

Federal Court



Cour fédérale

Date: 20130618

Docket: T-2145-12

Citation: 2013 FC 671

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Scott

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

SDV LOGISTIQUES (CANADA) INC.

Plaintiff

and

**THE DIESELGENSET TYPE 8M 25, ENGINE
NO. 45085 EX THE BARGE "ANDREA"**

and

**THE OWNERS AND ALL OTHERS
INTERESTED IN THE DIESELGENSET
TYPE 8M 25, ENGINE NO. 45085 EX THE
BARGE "ANDREA"**

and

**THE DIESELGENSET TYPE 8M 25, ENGINE
NO. 45086 EX THE BARGE "ANDREA"**

and

**THE OWNERS AND ALL OTHERS
INTERESTED IN THE DIESELGENSET
TYPE 8M 25, ENGINE NO. 45086 EX THE
BARGE "ANDREA"**

and

**THE DIESELGENSET TYPE 8M 25, ENGINE
NO. 45087 EX THE BARGE "ANDREA"**

and

**THE OWNERS AND ALL OTHERS
INTERESTED IN THE DIESELGENSET**

**TYPE 8M 25, ENGINE NO. 45087 EX THE
BARGE “ANDREA”
and
THE DIESELGENSET TYPE 8M 25, ENGINE
NO. 45088 EX THE BARGE “ANDREA”
and
THE OWNERS AND ALL OTHERS
INTERESTED IN THE DIESELGENSET
TYPE 8M 25, ENGINE NO. 45088 EX THE
BARGE “ANDREA”
and
THE LIFTING-DEVICE EX THE
BARGE “ANDREA”
and
THE OWNERS AND ALL OTHERS
INTERESTED IN THE LIFTING-DEVICE
EX THE BARGE “ANDREA”
and
EXPORT DEVELOPMENT CANADA**

Defendants

**and
OCEAN HOTELS I LTD
and
OCEAN HOTELS II LTD
and
DAVIES YARDS INC**

Mises-en-cause

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an appeal by Plaintiff, SDV Logistiques (Canada) Inc. (SDV), pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 (the *Rules*), for an Order in Appeal reversing the decision rendered by Mr. Richard Morneau, Prothonotary, on May 14, 2013, refusing to allow the sale of 4

marine diesel generators (the generators) and a lifting device located in Hamburg, Germany, under Rule 379 of the *Rules*, for lack of jurisdiction of this Court.

[2] For the reasons that follow, this appeal is dismissed with costs.

II. The facts

[3] In April 2010, Davie Yards Inc. (Davie 1) instructed SDV to arrange for the pick-up and shipment of various cargoes including the generators. SDV, pursuant to its agreement and further to additional instructions issued by Davie on May 28, 2010, arranged for the pick-up of the generators from Kiel and their delivery and storage to the port of Hamburg where they arrived aboard the barge Andrea on June 2, 2010.

[4] Since June 2, 2010, the generators have been placed in warehousing at Unikai's Terminal, shed 48, at the port of Hamburg. The warehouse is operated by another company of the SDV Group, namely SDV Projects GmbH.

[5] The successor company to Davie 1 paid for the monthly storage fees of approximately 13 000 euros until March 12, 2012, despite the fact that it has been carrying business since February 24, 2010, under the *Companies' Creditors Arrangement Act*, (RSC, 1985, c C-36).

[6] Since that date Davie 3, a new company that has purchased the assets of the Davie Shipyard, has ceased to make payments to SDV for the storage and warehousing costs the latter is incurring on a monthly basis. The current balance owed to SDV stands at \$234 264.05.

[7] On October 5, 2009, the Export Development Corporation (EDC) entered into a loan agreement (the loan agreement) with the mises-en-cause, Ocean Hotels I Limited and Ocean Hotels II Limited, as borrowers, whereby certain sums of money were loaned to complete the construction by Davies of Hulls 721 and 722.

[8] The loan agreement granted EDC a first priority mortgage on Hulls 721 and 722 and all appurtenances pertaining to each one, including machinery and equipment, such as the Generators.

[9] On October 30, two separate moveable hypothecs and shipbuilder's mortgage agreements were entered into between EDC and Ocean Hotels I Limited and Ocean Hotels II Limited.

[10] EDC did register first priority shipbuilder's mortgages on each hull and appurtenances related to each and registered first priority hypothecs in Quebec over each hull and all appurtenances pertaining to each.

[11] Under the RDPRM, that is the Quebec Register of Personal and Movable Real Rights, EDC remains in first priority position and is the sole marine mortgagee.

[12] SDV alleges that the generators and lifting unit (the Defendants' cargoes) are *in rem* defendants. The generators and lifting device were purchased and paid for on behalf of Ocean Hotels I Limited and Ocean Hotels II Limited, they are appurtenances to be installed on Hulls 721 and 722.

[13] Davie has recently resumed operations and is now owned by a new entity (Davies 3) and Hulls 721 and 722 are still in a partially-constructed state.

