

Federal Court



Cour fédérale

Date: 20190802

Docket: T-1128-17

Citation: 2019 FC 1043

Ottawa, Ontario, August 2, 2019

PRESENT: The Honourable Mr. Justice Southcott

ADMIRALTY ACTION *IN REM*

BETWEEN:

ROYAL BANK OF CANADA

Plaintiff

and

**SEAMOUNT MARINE LTD.,
AND THE OWNERS AND ALL
OTHERS INTERESTED IN
THE SHIP "OCEAN MARAUDER"**

Defendants

ORDER AND REASONS

I. Overview

[1] This decision addresses a motion filed on July 5, 2019 by Smythe Insolvency Inc., the trustee in bankruptcy [the Trustee] for the Defendant, Seamount Marine Ltd. [Seamount], seeking a stay of the claim of Stryder King Holdings Ltd. [Stryder King] against the proceeds of

sale of the Defendant Vessel “Ocean Marauder” [the Vessel] and seeking an order paying out of Court to the Trustee all remaining funds from the proceeds of sale. The motion is opposed by Stryder King and was argued in Vancouver on July 18, 2019.

[2] For the reasons explained below, this motion is granted, and an Order will issue staying the claim of Stryder King and paying to the Trustee the remaining proceeds of sale of the Vessel less \$2000.00, which sum will remain in Court as security for the claim of the Campbell River Harbour Authority.

II. **Background**

[3] Stryder King is a British Columbia company involved in the commercial fishing industry. Its principal is Michael Dudek. Seamount is a British Columbia company which was also involved in the commercial fishing industry until its bankruptcy in September 2017. Seamount’s principal was David McIntyre, Mr. Dudek’s son-in-law. The Vessel is a fishing vessel registered under the *Canada Shipping Act 2001*, SC 2001, c 26 [CSA], at the port of Vancouver with official number 383475. It was Seamount’s primary asset.

[4] As documented in a written agreement dated May 20, 2015 [the Loan Agreement], Stryder King loaned Seamount a combined principal sum of \$2 million, at various rates of interest and with various dates of advancement and required repayment, to enable Seamount to purchase the Vessel and establish a commercial black cod fishing business. The Loan Agreement includes the following paragraph:

It is to be understood that a formal mortgage tied to the vessel Marauder TC # [redacted] for which the loans have been taken out may be requested after December 31, 2015 should there be a default with any of these arrangements.

[5] Seamount made interest payments to Stryder King on September 14, 2015 and September 28, 2015 but subsequently failed to make any further interest payments. Seamount also made a single payment of \$150,000.00 toward repayment of principal on September 14, 2015, but it subsequently failed to make any further principal payments as required by the terms of the Loan Agreement.

[6] On April 6, 2017, Stryder King issued a written demand to Seamount that it execute a registrable marine mortgage, in a form enclosed with the demand. This demand went unsatisfied, and on April 25, 2017, Stryder King commenced an admiralty action (with Victoria Registry file no. 17 1601) in the British Columbia Supreme Court [BCSC], *in personam* against Seamount and *in rem* against the Vessel, seeking to enforce the Loan Agreement. Stryder King caused the Vessel to be arrested in the BCSC action at her berth in Campbell River, British Columbia on or about April 27, 2017.

[7] At the time of the Vessel's arrest, it was also the subject of mortgages registered under the CSA in favour of the Royal Bank of Canada [RBC] as a first mortgagee and Lenico Holdings Ltd. [Lenico] as a second mortgagee. On July 26, 2017, RBC commenced the present Federal Court action to enforce its first priority statutory marine mortgage. On September 14, 2017, Stryder King filed a Caveat Release in this action. Upon motion by RBC, Justice Strickland issued an Order dated September 19, 2017, later replaced by an Amended Order of the same

date, initiating a process for judicial sale of the Vessel [the Sale Order]. On September 26, 2017, Stryder King released the Vessel from arrest in the BCSC action to permit the sale of the Vessel in this action.

[8] On October 20, 2017, Stryder King also commenced a separate action in this Court (in Court file no. T-1604-17) *in personam* against Seamount and *in rem* against the Vessel, claiming judgment for amounts owing by Seamount under the Loan Agreement and a declaration that Stryder King holds an equitable mortgage in respect of the Vessel for such amounts.

