

Federal Court



Cour fédérale

Date: 20221214

Docket: T-1188-21

Citation: 2022 FC 1736

Edmonton, Alberta, December 14, 2022

PRESENT: Madam Associate Judge Catherine A. Coughlan

**ACTION *IN REM* AGAINST THE VESSEL “K” AND
THE VESSEL “P” AND *IN PERSONAM***

BETWEEN:

TRUE NORTH SERVICES LLC

Plaintiff

and

0969582 B.C. LTD, THE VESSEL “K”, AND THE VESSEL “P”

Defendants

AND BETWEEN:

0969582 B.C. LTD

Plaintiff by Counterclaim

and

TRUE NORTH SERVICES LLC

Defendant by Counterclaim

ORDER AND REASONS

I. Overview

[1] The present motion was heard on December 6, 2022, at the General Sittings in Vancouver, British Columbia, via videoconference. In its motion, the Defendant/Plaintiff by Counterclaim, 0969582 B.C. Ltd (“0969”) seeks an order approving a proposed form of Bank Guarantee to be provided by 0969 as security for the release from arrest of Vessel “K” and Vessel “P”. The form of security is attached as Schedule “A” to the Notice of Motion. 0969 also seeks an order fixing the amount of bail to be provided in the Bank Guarantee.

[2] The Plaintiff/Defendant by Counterclaim, True North Services LLC (“True North”) opposes the relief sought. True North asserts that although 0969 has a right to post security for the release of the Vessels, the form of security offered is unusual, amounting to an unnecessary departure from established convention and the standard Court Form wording found at Form 486A of the *Federal Courts Rules* [Rules]. As a result, True North claims that if the Court were to approve this form of security, it would be exposed to greater risk than if the Vessels were permitted to remain under arrest.

[3] As a further complication, the parties do not agree on what constitutes an appropriate quantum for the security. While 0969 agrees that the reasonable expenses incurred by True North that benefitted 0969 should be secured, it nonetheless asserts that many of True North’s charges are excessive and without any basis in law.

[4] For the motion, both parties submitted motion records which included affidavit evidence; neither party conducted cross-examinations on the affidavits. The materials disclose some unusual

facts that merit some consideration particularly in light of the divide over both the security instrument and the quantum to be secured.

II. Facts

[5] Vessels “K” and “P” are two concrete pontoons that were constructed in 1963 to form part of a floating bridge on Lake Washington, in Washington State. The bridge consisted of 26 pontoons and Vessels “K” and “P” were the smallest of the pontoons. In 2016, the bridge was decommissioned when a new bridge was built. It appears that True North is the owner of all 26 pontoons. It is uncontroversial that on May 31, 2018, 0969 entered into an agreement with True North for the purchase of Vessels “K” and “P” for a purchase price of \$200,000 USD and an additional \$75,000 USD for the transportation of the Vessels to a storage facility on the Pitt River in Coquitlam, British Columbia.

[6] On June 1, 2018, 0969 paid \$275,000 USD to True North. On July 15, 2018, Vessels “K” and “P” were delivered to the Harkin Towing storage facility on the Pitt River where they remain to this day. Once delivered, it is common ground that there was no communication whatsoever as between True North and 0969 until May 13, 2021, almost three years later. It is also common ground that despite having paid the full purchase price and transportation costs, 0969 did not take delivery of the Vessels and True North remained the registered owner of the Vessels.

[7] In May 2021, 0969 sought to move Vessel “K” and Vessel “P” to a different location but True North refused to release the Vessels until it was compensated for sums expended by it on the Vessels over the intervening three years. The evidence filed on the motion indicates that the parties

had discussions about the terms under which the Vessels would be released but no resolution was found.

[8] On July 26, 2021, 0969 commenced an action in the British Columbia Supreme Court against Harkin Towing for an order surrendering possession of the Vessels to 0969. The following day, True North commenced the within action and obtained a warrant for the arrest of the Vessels. The Vessels have remained under arrest for in excess of 480 days.

