Federal Court of Appeal | Cour d'appel fédérale

Date: 20210629

Dockets: A-171-19
A-183-19

Citation: 2021 FCA 130

CORAM: **NADON J.A.**
WEBB J.A.
LEBLANC J.A.

Docket: A-171-19

BETWEEN:

WORLDSPAN MARINE INC.

Appellant

and

HARRY SARGEANT III and
COMERICA BANK

Respondents

Docket: A-183-19

AND BETWEEN:

OFFSHORE INTERIORS INC. and
RESTAURANT DESIGN AND SALES LLC

Appellants

and

HARRY SARGEANT III and
COMERICA BANK

Respondents

Heard by online video conference hosted by the Registry

on December 1, 2020.

Judgment delivered at Ottawa, Ontario, on June 29, 2021.

REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	WEBB J.A. LEBLANC J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] Before us are two appeals from the decision of Heneghan J. (the Judge) of the Federal Court dated April 30, 2019 (2019 FC 546). The appeals arise from a Vessel Construction Agreement (the VCA) entered into on February 28, 2008, between Harry Sargeant III (Sargeant) and Worldspan Marine Inc. (Worldspan) in regard to the construction of the vessel QE014226C010 (the Vessel), a 142 ft custom-built luxury yacht.

[2] Because of the complicated and ongoing litigation in regard to the construction of the vessel that began in 2010 and which led to the Vessel's arrest and its sale by the Federal Court, it will be useful and necessary to immediately highlight the facts and the proceedings relevant to the appeals before addressing the impugned decision.

[3] Construction of the Vessel by Worldspan began in March 2008 and because of differences between Sargeant and Worldspan regarding, *inter alia*, project costs, construction was ended in April/May 2010. During that period of time, Sargeant, to whom Worldspan as owner of the ship had granted a builder's mortgage (the mortgage), advanced to Worldspan approximately $ 20 million. I should mention here that on August 14, 2009, Sargeant entered

into a Construction Loan Agreement with Comerica Bank (Comerica) in order to finance the completion of the Vessel. Hence, by way of an Assignment of Security Agreement and Mortgage (also dated August 14, 2009) Sargeant assigned his interests in the VCA, the Vessel and the builder's mortgage to Comerica in exchange for the advanced funds. As I do not intend to distinguish between the interests of Sargeant and Comerica in these reasons, I will hereinafter refer to both of them as Sargeant.

[4] On July 28, 2010, pursuant to an *in rem* and *in personam* action commenced on that day by Offshore Interiors Inc. (Offshore), a subcontractor of Worldspan which had provided goods and services to the Vessel while under construction, against Worldspan, Crescent Custom Yachts Inc. (Crescent), a wholly owned subsidiary of Worldspan, and against the Vessel and her owners, the Vessel was arrested.

[5] On May 31, 2011, judgment by default, *in personam* and *in rem*, was granted in favour of Offshore in the sum of $ 273,754.58.

[6] On May 27, 2011, Worldspan and related entities filed a Petition in the British Columbia Supreme Court (the BC Court) seeking relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the CCAA) and on July 22, 2011, Pearlman J. of the BC Court issued a Claims Process Order in the CCAA proceedings. This Order required all creditors to deliver proofs of claim on or before a fixed date, failing which the creditors would be barred from making or enforcing any claim. Pearlman J.'s Order also provided that if a creditor who had filed

a proof of claim in the CCAA proceedings was asserting an *in rem* claim against the Vessel, that creditor could pursue its claim outside the CCAA proceedings in the Federal Court.

[7] On August 29, 2011, Prothonotary Lafrenière (as he then was) made an Order, referred to as the "Claims Process Order" (the FC Claims Process Order), which limited claims to be made against the Vessel to *in rem* claims. As part of this process, Sargeant filed a proof of claim in the sum of approximately $ 20 million based on his mortgage. Additional proofs of claim were filed by various creditors, including the appellants Offshore and Restaurant Design and Sales LLC (Restaurant), and these claims totalled approximately $ 2 million.

[8] On November 30, 2011, Worldspan's *in rem* claim against the Vessel was dismissed by the Federal Court.

[9] The Vessel remained under arrest until June 30, 2014, when it was sold by the Federal Court, free and clear of any and all claims, liens and encumbrances, for the sum of US$ 5 million. I should point out that by Order dated June 27, 2014, Prothonotary Lafrenière had ordered that the Vessel was to be sold for US$ 5 million to a third party and that the sale would become effective on June 30, 2014.