[9] A sale of the Vessel was approved by Order dated November 1, 2017, for the amount of \$1,800,000.00, which proceeds were paid into Court in this action. The Sale Order included the following terms potentially relevant to the present motion:

9. The Sheriff shall also include in the advertisement for sale a notice to creditors to the effect that:

....

- b. Any claim against the Vessel or the proceeds of its sale by an alleged creditor must be filed by Affidavit in any Registry Office of the Federal Court on or before October 26, 2017, failing which the claim shall be barred. Such Affidavit shall provide full particulars of the claim, its basis and alleged status. If priority is claimed, the creditor/claimant shall set out the basis upon which it claims such priority.

10. The terms set out in the advertisement as listed in paragraphs 8 and 9 are terms of this Order.

....

17. All questions relating to the right of any claimant, including the Plaintiff and Caveators, against the Vessel or the proceeds of sale of the Vessel and all questions respecting the priority of all

in rem creditors shall be reserved until further order of the Court.

18. Liberty to apply to the Court to vary or set aside this Order or any provision thereof is granted to all interested parties.

[10] The only affidavits of claim filed in this action by the October 26, 2017 deadline prescribed by the Sale Order were those of RBC and Lenico (claiming amounts secured by their first and second priority marine mortgages registered under the CSA), the Campbell River Harbour Authority [CRHA] (claiming a principal debt of \$1786.06 for unpaid moorage and related charges and claiming a possessory lien over the Vessel) and Stryder King. Stryder King's Affidavit of Claim, filed on October 26, 2017, claimed amounts owing to it under the Loan Agreement and claimed the status of an unregistered mortgagee or an equitable mortgagee with priority subsequent to the registered mortgages but ahead of unsecured creditors.

[11] In the meantime, Seamount filed an Assignment in Bankruptcy on September 13, 2017. The Trustee was appointed as the trustee in bankruptcy for Seamount, and Stryder King filed with the Trustee a Proof of Claim dated September 22, 2017, asserting a secured claim in the amount of \$2,129,853.54 and referring to "an equitable ships mortgage granted December 31, 2015" [the Proof of Claim]. The Proof of Claim attached an accounting of the amount owing to Stryder King and a copy of the Loan Agreement.

[12] On October 30, 2017, the Trustee issued to Stryder King a Notice of Disallowance, which disallowed Stryder King's secured claim of \$2,129,853.54 and allowed this amount as an unsecured claim. The Notice of Disallowance provided the following reasons for disallowing the secured claim:

The creditor has not provided sufficient description of the property and the document titled “Agreement for the Loan of Funds to Seamount Marine Ltd. from Stryder King Holdings Ltd.” drafted May 20, 2015 is inadequate to meet the test for an equitable mortgage.

In addition, even if the loan were determined to be an equitable mortgage, which we don’t believe:

- pursuant to Section 20(b)(i) of the Personal Property Security Act (PPSA) as a result of a financing statement not being filed in the Personal Property Registry as of the date of bankruptcy, the secured claim is void against the Trustee.
- pursuant to Section 70 of the Canada Shipping Act (CSA) there is a requirement to register the security in the Registry of Vessels as at the date of bankruptcy for the secured claim to be valid against the Trustee. The security was not registered as of September 13, 2017 and thus void against the Trustee.

[13] The Notice of Disallowance further states that, if Stryder King is dissatisfied with the decision disallowing its secured claim, it may appeal to the Court within 30 days after the Notice is served or sent, or within such further period as the Court may allow on application made within the 30 day period. While “Court” is not defined in the document, the Notice of Disallowance bears a heading which refers to the Supreme Court of British Columbia in Bankruptcy. Stryder King did not appeal the Notice of Disallowance to the BCSC.

[14] Upon motion, the Federal Court issued Orders in this proceeding in December 2017, declaring RBC and Lenico to hold first and second priority mortgages over the Vessel and paying to them out of the proceeds of sale of the Vessel the amounts of \$804,997.05 and \$349,550.46, respectively. The Acting Sherriff’s commission and costs were assessed at

\$59,252.89 and were also ordered paid from the proceeds of sale. At the hearing of the present motion, counsel for Stryder King confirmed that the amount remaining in Court from the proceeds of sale of the Vessel, as of the end of June 2019, totals \$527,053.90 inclusive of interest.