[14] The Defendants' cargoes are still in Hamburg and have never been in Canada.

[15] Ocean Hotels I Limited and Ocean Hotels II Limited have defaulted on the loan agreement and EDC claims to be in a position to sell Hulls 721 and 722 pursuant to section 69 of the *Canada Shipping Act 2001*, SC 2001, c 26 (the *Shipping Act*).

[16] A warrant for the arrest of the Defendants' cargoes was issued on November 28, 2012 but was never served *in rem*.

[17] SDV amended its pleadings on May 1st, 2013 to pursue its action *in personam* against EDC.

III. Relevant legislation

[18] The applicable section of the *Canada Shipping Act 2001*, SC 2001, c 26, and the applicable Rules of the *Federal Courts Rules*, SOR/98-106 are appended to this decision.

IV. The issues

1. *What is the standard of review for an appeal of a Prothonotary's decision?*
2. *Does the Federal Court have jurisdiction in the present case?*

V. The standard of review

[19] Both parties point the Court to the well known principles established by the Federal Court of Appeal in *R v Aqua Gem Investments*, [1993] 2 FC 425 (FCA) and *Merck 7 Co. v Apotex Inc.*, [2004] 2 FCR 459 (FCA) and by the Supreme Court in *Z. I. Pompey Industrie v ECU-line N. V.*, [2003] 1 SCR 450 that discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless they are clearly wrong or they raise questions that are vital to the final issue of the case.

[20] EDC argues that the Court should not have to determine whether the Prothonotary's findings were vital to the final issue of the case as his decision concerned the jurisdiction of the Court, which is a pure question of law that attracts a standard of correctness as determined by the Supreme Court in *Housen v Nikolaisen*, [2002] 2 SCR 235.

[21] The Court disagrees with EDC's position as *Dunsmuir* clearly states that in applying the standard of correctness the reviewing Court, must set aside the findings in first instance and conduct its own analysis (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9).

[22] The Court will consequently proceed on a *de novo* basis.

VI. Position of the parties

A. SDV's position

[23] SDV argues that the Prothonotary erred in refusing to apply Rule 379 of the *Federal Court Rules*, for the following reasons:

- a) the Federal court has jurisdiction to hear cases dealing with navigation and shipping, which includes warehousing and storage that arise out of a contract for the carriage of goods by sea (see *ITO-International Terminal operators Ltd v Milsa Electronics*, [1986] 1 SCR 752);
- b) the Court's jurisdiction may be exercised *in personam*, as in the present instance, and there exists no geographical restrictions on the exercise of its jurisdiction nor on the place where the cause of action originates;
- c) citing the decision in *Alpha Trading Monaco SAM v the ship "Sarah Desgagnés"*, 2010 FC 695 [*Alpha Trading Monaco*], where the Court ordered the arrest of a ship under arrest in another forum, there is no impediment for the Court to issue an order to sell the Defendants' cargoes notwithstanding that they are located in Hamburg, because it is under the control of a Canadian company subject to its jurisdiction; and
- d) the Court has the power to order the judicial sale of goods while these goods may not be under arrest, since the location of these goods is irrelevant as they are within the

power and control of SDV, a Canadian company (see *Imperial Trusts Co v Lequesnoy*, 1921 CarswellNat 17 [Lequesnoy]).

[24] Finally, SDV argues that if the Court refuses to reverse the Prothonotary's decision and issue an Order for the sale of the generators because there is peril to the Defendants' cargoes, this would be inequitable since SDV will be forced to institute proceedings in Germany.

B. EDC's position

[25] EDC alleges that the Prothonotary's decision should be upheld for the following reasons:

- a) firstly, the action before the Court at this time is no longer an action *in rem* but solely an action *in personam* against EDC;
- b) while there is no doubt that the Federal Court's jurisdiction may, in all cases, be exercised *in personam*, by abandoning the *in rem* portion of the present action, SDV is left with solely one *in personam* defendant;
- c) under section 69 of the *Shipping Act*, EDC has a statutory power of sale over the Defendants' cargoes which are not in Canada, as mortgagee, and is the only party who benefits from a statutory provision granting it such right;
- d) the Federal Court being a statutory court, in absence of a precise statutory empowerment, cannot sell property such as Defendants' cargoes which have never been in Canada and were never served with an action;
- e) in the present case, there is no need for a *forum non conveniens* analysis since there is no competing jurisdiction;

- f) in this *in personam action* for unpaid storage charges, Rule 379 cannot apply as the generators are not the subject of the action and there is no evidence before the Court that they are deteriorating; and
- g) Rule 379 can only apply to property in Canada in the possession of a party to the action.

VII. Analysis

[26] It is clear that the Federal Court has *in personam* jurisdiction over cases dealing with navigating and shipping including claims for warehousing arising out of the carriage of goods by sea, but in the present case, it is to be noted that there exists no contract for the storage of goods between SDV and Davies 3 or with EDC, the sole defendant in this *in personam action*, for unpaid storage charges. While the Federal Court has *in personam* jurisdiction, there needs to be a statutory provision granting the Court power to force the sale of cargoes which have never been in Canada. The sole existing provision is found in section 69 of the *Shipping Act*. It empowers the mortgagee, in this instance EDC, to seek an order from the Court for the sale of mortgaged property which is not in Canada.

