Federal Court  Cour fédérale

Date: 20130220

Dockets: T-484-11
T-1-12

Citation: 2013 FC 177

Ottawa, Ontario, February 20, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

CAMECO CORPORATION
CAMECO INC. AND
CAMECO EUROPE LTD.

Plaintiffs

and

THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP "MCP ALTONA",
THE SHIP "MCP ALTONA",
MS MCP ALTONA GMBH & CO KG,
HARTMANN SCHIFFAHRTS GMBH & CO,
HARTMANN SHIPPING ASIA PTE LTD.,
FRASER SURREY DOCKS LP AND
PACIFIC RIM STEVEDORING LTD.

Defendants

REASONS FOR ORDER AND ORDER
(COSTS ON PRIORITIES MOTION)

[1] After payment of the acting marshal's fees and disbursements arising from the judicial sale of the MCP Altona, there were two contenders for the balance of the proceeds of sale: Cameco and the caveator HSH Nordbank AG. The Bank moved for payment on the basis that at best Cameco

had a cargo claim, a claim which is ordinarily outranked by a mortgage. Cameco defended on the basis that it had four grounds on which it outranked the Bank. In reasons reported at 2013 FC 23, I ruled in the Bank's favour. Before me now is the Bank's motion for costs.

[2] The Bank's position is that it should be awarded costs on an enhanced basis. Cameco invites me to award no costs at all or, in the alternative, costs based on Column III of Tariff B of the *Federal Courts Rules*, the default column.

[3] The parties have been at loggerheads throughout the saga of the MCP Altona's return to Vancouver with spilled uranium loose in hold number 1, her arrest, her sale, the amount of disbursements reasonably incurred by the marshal, as financed by the Bank, and now the distribution of the proceeds of sale. It must also be kept in mind that at the same time Cameco has sued for its loss, it has been sued by others on the basis it caused the loss, and has been engaged in meaningful debates, exchange of pleadings, exchange of documents, as well as scientific testing, all in an effort to ascertain the cause of the spill and the liabilities which flow therefrom. The Bank, although only a caveator, was not entirely immune from these proceedings and properly participated in a number of case management conferences. However, what is before me is the issue of costs on the Bank's successful motion for payment out, no more and no less. For instance, the Bank has taken umbrage with Cameco's challenge of some of the disbursements incurred by the acting marshal, and funded by it. That challenge was successful, at least in part, and, in any event, costs arising therefrom are before the assessment officer, not me.

[4] Both sides have criticized the behaviour of the other. However, I need go no further than my reasons on the priorities motion to say I pay no heed to the submissions of either side.

[5] The Bank points out, correctly, that the procedure the Court has developed for the resolution of disputes relating to priorities with respect to the proceeds of the judicial sale of ships are somewhat hybrid in nature. If memory serves, initially each claimant was to set itself up as a plaintiff, and each other party contesting that claim would set itself up as a defendant. Thus, one had a whole series of statements of claim and statements of defence, affidavits of documents and examinations for discovery leading ultimately to a trial.

[6] I believe it was Mr. Justice Addy who first decided this procedure was far too cumbersome and far too costly. He drew inspiration from the application portion of our rules, as they then were, rather than the action portion. Thus, the current practice, which was followed in this case, is that each side file written submissions setting out its case, backed up by affidavits and documents to be relied upon. Parties are entitled to cross-examine affiants, and then the matter proceeds to a hearing without witnesses. Essentially, this is no different from other applications. Indeed, applications with respect to the Patented Medicine (Notice of Compliance) Regulations are, invariably, far more lengthy than the two days of argument in this case.

[7] Cameco asserted four grounds why its claim should outrank the Bank's.

[8] It submitted that the cost of discharging its cargo should be treated as a marshal's expense. This point had never been definitively decided in Canada before. English law went one way and American law the other.

[9] It also submitted it enjoyed a maritime lien in accordance with section 139 of the *Marine Liability Act*. There has been very little jurisprudence on that point.

[10] It submitted as it that it had a salvage lien, arising from the incorporation of the 1989 Salvage Convention into Canadian law. This was a novel point.

[11] Finally, it submitted that the Court, in its exercise of its equitable jurisdiction, should rearrange the normal sequence of priorities. For the reasons given, I declined to do so.

[12] I say this because although I ruled against Cameco, its position was far from frivolous or vexatious. It had legitimate arguing points.

[13] The Bank is correct in saying that in order to understand Cameco's claim for priority, it had to review the affidavit of documents in the cargo claim. There were over 20,000 of them. Again, this is not unusual in applications. In PM (NOC) applications referred to above, the record may easily comprise 40 or more volumes.

[14] The Bank complains that it had to translate some of its documents into English. It is a rule of court that documents in a foreign language relied upon must be translated into either English or French.

[15] The Bank also suggests that if it were not for the arrest by Cameco, and an accompanying arrest by Tam International in T-424-11, it could have moved the ship to the Far East and obtained a better price. This is simply not so. Cameco has a reasonably arguable case and was entitled to arrest the ship. She would have been released if the owners had provided bail in the amount of such reasonably arguable case plus interest and costs, or the value of the ship, whichever was less. They did not do so. Furthermore, other parties had filed caveat releases.

[16] In any event, the ship was going nowhere from January to May 2011 because she was contaminated, a contamination which was cleaned up by Cameco.

[17] It is illusory to think that the Bank under a power of sale in its mortgage could have achieved a better price. All the Bank could do would be to sell its debtors', *i.e.* the shipowners, interest in the ship. It could not sell the ship free of liens and encumbrances, of which there were many, all of which were wiped away as a result of the sale in this Court.

[18] Cameco points out that no draft bill of costs has been provided and no supporting affidavit. Although the Court favours an award of lump sum costs when feasible, there is simply not enough information on file to allow me to come to any conclusion. Thus, I shall issue directions to the assessment officer.

[19] The Bank submits that there were a number of complicated issues. Celerity calls for enhanced costs. The issues were complicated and interesting, but for the reasons given in *Universal Sales, Ltd v Edinburgh Assurance Co*, 2012 FC 1192, [2012] FCJ No 1292 (QL), and the jurisprudence cited therein, I should remain within the Tariff. Were it not for a relevant settlement offer in that case, I would have awarded fees at the low-end of Column IV. I shall do so in this case.

[20] The Bank shall also be entitled to reasonable disbursements, including the reasonable cost of translation from German to English, and the costs of travel from Vancouver to Ottawa for the purposes of arguing the priorities motion.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that the assessment officer tax costs in favour of HSH Nordbank AG in accordance therewith.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-484-11 T-1-12
STYLE OF CAUSE:	CAMECO CORPORATION, CAMECO INC. AND CAMECO EUROPE LTD. v THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD., FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD.

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

REASONS FOR ORDER AND ORDER (COSTS ON PRIORITIES MOTION):	HARRINGTON J.
DATED:	FEBRUARY 20, 2013

WRITTEN REPRESENTATIONS BY:

Marc D. Isaacs	FOR THE PLAINTIFFS
David F. McEwen, Q.C.	FOR THE CAVEATOR HSH NORDBANK AG

SOLICITORS OF RECORD:

Isaacs & Co. Barristers & Solicitors Toronto, Ontario	FOR THE PLAINTIFFS
Borden Ladner Gervais LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE DEFENDANTS THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS MCP ALTONA GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD.

SOLICITORS OF RECORD: cont'd

Fasken Martineau Barristers & Solicitors Vancouver, British Columbia	FOR THE DEFENDANTS FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD.
Alexander Holburn Beaudin & Lang LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE CAVEATOR HSH NORDBANK AG