[15] On December 18, 2018, Stryder King filed a motion in this action, seeking a determination that it holds an equitable mortgage over the Vessel and an order paying to it the remaining proceeds of sale. The hearing of that motion was adjourned to July 18, 2019. On July 5, 2019, the Trustee filed the present motion, seeking to stay Stryder King's claim and instead have the remaining proceeds of sale paid to the Trustee. The parties initially requested that the Trustee's motion be heard on July 18, 2019, along with Stryder King's motion, but subsequently requested that only the Trustee's motion be heard on that date. The Court granted both requests, and Stryder King's motion was adjourned *sine die*.

[16] Subsequently, on July 15, 2019, Stryder King submitted to the Court Registry a motion record dated July 14, 2019 seeking leave pursuant to Rule 201 to amend its Statement of Claim in Federal Court file no. T-1604-17 to plead, in addition to its claim to an equitable mortgage, principles of unjust enrichment and promissory estoppel giving rise to a constructive or resulting trust over the Vessel. Stryder King sought an abridgement of time to have this motion returnable on July 18, 2019 in Vancouver, at the same time as the Trustee's stay motion. The Trustee opposed the scheduling of the new motion on July 18.

[17] On July 16, 2019, I issued a Direction, agreeing with the Trustee's position and declining to schedule Stryder King's amendment motion in T-1604-17 for hearing on July 18. However, I noted that Stryder King had also filed a motion record in response to the Trustee's stay motion, attaching copies of Stryder King's intended motion to amend its Statement of Claim in T-1604-17 and presenting arguments based on that intention in response to the Trustee's request for a stay. My Direction therefore indicated an expectation that the parties would address those arguments at the hearing of the Trustee's motion on July 18, 2019.

III. Issues

[18] At the hearing of the Trustee's motion, I noted that there was considerable overlap between the arguments advanced by the parties in their motion records filed in the Trustee's stay motion and the arguments in the motion records filed in Stryder King's December 18, 2018 motion seeking determination that it holds an equitable mortgage. The parties' counsel acknowledged that their respective materials filed in the stay motion addressed arguments relevant to whether Stryder King holds an equitable mortgage, including whether an equitable mortgage would arise on the facts of this case, whether the holder of an equitable mortgage qualifies as a "secured creditor" under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA], and whether the failure of Stryder King to register a financing statement under the *British Columbia Personal Property Security Act*, RSBC 1996, c 359 [PPSA] resulted in any equitable mortgage it held being ineffective against the Trustee. However, the parties' counsel jointly agreed that, while they were referring to those arguments to provide the Court with context related to the dispute surrounding Stryder King's claim, they were not seeking adjudication of those arguments in the stay motion. Depending on the outcome of the stay motion, those

arguments would be advanced in a subsequent hearing of Stryder King's motion seeking determination that it holds an equitable mortgage.

[19] The Trustee brings the present motion, seeking a stay of Stryder King's claim and, if the stay is granted, payment to the Trustee of the remaining proceeds of sale, based on arguments to the effect that the question of Stryder King's claim to an equitable mortgage has already been finally and conclusively decided in the bankruptcy proceeding under the provisions of the BIA, as a result of the decision contained in the Notice of Disallowance issued by the Trustee and Stryder King's failure to appeal that decision to the BCSC. The Trustee relies on the doctrines of issue estoppel (forming part of the doctrine of *res judicata*), collateral attack, abuse of process, and election in support of its arguments. Stryder King responds with arguments to the effect that its claims have not been finally and conclusively decided and that it would be inappropriate for the Court to issue a stay of proceedings. These arguments include substantial reliance on Stryder King's intention to assert principles of constructive and resulting trust and proprietary estoppel.

[20] Neither of the parties has expressly articulated a list of issues to be decided in this motion. However, in my view, the arguments requiring adjudication can appropriately be addressed within the framework of the following two issues:

- A. Should the Court order that Stryder King's claim be stayed?
- B. If so, should the Court issue an order that all remaining funds from the proceeds of sale of the Vessel be paid out of Court to the Trustee?

IV. **Analysis**

A. *Should the Court order that Stryder King's claim be stayed?*

[21] As a starting point, I note Stryder King's submission that Seamount's bankruptcy does not detract from the jurisdiction of the Federal Court to adjudicate secured claims *in rem* against the Vessel. There is no doubt that Stryder King is correct in advancing this position, which was explained by the Supreme Court of Canada in *Holt Cargo Systems v ABC Containerline NV (Trustee of)*, 2001 SCC 90 at para 66, and is consistent with s 69.3(2) of the BIA, which provides that the bankruptcy of a debtor, and the stay of proceedings imposed by s 69.3(1) as a result of a bankruptcy, do not prevent a secured creditor from realizing upon its security.

