provided background information on repairs in Perama and analyses the invoices submitted by the Plaintiff and the calculations made by Theta;
- j) Despite having the Margetis report for over a year, it was only at the Pre-Trial Conference that the Plaintiff announced its intention to file a report by Mr. Anastasios Chondromatidis in sur-rebuttal to the Margetis report during the first week of September;
- k) This request was opposed by Rodel;

- 1) The Case Management Judge, Prothonotary Me Morneau included in his CMO of July 7, 2011 that the eventual report of Mr. Chondromatidis must be in “strict rebuttal”;

...

[12] After hearing counsel for the parties and analyzing their motion records, I support taking Rodel’s position and find that their submissions — and especially the table that its counsel reproduced on pages 14 *et seq.* of its written submissions — fairly and reasonably translate the following findings made by Rodel at paragraphs 17, 18 and 30 of its written submissions:

17. Rodel objects to the filing of the Chondromatidis Report as it constitutes an attempt by the Plaintiff to split its evidence. The Chondromatidis Report examines documents that were already disclosed in the Affidavits of Documents and discusses issues that were raised in the pleadings and/or during the examinations for discovery. Navamar had every opportunity to deal with these issues in its initial report, produced by Theta Marine in January 2010.
18. A sur-rebuttal report, or rebuttal evidence in general from the Plaintiff, is only be admissible where there are new facts raised in defence that were not dealt with during the evidence in chief (whether factual or expert) or could not have been dealt with in the evidence in chief. This is clearly not the case here.
- (...)
30. In light of the above, it is respectfully that the Chondromatidis Report is essentially confirmatory of the Plaintiff’s case. It addresses issues and evidence that were available well before the Theta Report was prepared and that were either dealt with in the Theta Report or could have been dealt with in the Theta Report. (...)

[Emphasis added.]

[13] While the Theta Marine report could or should have dealt with all the points that were raised in the Chondromatidis Report, this division of the expert evidence by Navamar causes prejudice to Rodel because in addition to the fact that this report does not comply with this Court's order dated July 7, 2011, retaining the Chondromatidis Report would legitimately lead to Rodel wanting to rebut that report. In addition to causing additional expenditures of energy and money for Rodel, this new rebuttal would encourage the creation of a sequence of reports that are not warranted in this case and which may, in principle, be never-ending.

[14] For the above reasons, I no longer find that it is in the interests of justice to allow the Chondromatidis Report to be retained.

ORDER

CONSEQUENTLY, Rodel's motion is allowed, with costs up to \$1,400.00, and the Chondromatidis Report is stricken from this Court's record.

“Richard Morneau”

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1495-07

STYLE OF CAUSE: NAVAMAR LTD.
v.
RODEL ENTERPRISES INC.
and THE SHIP FEDON
and THE OWNERS AND ALL THOSE INTERESTED
IN THE SHIP FEDON

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 11, 2012

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: January 13, 2012

APPEARANCES:

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