[9] It is also common ground that between March 10, 2022 and the hearing of this motion, counsel for the parties discussed various forms of security that might be acceptable for release of the Vessels. Unfortunately, the parties were unable to agree on either a form of security or the quantum of security. Those are the two issues before this Court.

i. Form of Security

[10] As noted earlier, True North acknowledges that 0969 has the right to post security by way of a bank guarantee pursuant to Rule 486(1)(b) of the *Rules* to secure the release of the Vessels from arrest. However, True North argues that the Bank Guarantee proffered at Schedule “A” is not a sufficiently risk free form of bail to stand in the place of the arrested Vessels and if accepted, would leave True North in a worse position: *Beaudette v “Ethel Q.” (The)*, 1916 CarswellNet 61, 16 Ex C.R. 280 (Exchequer Court of Canada) at para 5. Indeed, citing *Excel Metal Fab Ltd v “Ogopogo I” (The)* 1987 CarswellNet 247, 5 A.C.W.S. (3d) 155, True North argues that the objectives for approving “bail are twofold; (1) to ensure that the security replacing the res within the jurisdiction does not leave the Plaintiff in a worse position and (2) to ensure that the owner of

the res may exercise the release provisions under reasonable terms.” Against those objectives, True North argues that the Bank Guarantee is unreasonable for a number of reasons including:

1. It departs from standard language found in Rule 468;
2. It refers to the Registrar of the Federal Court of Canada as the beneficiary rather than True North and requires the Registrar to take onerous steps without any assurance that the Registrar has either the authority or jurisdiction to take those steps;
3. It seeks to add many additional terms that are not justified and departs from longstanding practice;
4. It contains an expiry date which is unacceptable; and
5. It contains basic drafting errors.

III. Analysis

[11] For the purposes of disposing of this motion, I need only deal with the concerns expressed at subparagraphs 1 and 2 above.

[12] The underlying rationale for posting security to obtain the release of a vessel from arrest is well articulated by Prothonotary Hargave in *Richardson International Ltd v Ship Mys Chikhacheva et al*, 2002 FCT 482 [*Richardson*]. At paragraph 10 of the decision, the learned Prothonotary notes that “[...] security, be it a Protection and Indemnity Club letter or a guarantee, as in the present instance, ought to be as substantial, risk free and available as either the arrested vessel tied to the

dock and ready for execution, or a bail bond.” Put another way, there is no reason for the beneficiary of the guarantee to accept less protection than if the vessel remained under arrest.

[13] A review of the draft Bank Guarantee at Schedule “A” reveals that it does not use standard language consistent with a bail bond provided under Rule 468. While the *Rules* do not provide for a Court Form of guarantee, I agree with True North’s argument that this Court has recognized language in a guarantee that substantially follows Form 486A (Bail Bond) as being acceptable or “usual”: *Richardson* at para 2.

[14] Far from the simple two-paragraph Bail Bond in Form 486A, the draft Bank Guarantee is three pages in length and incorporates by reference a further 18 pages from the Uniform Rules for Demand Guarantee of the International Chamber of Commerce, ICC Publication no. 758. True North argues that the terms of the draft Bank Guarantee are extensive and “replete with invitations and opportunities for the guarantor (a bank) to take technical positions or otherwise refuse to pay any claim against the guaranty.”

[15] From my review of the Bank Guarantee, I agree with True North that the current form of security represents a significant departure from the usual form accepted by this Court and creates risk for True North that it should not have imposed on it.

[16] Even had I not come to that conclusion, I would nevertheless have rejected the draft Bank Guarantee because its terms purport to make the Registrar of the Federal Court a participant in the security. Rather than naming True North as the beneficiary, the Bank Guarantee names the Registrar, Federal Court of Canada as the party in whose favour the guarantee is issued.

[17] That very issue was considered by this Court in *Richardson*. In that case, the Bank's treatment of the Plaintiff's demand for payment drew the ire of this Court. The Royal Bank, the guarantor, initially refused the Plaintiff's demand for payment under the guarantee because the Federal Court of Canada was the named beneficiary. Although the case settled before the hearing of the motion, Prothonotary Hargrave was sufficiently concerned about the Bank's conduct, that he issued brief reasons "so that this sort of problem...never repeats itself": *Richardson* at para 1. In remonstrating the Bank, he noted, that "It ought to have been clear to the Bank both that the guarantee was to secure the Plaintiff which had given up its sound in rem security, not the Federal Court of Canada, and that it ought to have moved with good grace and alacrity to make good under its guarantee." It is curious that 20 years after *Richardson*, the same Bank, is insisting, as it did in *Richardson*, that the Registrar is the appropriate beneficiary.