[22] Indeed, I do not understand the Trustee to be taking issue with this proposition. The Trustee takes the position that the facts of this case do not provide Stryder King with the benefit of a secured claim for purposes of the BIA and that, even if they did, the lack of a registration under the PPSA would deprive Stryder King of such benefit. However, as previously observed, the Trustee's request for a stay does not rely upon those positions. Rather, the Trustee's stay motion results from the particular manner in which Stryder King's claim has been approached in the present case, such that, in the Trustee's submission, Stryder King's effort to invoke the jurisdiction of the Federal Court represents an inappropriate effort to re-litigate issues that have already been adjudicated.

[23] As previously noted, Stryder King filed with the Trustee a Proof of Claim asserting a secured claim in the amount of \$2,129,853.54 and referring to an equitable ships mortgage in

support thereof. The Trustee disallowed this secured claim in its Notice of Disallowance issued on October 30, 2017, and Stryder King did not appeal that decision. The Trustee relies on the following subsections of s 135 of the BIA to support its arguments that the issue of Stryder King's entitlement to a secured position has therefore been finally and conclusively determined:

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security

....

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

- (a)** any claim;
- (b)** any right to a priority under the applicable order of priority set out in this Act; or
- (c)** any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under

Examen de la preuve

135 (1) Le syndic examine chaque preuve de réclamation ou de garantie produite, ainsi que leurs motifs, et il peut exiger de nouveaux témoignages à l'appui

....

Rejet par le syndic

(2) Le syndic peut rejeter, en tout ou en partie, toute réclamation, tout droit à un rang prioritaire dans l'ordre de collocation applicable prévu par la présente loi ou toute garantie.

Avis de la décision

(3) S'il décide qu'une réclamation est prouvable ou s'il rejette, en tout ou en partie, une réclamation, un droit à un rang prioritaire ou une garantie, le syndic en donne sans délai, de la manière prescrite, un avis motivé, en la forme prescrite, à l'intéressé.

subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Effet de la décision

(4) La décision et le rejet sont définitifs et péremptoires, à moins que, dans les trente jours suivant la signification de l'avis, ou dans tel autre délai que le tribunal peut accorder, sur demande présentée dans les mêmes trente jours, le destinataire de l'avis n'interjette appel devant le tribunal, conformément aux Règles générales, de la décision du syndic.

[24] It is undisputed that Stryder King did not appeal to the BCSC the Trustee's disallowance of its security under s 135(2)(c), as it was entitled to do under 135(4). The Trustee submits that such disallowance therefore became a final and conclusive determination by operation of s 135(4). In reliance on these facts and statutory provisions, the Trustee argues that the doctrines of issue estoppel, collateral attack, abuse of process and election all preclude Stryder King from pursuing adjudication of its claim in the Federal Court.

[25] Turning first to issue estoppel, the Trustee refers the Court to *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [*Toronto (City)*] at para 23, which describes this doctrine as a branch of *res judicata* that precludes the re-litigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, there are three conditions: (a) the issue

must be the same as the one decided in the prior decision; (b) the prior judicial decision must have been final; and (c) the parties to both proceedings must be the same.

[26] While the Trustee is obviously not a court, it relies on authority to the effect that decisions of a trustee in bankruptcy, in allowing or disallowing a claim, are both final and of a judicial nature, subject only to appeal under s 135(4) of the BIA (see *Friedland, Re*, 2011 BCSC 1058 [*Friedland*] at para 12, relying on *Galaxy Sports Inc., Re*, 2004 BCCA 284). Stryder King has advanced no basis for the Court to decline to follow this authority.

[27] I also agree with the Trustee that *Associated Freezers of Canada Inc (Faillite de)*, 1999 CanLII 11515 (QCCS) [*Associated Freezers*] is instructive. In that case, the trustee in an Ontario bankruptcy had disallowed a proof of claim in accordance with s 135(2) of the BIA. The creditor appealed the disallowance to the Ontario Court (General Division) but subsequently abandoned that appeal. In the course of subsequent efforts by the creditor to assert a security interest in Québec, the Québec Cour Supérieure [QCCS] considered, at paragraphs 27 to 30, the effect of the trustee's previous disallowance of the creditor's claim. The QCCS held that, following the creditor's abandonment of its appeal to the Ontario Court, the trustee's disallowance was in every way as final and conclusive as a judgment of a competent court of civil jurisdiction.