[10] On March 5, 2013, prior to the order for sale of the Vessel made by the Federal Court, on June 27, 2014, Prothonotary Lafrenière held that the mortgage granted to Sargeant, pursuant to the VCA, did not create a lien or charge in the Vessel, other than to secure its delivery to Sargeant.

[11] On December 19, 2013, Strickland J. set aside Prothonotary Lafrenière's Order of March 5, 2013, holding that the mortgage, contrary to the Prothonotary's view, provided security to Sargeant, not only in respect of the delivery of the Vessel but also to secure the sums advanced by him to Worldspan (*Offshore Interiors Inc. v. Worldspan Marine Inc.*, 2013 FC 1266, [2013] 444 F.T.R. 283 [*Offshore No.1*].

[12] On February 15, 2015, this Court confirmed Strickland J.'s decision (*Offshore Interiors Inc. v. Sargeant*, 2015 FCA 46, [2015] 467 N.R. 355 [*Offshore No. 2*]).

[13] Following the above decisions, Worldspan brought a motion before the Federal Court, on October 14, 2014, for a declaration that any amount due and owing by Sargeant to it under the VCA should have priority over Sargeant's security interests in the Vessel. More particularly, Worldspan argued that, by reason of section 12.1 of the VCA, the sum of $ 6,557,362.36 which, in its view, was owed to it by Sargeant, should be paid prior to the exercise of Sargeant's rights under the mortgage. Stated differently, Worldspan's position was that Sargeant was only entitled to receive the proceeds of sale of the Vessel once he had paid Worldspan in full the amount owed to it.

[14] A second motion was brought, this time by Sargeant, on November 23, 2015, pursuant to which he sought an order that the *in personam* claims between himself and Worldspan should proceed before the BC Court and not before the Federal Court.

[15] The above two motions were heard by Southcott J. on December 14, 2015. On January 8, 2016, he held that Sargeant was under no obligation to pay to Worldspan any amount for which he could be held liable under the VCA as a condition to the exercise of his rights under the mortgage (*Offshore Interiors Inc. v. Worldspan Marine Inc.*, 2016 FC 27, 262 ACWS (3d) 362 [*Worldspan No. 1*]). In so concluding, Southcott J., at paragraph 64, made the point that he agreed with Sargeant's interpretation of section 12.1 of the VCA that it "creates a right by Worldspan to deduct amounts owed to it pursuant to the VCA from any Mortgage claim by Sargeant."

[16] With respect to Sargeant's motion that the *in personam* claims relating to the VCA should proceed before the BC Court, Southcott J. refused to make the order sought. At paragraph 93 of his reasons, he expressed himself in the following terms:

> I emphasize that this conclusion [*i.e.* his refusal to make the order sought by Sargeant] is not intended to suggest that *in personam* proceedings should be commenced in this Court and therefore should not give rise to the "procedural fog" that Sargeant expressed concern would impact other claimants. Rather, my conclusion is that this Court's *in rem* jurisdiction includes whatever liability and quantification determinations, including defence arguments raised by the vessel owner, are necessary to adjudicate the *in rem* claims.

[17] On November 30, 2016, Worldspan's appeal of Southcott J.'s decision was dismissed by this Court (*Worldspan Marine Inc. v. Sargeant*, 2016 FCA 307 [*Worldspan No. 2*]). In brief reasons for a unanimous Court, Pelletier J.A. disposed of the matter as follows:

> [1] Worldspan Marine Inc. (Worldspan) appeals from a decision of the Federal Court, reported at 2016 FC 27, in which the Federal Court held that Harry Sargeant III (Sargeant) was not required to pay Worldspan any amounts which it

> may be found to owe to Worldspan pursuant to a Vessel Construction Agreement as a condition of exercising its rights under a ship's mortgage granted to it by Worldspan.
>
> [2] We have not been persuaded that the Federal Court committed a palpable and overriding error in coming to the conclusion which it did. Mr. Wharton, counsel for Worldspan skillfully laid out a contractual interpretation which would support the conclusion which he seeks. Unfortunately for his client, the Federal Court adopted an equally plausible construction which supports a different conclusion. To the extent that there is evidence which would support the FC's conclusion, and there is, this Court cannot intervene.
>
> [3] As a result, the appeal will be dismissed with costs.