[18] Further, the terms of draft Bank Guarantee require the Registrar to take a number of positive steps in the event the security is called upon as follows:

This Guarantee is available for payment to The Registrar at any time and from time to time upon receipt by the Bank at its above noted address of the following documents:

1- The Registrar's dated and signed written demand, addressed to the Bank stating that:

a) The judgment granted in the proceeding against "P" and "K" from the Warrant issued on July 27, 2021 in Federal Court, Action No. T-188-2 arresting vessels "P" and "K" is not satisfied or stayed; and

b) the amount of the judgment, that the judgment is now final, the appeal period has expired and no appeal or application for leave to appeal has been filed; and

c) the Applicant has not paid the judgment; and

As a result thereof, The Registrar, Federal Court of Canada, Vancouver Local Office, hereby demand payment of the sum of

CAD --- (_____ Canadian Dollars) under Royal Bank of Canada Irrevocable Demand Guarantee No. OGU7069600V.

2- A certified copy of the final judgement in the Action requiring payment of any sums secured by this Demand Guarantee.

3- The original of this Demand Guarantee for our endorsement of payment.

[19] During the course of oral argument, I raised these terms with counsel for 0969. Counsel was unable to point me to any authority or precedent supporting the Registrar's authority or jurisdiction to carry out the obligations detailed in the Bank Guarantee. Counsel did acknowledge that the terms make the Registrar a "participant" in the security but argued that the terms are not unduly onerous and the Registrar should have no concerns about them.

[20] I am not persuaded by 0969's arguments. As the Court made clear in *Richardson*, the beneficiary of the security is the party who has given up the *rem* in exchange for security. In those circumstances, it is difficult to conceive of a role for the Federal Court. The Court should have no role in obtaining security for a party and certainly should not have foisted upon it the obligations to take the steps enumerated in the guarantee in the event the security is called. It is not, in my view, the proper role of this Court to assist a party to obtain security nor to be a party or participant in that security.

[21] For the reasons stated above, I am not prepared to approve the form of security provided and the motion must fail.

i. Quantum of Security

[22] At the hearing of this motion, I inquired of counsel whether I should consider the issue of quantum if I found that the form of security was not acceptable to the Court. Counsel for

True North took the position, both in his written representations and his oral submissions that I ought not to consider quantum. That said, counsel did concede that the Court might wish to consider quantum in order to address a different form of security should one be offered. Counsel for 0969 takes a contrary view and says the Court should decide the issue of quantum in any event.

[23] Having heard considerable argument on the issue of quantum, I will address the quantum of bail to be fixed.

[24] The general rule which governs the fixing of bail permits a plaintiff bail in an amount sufficient to cover his or her reasonably arguable best case including interest up to the likely date of judgment and its costs of the proceeding, or the value of the ship arrested, whichever is the lesser. This cap on bail at the value of the ship applies even though the claim, costs and interest may exceed the value of the arrested ship: *Westshore Terminal Limited v Leo Ocean SA*, 2014 FC 136 at para 52, *aff'd Westshore Terminals Limited Partnership v Leo Ocean SA*, [2015] 3 FCR 712, 2014 FCA 231 at para 39. Furthermore, and as noted by Prothonotary Hargrave in *Norcan Electrical Systems Inc. v Feeding Systems A/S*, 2002 FCT 702 at para 10 [*Norcan*], “bail is not an indication of what the Plaintiff will in fact realize, but rather a somewhat rough measure of what the Plaintiff might recover on its reasonably best arguable case.”