[28] Moreover, in reciting the history of the bankruptcy proceedings, *Associated Freezers* noted that that the Ontario Court had previously considered a related motion and had concluded that, following the trustee's disallowance of the creditor's claim and the appeal of that disallowance having been abandoned, the matter was *res judicata*. Relying on the trustee's

disallowance of the claim and the subsequent decision of the Ontario Court (which had been confirmed by the Ontario Court of Appeal), the QCCS also concluded that the matter had become *res judicata*.

[29] Stryder King submits that the intent in filing the Proof of Claim was to put the Trustee and the other creditors of Seamount on notice that Stryder King was a creditor. It argues that not all of its claim is secured and submits that it only attorned to the jurisdiction of the Trustee in respect of the unsecured portion of its claim, related to Seamount assets outside the jurisdiction of the Federal Court. I find little merit to this submission. As noted by the Trustee, there is no evidence before the Court of Stryder King's intention in filing the Proof of Claim. Moreover, the Proof of Claim expressly describes the claim as a secured claim and, apparently in response to the portion of the proof of claim form which requests particulars of the security, refers to an equitable ships mortgage. Also, if Stryder King had concluded, following receipt of the Notice of Disallowance, that the Trustee had misinterpreted the intention or nature of the Proof of Claim, it was available to Stryder King to appeal the disallowance of its security to the BCSC under s 135(4) of the BIA.

[30] Stryder King also argued at the hearing that the effect of an equitable mortgage is to create not only a security interest but also a constructive trust over the relevant asset. Therefore, it says, it holds a property interest in the Vessel which is not within the jurisdiction of the Trustee to disallow. However, again, if Stryder King had concluded, following receipt of the Notice of Disallowance, that the Trustee had exceeded its jurisdiction in disallowing its claim, its recourse was to appeal the decision to the BCSC. In my view, Stryder King cannot avoid the application

of the doctrine of *res judicata* by raising in the Federal Court arguments that could have been raised before the Trustee and in an appeal to the BCSC. As noted in the description of the earlier decision of the Ontario Court at paragraph 9 of *Associated Freezers*, the doctrine of *res judicata* does not rest on whether or not the decision of the trustee in bankruptcy is right, but rather on whether it is binding, and involves any aspect which could have reasonably been raised before the trustee.

[31] Returning to the conditions prescribed by *Toronto (City)* for application of the doctrine of issue estoppel, my conclusion is that the Trustee's decision in its Notice of Disallowance is a final decision of a nature that permits invocation of the doctrine, and the parties to the process leading to the Notice of Disallowance are the same as those presently before the Court. I also find that, subject to arguments arising from Stryder King's intention to amend its Statement of Claim in T-1604-17, the issue addressed by the Notice of Disallowance (i.e. the question of Stryder King's entitlement to an equitable mortgage) is the same as the issue presently before the Court. I will consider Stryder King's amendment arguments later in this analysis but, subject thereto, find that the principles of issue estoppel / *res judicata* preclude Stryder King from pursuing its claim through the within proceeding.

[32] Although this determination makes it unnecessary to consider the Trustee's alternative arguments based on the doctrines of collateral attack, abuse of process, and election, I will briefly address these arguments as well.

[33] As noted by the Trustee, *British Columbia (Workers' Compensation Board) v British Columbia (Human Rights Tribunal)*, 2011 SCC 52 [*British Columbia (Workers' Compensation Board)*] at para 28 describes the rule against collateral attack as, similarly to issue estoppel, preventing a party from using an institutional detour to attack the validity of a court or administrative decision by seeking a different result from a different forum, rather than through the designated appellate or judicial review route. The Trustee submits that that this rule is applicable to the present case. When its secured claim was disallowed in the bankruptcy proceeding, Stryder King did not invoke its statutory right of appeal under s 135(4) but rather seeks a rehearing of that claim before this Court. The Trustee argues that the rule against collateral attack prohibits such circumvention of the mechanism to review the decision of the Trustee prescribed by statute. Again, subject to arguments to be considered below related to Stryder King's intention to amend its claim, I agree that the rule against collateral attack applies.

[34] *British Columbia (Workers' Compensation Board)* at paras 31-33, also describes the doctrine of abuse of process as another principle with the goal of protecting the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings. This doctrine can be triggered where neither *res judicata* nor the rule against collateral attack is strictly applicable. As observed in *Toronto (City)* at para 37, one circumstance in which this doctrine has been applied is where the litigation before a court is found to be in essence an attempt to re-litigate a claim which the court has already determined.