[27] The Court rejects SDV's argument that *Lequesnoy* cited above, in fact should be read as granting such statutory power to order the sale of the generators for unpaid storage charges in the present instance. It is clear, from a reading of *Lequesnoy*, that there existed an enabling provision specifically granting power to a mortgagee notwithstanding that the ship was not within the power of the Exchequer Court at the time by arrest. Sections 29 and 35 of the *Merchant Shipping Act*,

1894, c 60, granted such powers to the Court to issue an order in favor of mortgagees. There is no equivalent provision in the *Shipping Act* granting such power to issue an order in favour of SDV who does not hold mortgagee's rights against the generators as does EDC. SDV could not point the Court to another statute. Hence, the Court is without any enabling provision to grant the relief sought.

[28] Similarly for SDV's reference to the *Alpha Trading Monaco* case cited above. That case is clearly distinguishable from the case at bar for a number of reasons. Firstly, the ship in Monaco had previously been arrested in Canada and released on bail, which is quite different from the present case where the generators were never in Canada and the warrant for their arrest which was issued on November 28 2012, was never served *in rem*. More so, as SDV released its warrant on May 1, 2013, thereby limiting its action to one *in personam*.

[29] It is also quite apparent that Rule 379 cannot be applied because the generators are not and have never been in Canada. Furthermore, there is no evidence before the Court that the generators are likely to deteriorate. The affidavit of Mr. Fontan submitted by SDV does not constitute binding evidence of deterioration since he merely states an opinion as financial manager of SDV that he fears that the value of the stored generators may be diminishing.

[30] Rule 379 is a general provision in the Court's Rules. It is found in Part 8 of the *Rules* which deals with preservation of rights in proceedings. Part 13 of the *Rules* is the section devoted to admiralty actions. Rule 475(2) is at the very beginning of Part 13 and states that; "[e]xcept to the

extent that they are inconsistent with this Part, the rules applicable to other actions also apply to Admiralty actions.”

[31] For the Court to be able to issue an Order pursuant to Rule 379, there needs to be an enabling provision granting it the right to issue such Order for property that is outside its jurisdiction. As stated above, there is no provision in the admiralty section of the *Rules* as the action against the Defendant EDC is strictly *in personam*. There is also no other statutory enabling provision and there is no evidence before the Court that the cargoes are actually in peril.

[32] Consequently, this appeal is dismissed with costs because the Prothonotary was correct in affirming that the Court has no jurisdiction in the present case to issue the Order sought by SDV.

ORDER

THIS COURT ORDERS that the appeal be dismissed with costs.

“André F. J. Scott”

Judge

ANNEX

Section 69 of the *Canada Shipping Act 2001*, SC 2001, c 26, provides as follows:

Mortgagee has power of sale

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.

Restriction

(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.

Le créancier hypothécaire a le pouvoir de vendre

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.

Limites

(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.

Rules 51, 379 and 475(2) of the *Federal Courts Rules*, SOR/98-106, provide as follows:

Appeal

51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

Service of appeal

(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.

Appel

51. (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

Signification de l'appel

(2) L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.

Sale of perishable or deteriorating property

379. Where any property, other than real property or immovables, that is the subject-matter of a proceeding or the subject of a question that may arise in a proceeding

(a) is of a perishable nature,

(b) is likely to deteriorate if kept, or

I should for any other reason be sold without delay,

on motion, the Court may order the sale of the property, in such a manner and on such conditions as may be specified in the order.

Application

475. (1) This Part applies to Admiralty actions.

Application of other rules

(2) Except to the extent that they are inconsistent with this Part, the rules applicable to other actions apply to Admiralty actions.

Vente de biens périssables

379. La Cour peut, sur requête, ordonner — de la manière et aux conditions qu'elle précise dans l'ordonnance — la vente des biens, autres que les immeubles ou les biens réels, qui font l'objet d'une instance ou au sujet desquels une question peut y être soulevée et qui, selon le cas :

a) sont de nature périssable;

b) risquent de se détériorer s'ils sont gardés;

c) doivent, pour toute autre raison, être vendus sans délai.

Application

475. (1) La présente partie s'applique aux actions en matière d'amirauté.

Incompatibilité

(2) Sauf dans la mesure où elles sont incompatibles avec une règle de la présente partie, les règles applicables aux autres actions s'appliquent aux actions en matière d'amirauté.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2145-12

STYLE OF CAUSE: SDV LOGISTIQUES (CANADA) INC.
v
THE DIESELGENSET TYPE 8M 25, ENGINE NO.
45085 EX THE BARGE "ANDREA" ET AL
and
OCEAN HOTELS I LTD ET AL

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: June 3, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: June 18, 2013

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