[25] Various decisions of this Court caution that a court setting bail should not embark on a close examination of the merits of the Plaintiff’s claim: *Norcan* at para 11; *Altantic Shipping (London) Ltd v “Captain Forever” (The) (1995)*, 97 F.T.R. 32 (Fed T.D.); *Amican Navigation Inc. v Densan Shipping Co Inc.* 1997 CarswellNet 2151, 75 A.C.W.S. (3d) 196.

[26] As Justice Barnes observed in *Canadian Sub Sea Hydraulics Ltd v "Cormorant" (Ship)*, 2006 FC 1051 at para 7, "the plaintiffs' reasonably arguable case will often be the amount it asserts to be owing in its Statement of Claim." Ultimately, the Court may be called upon to make a "rough and ready" assessment if required.

[27] For the purposes of this motion, True North takes the position that since 0969 has not presented any evidence as to the appraised value of the Vessels, it is entitled to have security fixed at its reasonably arguable best case.

[28] For its part, 0969 disagrees and argues that the Court should consider the purchase price paid to True North for the Vessels in 2018 as the appraised value of the Vessels. This price, they assert, should constitute the cap on the value of the Vessels for the purposes of fixing security. 0969 further argues that they have not obtained a recent appraisal of the Vessels because there is no market for the Vessels against which an appraisal could be made. In support of that proposition, they proffer the September 27, 2022 affidavit of Keith Leach, Director of 0969 who affirms that he is not aware that the pontoons have a different value now than when they were purchased. At the hearing, counsel for 0969 suggested that as True North has 26 other Pontoons, they are best placed to provide the current appraised value for the Vessels.

[29] I am not persuaded by 0969's arguments. The fact remains that there is no evidence before the Court as to any appraisals conducted in 2018 at the time of sale to 0969. Further, there is no evidence before the Court as to the present day value of the Vessels. In fact, there is simply no evidence at all before the Court as to the appraised value of the Vessels. I am not prepared to infer the appraised value from the purchase price paid some four years ago. Nor, am I prepared to expect

True North to provide an appraisal. It is beyond doubt that 0969 bears the burden of establishing the value of the Vessels if it wishes to take advantage of the cap.

[30] As no evidence of the appraised value was adduced, the security will be fixed at True North's reasonably arguable best case.

[31] For the purposes of fixing the security, True North reduced its claim to three expenses incurred by it, together with interest at the Admiralty rate and costs for a total of \$606,196.51. A chart appended as Annex A to these Reasons details the claim.

[32] The three expenses include moorage, insurance and maintenance said to have been paid by True North since July 2018 to the present time. At the hearing of the motion, counsel for 0969 advised that his client took no issue with the moorage charges. With respect to the insurance charges, 0969 does not challenge the quantum claimed but asserts that as it is not the loss payee, the insurance coverage provided it with no benefit and it should not have to pay for it. With respect to the maintenance charge, 0969 argues that these expenses relate to matters exclusively for the benefit of True North; i.e. to show True North's other pontoons for sale or to repair True North's pontoons. Further, 0969 says that it performed its own inspections and maintenance of Vessel "K" and Vessel "P" and was not aware that True North was conducting these inspections. With respect to costs and interest at the Admiralty rate, 0969 takes no issue with these charges.

[33] With those concessions, the only charges that must be addressed by the Court are those incurred for insurance and maintenance of the Vessels.

[34] With respect to the insurance charges, I am persuaded that these charges must be included in True North's reasonably arguable best case. The evidence of Jessica Gugay, Legal Assistant,

attaches as Exhibit “A” a copy of an email dated May 31, 2018 from Amanda Sprang of True North to Sean Carroll with a copy to Keith Leach advising as follows:

As discussed via telephone, we will facilitate customs clearance, insurance transfer, and moorage agreement transfer to your company next week. The pontoons will remain insured under our policy until you obtain your insurance certificate and moored under our agreement with Harken until you have your own agreement with them next week. (emphasis added)

The current moorage price we have with Harken for K & P is CAN \$1,800 per month per pontoon.

[35] From the time of sale, True North maintained insurance coverage on the Vessels for public liability and hull damage. At no time during the three years prior to May 2021 did 0969 obtain a certificate of insurance for the Vessels. The email makes it abundantly clear that True North would continue to maintain the policy of insurance until 0969 provided its own certificate of insurance. The evidence is clear that True North continued to incur that expense. I can find no basis upon which True North should be disentitled from claiming this expense in fixing security.