[35] The present case is not one in which the Federal Court is being asked to address an issue which this Court has itself already determined. Nor could it typically be argued to be an abuse of

process for a creditor which asserts a secured claim against a ship to seek to have that claim adjudicated by the Federal Court under its *in rem* maritime jurisdiction. However, in a circumstance where a claim is already subject to a final determination in another proceeding, I agree with the Trustee that the goal underlying the doctrine of abuse of process is engaged. If for any reason the doctrine of issue estoppel or the rule against collateral attack was not strictly available, I would find the doctrine of abuse of process to preclude the pursuit of Stryder King's claim in this Court.

[36] Finally, the Trustee relies on the doctrine of election. In *Re SH Lennard & Company Limited* (1971), 15 CBR (NS) 261 (BCSC) [*Lennard*], the British Columbia Supreme Court addressed circumstances where a creditor sought to pursue actions which advanced claims identical to those previously disallowed by a trustee in bankruptcy, with no appeal having been taken. In denying the creditor leave to continue its actions, the Court at paragraph 3 adopted the principle that:

... a person who selects one method of having his claim adjudicated upon, if he is dissatisfied with the way in which that adjudication has been decided, should not be allowed to select another method of having it adjudicated; his only remedy, then, is to appeal from the decision of the trustee.

[37] Again, I find this principle applicable to the present circumstances. Stryder King seeks to distinguish *Lennard* on the basis that it did not involve an effort to invoke *in rem* maritime jurisdiction through an existing action in the Federal Court. In my view, that argument does not represent a basis to depart from the principle described in *Lennard*.

[38] I now turn to Stryder King's arguments based on its intention to amend its Statement of Claim in T-1604-17 to assert principles of constructive or resulting trusts and promissory estoppel. These amendments would plead that Seamount has been unjustly enriched by the receipt of the loan from Stryder King without providing the agreed security over the Vessel, that Seamount's refusal to provide the security was unconscionable, and that Stryder King relied to its detriment on Seamount's promise in the Loan Agreement to provide the security. Stryder King submits that its claims based on these allegations, that it is the beneficiary of a constructive or resulting trust over the Vessel, have not been adjudicated by the Trustee and, because they relate to property interests in the Vessel rather than security interests, these claims are not within the Trustee's jurisdiction to disallow.

[39] It is not the role of the Court on this motion to assess the merits of these new claims. Nor is the motion to amend the Statement of Claim in T-1604-17 presently before the Court. Even if that motion was presently under consideration, it is difficult to see how it would be directly relevant to the Trustee's stay motion. Stryder King's action in T-1604-17 is already subject to a stay by Order of Prothonotary Ring dated February 28, 2019, issued in the context of the Court's status review process. The Trustee's stay motion relates to Stryder King's claim against the proceeds of sale of the Vessel in the present action in which the Vessel was sold. That claim is set out in Stryder King's Affidavit of Claim filed on October 26, 2017, which, as previously noted, claims an unregistered legal mortgage or equitable mortgage against the Vessel, pursuant to which Stryder King has filed its motion (currently adjourned *sine die*) seeking a determination that it holds an equitable mortgage.

[40] Stryder King's counsel stated at the hearing that it had not yet decided whether to pursue its *in rem* claim through T-1604-17 or through the present action (T-1128-17), noting that the full action in T-1604-17 would afford rights of discovery that the summary process for adjudication of claims in the present action would not. However, counsel explained that, if Stryder King pursued its claim in the present action, it would be its intention to seek to amend its Affidavit of Claim and its motion seeking a determination of its claim to include its trust and estoppel arguments.

[41] In that context, I note and repeat for ease of reference the paragraph in Justice Strickland's Sale Order requiring that claimants against the proceeds of sale of the Vessel file affidavits of claim, failing which such claims would be barred:

Any claim against the Vessel or the proceeds of its sale by an alleged creditor must be filed by Affidavit in any Registry Office of the Federal Court on or before October 26, 2017, failing which the claim shall be barred. Such Affidavit shall provide full particulars of the claim, its basis and alleged status. If priority is claimed, the creditor/claimant shall set out the basis upon which it claims such priority.