[18] On June 19, 2017, Strickland J., by way of a Direction, set a date for the Priorities hearing, *i.e.* December 13 and 14, 2017, and established the steps which had to be followed to move the matter forward. More particularly, Strickland J., at page 4 of her Direction, indicated that the parties who had filed affidavits following the FC Claims Process Order of August 29, 2011, were to file brief written representations setting out their respective positions with regard to the priority of their claim. Strickland J. also directed that by August 21, 2017, Worldspan should serve and file a motion "seeking determination of the question of whether a breach of the VCA is necessary or relevant to the final resolution of the *in rem* claims made in this action". And, if so, what party breached the VCA and the impact of the breach, if any, on the priority of the *in rem* claims (Appeal Book, p. 60).

[19] In a further Direction made on July 19, 2017, Strickland J. directed that Sargeant file a motion raising the question of whether a determination of a possible breach of the VCA was relevant or necessary with regard to the determination of the priorities of the *in rem* claims.

[20] By Notice of Motion, dated August 1, 2017, Sargeant sought a declaration from the Federal Court that the determination of any breach of the VCA was irrelevant and unnecessary for the final determination of priorities in respect of the *in rem* claims against the Vessel.

[21] By Notice of Motion dated August 21, 2017, Worldspan sought a declaration from the Federal Court that Sargeant was in breach of the VCA by reason of his failure to pay Claims Certificates when due.

[22] On December 1, 2017, Offshore filed a Notice of Motion and Motion Record seeking a declaration from the Federal Court that the mortgage granted to Sargeant should be deferred and/or that amounts owing to Offshore should have priority over the mortgage. In support of its motion, Offshore relied on the affidavits of Robert Ruzzi sworn May 17, 2011 and October 5, 2011, the affidavit of David Kelly, sworn October 5, 2011, and the affidavit of Fred Lillian sworn October 3, 2011. These affidavits had all been filed within the time prescribed by the Prothonotary in the FC Claims Process Order. In addition to these affidavits, Offshore also relied on the affidavit of David Kelly sworn November 29, 2017 and that of Fred Lillian sworn November 30, 2017, both of which had not been previously filed.

[23] On December 8, 2017, following a Case Management Conference held on December 7, 2017, the Judge refused to accept for filing the affidavit of David Kelly sworn on November 29, 2017 and that of Fred Lillian sworn November 30, 2017. The Judge refused to admit these affidavits on the grounds that they did not add anything relevant to the issues which she had to determine.

[24] Sargeant's motion was heard by the Judge in Vancouver on October 16, 2017, following which she reserved her decision. On December 13 and 14, 2017, she heard Worldspan and Offshore's motions. On April 30, 2019, the Judge made the following orders: 1) she allowed Sargeant's motion with costs; 2) she dismissed Worldspan's motion with costs; and 3) she dismissed Offshore's motion with costs;

[25] In appeal bearing number A-171-19, Worldspan appeals the Judge's Order granting Sargeant's motion and dismissing its motion. In appeal bearing number A-183-19, Offshore challenges the Judge's decision dismissing its motion in respect of the ranking of priorities against the Vessel.

[26] I now turn to the Judge's decision.

II. The Federal Court's decision

[27] Three motions were before the Judge. First, the Offshore motion to change the order of priority of the *in rem* claims. The Judge dealt with this motion at paragraphs 121 to 147 of her Reasons, concluding that there was no basis to change the ranking of the priorities of the claims against the Vessel. Hence, having previously disposed of the Sargeant and Worldspan motions, she found that Sargeant, having established his claim of $ 20 million against the Vessel, was entitled to receive the proceeds of sale thereof less the sums which had been paid on account of the sheriff's fees and other disbursements which took priority over his claim.

[28] The Judge began her analysis of the Offshore motion by indicating that the trade creditors were seeking reallocation of the priorities on the grounds that Sargeant, in refusing to pay the Claims Certificates presented to him by Worldspan, was responsible for Worldspan's failure to pay its subcontractors and other suppliers and that he had benefited from the work done by these creditors. Thus, it was argued that it would be unfair and unjust for Sargeant to receive the entirety of the proceeds of sale. Worldspan also argued that failure to reallocate the priorities would create an unjust arrangement in favour of Sargeant, adding that Sargeant had deliberately and knowingly failed to pay the Claims Certificates, thus enhancing his position at the expense of the trade creditors.

[29] The Judge indicated that the usual ranking of claims against the proceeds of sale of a ship was that maritime liens were paid first, followed by possessory liens, then mortgages, and finally by statutory liens (Reasons at para. 128).