[36] As for the maintenance expenses, they relate to amounts incurred by True North in maintaining all of the pontoons including “K” and “P”. Ms. Gugay’s evidence discloses that a Mr. Mark Weir was hired by True North to specifically maintain the 26 pontoons and another crew boat. They allocate 95% of his salary to the pontoon maintenance and divide that equally among the 26 pontoons. Exhibit “B” to Ms. Gugay’s affidavit details the allocation of Mr. Weir’s salary over the period in question. At paragraph 13 of Ms. Gugay’s affidavit, she deposes to the work undertaken by Mr. Weir, including detailed inspections quarterly which include checking 28 internal compartments and the need in 2019 to pump water out of Vessel “K”.

[37] In the affidavit #2 of Keith Leach, he deposes that from July 15, 2018, onwards he inspected the Vessels every six to eight weeks depending on the weather. He deposes that he traveled by boat from Ladner to the north side of the Port Mann bridge to the Vessels. He notes that his inspections varied from visual inspections to more detailed inspections during which he would go on the pontoons and inspect the decks and the holds. He further affirms that he was not aware that any other party was inspecting the pontoons and had he been aware, he would have asked them not to inspect Vessels “K” and “P”.

[38] The evidence of the parties is not inconsistent; it is apparent that both parties carried out inspections. It must be recalled that during the three years following the purchase of the Vessels, the parties had no discussions at all. It is not beyond the realm of comprehension to suppose that overlapping inspections were made. Nevertheless, it is also apparent that True North incurred expenses in relation to this activity. The expenses do not appear to be exorbitant and are fully documented in the evidence. Based on a rough and ready approach, I am prepared to include those costs in True North’s reasonably arguable best case.

[39] In the result, and without having the benefit of an appraisal of the Vessels, True North’s reasonably arguable best case for the purposes of fixing bail is \$606,196.51. Bail shall be fixed in that amount subject to 0969 being at liberty to apply on motion, within 30 days of this Order to reconsider bail based on evidence as to the market value of the Vessels.

ORDER in T-1188-21

THIS COURT ORDERS that:

1. The motion approving the proposed form of bank guarantee for security for the release of Vessel “K” and Vessel “P” is dismissed.
2. Bail shall be fixed at \$606,196.51.
3. 0969 is at liberty to apply, on motion, within 30 days of this Order to seek reconsideration of bail.

“Catherine A. Coughlan”

Associate Judge

Annex A

	Moorage	Insurance	Maintenance
Principal USD	\$154,950	\$93,446	\$55,495
Principal CAD (USDx1.34)	\$207,634	\$125,217	\$74,363
Interest at 5% compounded annually to Nov 30, 2020 (USD)	\$18,025	\$10,039	\$4,481
Interest at 5% compounded annually to Nov 30, 2020 (CAD)	\$24,154	\$13,453	\$6,005
Subtotal	\$231,788	\$138,670	\$80,368
Interest at 8% compounded annually from Dec 1, 2022 – Dec 1, 2025 (x 1.2597)	\$291,983.34	\$174,682.60	\$101,239.57
Subtotal	\$567,905.51		
Costs and Disbursements	\$38,291		
Total	\$606,196.51		

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Vancouver, Province of British Columbia, this 2nd day of December 2022.

Andrew Stainer
Solicitor for True North Services LLC

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1188-21

STYLE OF CAUSE: TRUE NORTH SERVICES LLC v 0969582 B.C. LTD,
THE VESSEL "K", AND THE VESSEL "P"

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 6, 2022

ORDER AND REASONS: COUGHLAN A.J.

DATED: DECEMBER 14, 2022

APPEARANCES:

Andrew Stainer

FOR THE PLAINTIFF

Guy Holeksa

FOR THE DEFENDANT
0969582 B.C. LTD

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE PLAINTIFF

Jenkins Marzban Logan LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE DEFENDANT
0969582 B.C. LTD