[42] On its face, this term of the Sale Order, which is typical in such orders issued in proceedings involving the judicial sale of ships, arguably precludes Stryder King from advancing its trust and estoppel arguments in its claim against the proceeds of sale of the Vessel, because its Affidavit of Claim does not set out those arguments as a basis for a claim of priority against the proceeds. Stryder King has cited no authority permitting it to amend its Affidavit of Claim or supporting a conclusion as to the likelihood that such an amendment would be permitted. I would be reluctant to conclude that there is no possibility of such an amendment being granted,

particularly given that paragraph 18 of the Sale Order affords to interested parties liberty to apply to the Court to vary any provision of the Order itself. However, as no motion seeking an amendment to the Affidavit of Claim has been filed with the Court, I agree with the Trustee's position that that the present motion should be decided based on the Affidavit of Claim as filed.

[43] I also do not consider the possibility of such amendments to particularly assist Stryder King in avoiding the application of *res judicata* and related doctrines upon which the Trustee relies. As observed earlier in these Reasons, the doctrine of *res judicata* applies to arguments which could have reasonably been raised before the Trustee (see *Associated Freezers* at para 9). The Trustee also submits that it would represent an abuse of process for Stryder King to attempt to circumvent the effect of the Notice of Disallowance under the BIA by now seeking to advance in the Federal Court new legal theories based upon the same facts as those underlying its Proof of Claim in the bankruptcy proceedings. I agree with the Trustee's characterization of Stryder King's efforts and find the Trustee's submission compelling.

[44] Stryder King also argues that it is available to it to submit to the Trustee a new proof of claim based on its trust and estoppel arguments and, in the event the Trustee disallows these claims, to appeal that decision to the BCSC under s 135(4). The Trustee takes the position that a new proof of claim cannot be filed in relation to a claim that has previously been disallowed (see *Atlas Acceptance Corporation Ltd v Fratkin*, [1978] MJ No 102 (Man CA) [*Atlas*] at para 25). As recognized in *Atlas* at paras 26-30, the BIA does not prohibit creditors from filing more than one proof of claim for separate claims. However, the Trustee submits that to qualify as a new claim, which Stryder King would be permitted to file pursuant to the explanation in *Atlas*, the

claim must relate to a different factual matrix or a different period of time than the original claim (see *Pope & Talbot Ltd, Re*, 2009 BCSC 1738 at para 32, relying on *Atlas*). The Trustee argues that Stryder King's proposed new claim would not so qualify.

[45] In response, Stryder King points out that its original Proof of Claim referred to its secured claim as based on an equitable ships mortgage granted on December 31, 2015, while it submits that its new claim would assert that it received the benefit of a property interest as of April 2017, when Seamount failed to accede to its demand to execute and register a marine mortgage. Stryder King therefore argues that the new claim relates to a different period of time than the original claim.

[46] In my view, it is not the role of the Federal Court to decide the merits of the parties' respective positions on the question of whether Stryder King is permitted to file with the Trustee a new proof of claim advancing these arguments. Rather, a dispute on this question would fall within the jurisdiction of the BCSC if presented with an appeal under s 135(4) of a decision on this question by the Trustee. Moreover, consistent with the principles underlying the doctrines of *res judicata*, collateral attack, abuse of process and election, the availability of this mechanism in the bankruptcy proceeding, in which proceeding Stryder King's original characterization of its claim was adjudicated, further supports the conclusion that the bankruptcy proceeding is the forum in which any effort by Stryder King to present its new legal theories should be pursued.

[47] The Trustee seeks the remedy of a stay, relying on both s 69.3(1) of the BIA and s 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA]. Section 69.3(1) creates a stay by operation of

law, and I do not read the provisions of the BIA as conferring upon the Federal Court jurisdiction to issue an order granting a stay as a result of the operation that section. However, s 50(1) of the FCA affords the Court a discretionary power to stay its proceedings either: (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or (b) where for any other reason it is in the interest of justice that the proceedings be stayed. The Trustee argues that Stryder King's claim is being proceeded with in another jurisdiction, referring to the jurisdiction conferred by the BIA. The parties did not present any substantive argument on whether the reference to "jurisdiction" in s 50(1)(a) includes an administrative jurisdiction of this sort and, in the absence of more substantive argument on this point, I decline to express a conclusion thereon. However, I have no doubt that s 50(1)(b) affords the Court the authority to stay its own proceedings, in the interests of justice, in order to give effect to the principles of issue estoppel / *res judicata* and the similar doctrines upon which the Trustee relies.

[48] As expressly identified in s 50(1), the stay is a discretionary remedy. Indeed, the law also affords the Court discretion whether or not to apply the doctrine of *res judicata*, even when its requirements are met (see *Friedland*). Stryder King refers the Court to the statement by Prothonotary Aalto in *Ricci v Tully*, 2009 FC 493 at para 42 [*Ricci*] that a stay of proceedings is a remedy that is to be exercised sparingly and only in the clearest of cases. Stryder King also notes the explanation in *Ricci* that the general test to be applied in a motion for a stay pursuant to s 50(1) of the FCA is that the continuation of the action will cause prejudice or injustice (not merely inconvenience or extra expenses) to the defendant, and that the stay will not work an injustice to the plaintiff. *Ricci* also sets out a number of guidelines to be considered in assessing whether a stay should be granted, as derived from other authorities of this Court.

[49] I have considered this test and these guidelines, as well as the submissions advanced by Stryder King at the hearing in relation to certain of the guidelines, and I am satisfied that the test is met in the present case. Permitting Stryder King to present its claim against the proceeds of sale of the Vessel in this proceeding would cause prejudice and injustice to the Trustee, not merely inconvenience or extra expenses, because the Trustee would be required to defend a claim which has already been finally and conclusively adjudicated. While the stay will obviously work to the detriment of Stryder King, I do not consider this to work an injustice, because Stryder King has had the benefit of the mechanism created by the BIA for adjudication of its claim, including the availability of recourse to a provincial superior court under s 135(4). While its claim has not been considered by a court, this is only because it did not avail itself of this recourse.

[50] My conclusion is that it is in the interests of justice that the Court issue the stay requested by the Trustee.

B. Should the Court issue an order that all remaining funds from the proceeds of sale of the Vessel be paid out of Court to the Trustee?

[51] Pursuant to s 71 of the BIA, following an assignment in bankruptcy, the bankrupt's property passes to and vests in the Trustee, subject to the other provisions of the BIA and to the rights of secured creditors. The conclusion in these Reasons is that it has been finally and conclusively decided in the bankruptcy proceeding that Stryder King is not a secured creditor. Therefore, the only remaining claimant asserting a secured claim against the proceeds of sale of the Vessel is CRHA. Subject to protecting the rights of that remaining claimant, I see no

impediment to paying the proceeds of sale to the Trustee, to be administered in accordance with the BIA.

[52] The parties have both referred the Court to the decision of Justice Mahoney in *Ultramar Canada Inc v Pierson Steamships Ltd* (1982), 43 CBR (NS) 9 (FC). The result in that case was the release of arrested vessels upon motion of the bankruptcy trustee, conditional upon the trustee providing security sufficient to cover the secured claims against the ships. The corresponding result in the present case, where the Defendant Vessel has already been sold, is the payment out of the proceeds of sale to the Trustee, subject to ensuring sufficient protection of the remaining claimant asserting a secured claim. Counsel for Stryder King also happens to be counsel for CRHA, and he and the Trustee's counsel agreed at the hearing that the CRHA claim would be protected by retaining in Court the amount of \$2000.00, in order to cover the principal claim of \$1786.06 plus accrued interest. My Order will therefore order payment out of Court to the Trustee of the remaining proceeds of sale, including accrued interest, less \$2000.00 to be retained by the Court.

V. **Costs**

[53] At the hearing of this motion, the parties requested an opportunity to consult with each other in an effort to reach agreement on how costs of this motion should be addressed. The parties subsequently wrote to the Court, jointly indicating that they had mutually agreed to withdraw their respective claims for costs of the motion. My Order will therefore award no costs.

ORDER IN T-1128-17

THIS COURT ORDERS that:

1. The claim of Stryder King Holdings Ltd. against the proceeds of sale of the Defendant Vessel is stayed.
2. All remaining funds held by the Court from the proceeds of sale of the Vessel including interest, less the amount of \$2000.00, shall be paid to Smythe Insolvency Inc., the trustee in bankruptcy for the Defendant, Seamount Marine Ltd.
3. No costs are awarded on this motion.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1128-17

STYLE OF CAUSE: ROYAL BANK OF CANADA v SEAMOUNT MARINE LTD., AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "OCEAN MARAUDER"

PLACE OF HEARING: VANCOUVER , BRITISH COLUMBIA

ORDER AND REASONS: SOUTHCOTT, J.

DATED: AUGUST 2, 2019

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