[30] The Judge then turned to the case law pertaining to the ranking of priorities and the circumstances in which the order thereof could be changed. She referred to a number of cases, namely: *Fraser Shipyard and Industrial Centre Ltd. v. Atlantis Two (The)*, (11 June 1999),T-111-98 (F.C.T.D.); *Cameco Corporation v. Ship MCP Altona* (2013), 425 F.T.R. 80; and *Ballantrae Holdings Inc v. "Phoenix Sun" (The)*, (2016), 6 P.P.S.A.C. (4th) 48. After a review of these cases, she wrote at paragraph 135 of her Reasons:

> The common thread emerging from the authorities referred to above is that the ranking of priorities will be changed, generally, when the interests of justice and the consideration of equitable principles require a reallocation of the general rule about the order of priorities.

[31] She then turned to the trade creditors' arguments as to why, in the present matter, the ranking of priorities should be changed.

[32] She first dealt with Offshore's argument to the effect that Sargeant had acted improperly when he declined to post security and take delivery of the Vessel prior to its sale by the Federal Court. On that basis, Offshore argued that Sargeant had acted improperly because taking delivery of the Vessel would have satisfied Worldspan's debt which had been secured by the mortgage. The Judge concluded that she could not see any evidence of improper conduct on the part of Sargeant when he refused to take delivery of the Vessel. In her view, Sargeant had made "a commercial decision, based on the facts that were known to him, including the commencement of litigation and the concurrent arrest of the Vessel by Offshore" (Reasons at para. 140).

[33] She also found that there was no evidence before her that any of the trade creditors, including Offshore, had performed work that enhanced the value of the Vessel which, even at the time of its sale in 2014, remained in a state of construction (Reasons at para. 144).

[34] Consequently, she held that there were no grounds to depart from the usual ranking of priorities. Hence, she declared, at paragraph 146 of her Reasons that "Sargeant's claim enjoys priority over all the other *in rem* claims." She therefore dismissed the trade creditors' motion for reallocation of the sale proceeds.

[35] With respect to the two other motions before her, *i.e.* Sargeant's motion for a declaration that the determination of any breach of the VCA was irrelevant and unnecessary for the settling

of the priorities and Worldspan's motion for an order that Sargeant was in breach of the VCA, these were dealt with by the Judge at paragraphs 74 to 120 of her Reasons.

[36] As I indicated earlier, the Judge allowed Sargeant's motion and dismissed Worldspan's motion. Her reasoning can be summarized as follows.

[37] She began by indicating that the VCA provided for the availability of a mortgage in Sargeant's favour, which right he had exercised. She also indicated that the mortgage was a contract independent of the VCA. She then referred to her Court's decisions in *Offshore No. 1* and in *Worldspan No. 1* and stated that it had been determined in those decisions that the mortgage created a charge in favour of Sargeant with respect to the funds advanced by him to Worldspan and that this constituted a debt which Worldspan had to pay, albeit with a right of set-off in its favour to the extent that moneys were owed to it by Sargeant.

[38] She then observed that Worldspan was asserting a personal claim in the BC Court against Sargeant with respect to an alleged breach of the VCA, adding that "[p]ersonal claims arising in relation to the VCA are relevant for present purposes only to the extent that any party asserting an *in rem* claim must show personal liability on the part of any defendant to such claim". (Reasons at para. 94).

[39] In other words, it was the Judge's view that in order to succeed on his mortgage claim, Sargeant had to demonstrate that Worldspan, as owner of the Vessel, was personally liable with regard to this debt. Thus, in her view, any discussion or debate pertaining to breaches of the

VCA or any liability thereunder were questions to be dealt with in the BC Court where the *in personam* claims had been filed and not in the Federal Court where only *in rem* claims were to be considered regarding the settling of the priorities and the payment of the proceeds of sale.

[40] Therefore, the Judge saw no point to Worldspan's argument that, prior to disbursing any sum to Sargeant from the proceeds of sale, a determination of the contractual dispute between Sargeant and Worldspan regarding the VCA had to be made.

[41] I would add that I do not take the Judge to be saying, nor could she be saying, that the Federal Court did not have jurisdiction to entertain the claims asserted by both Sargeant and Worldspan with regard to the alleged breaches of the VCA. Those claims, in my view, are clearly within the jurisdiction of the Federal Court under paragraph 22(2)(*n*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act), *i.e.* "any claim arising out of a contract relating to the construction, repair or equipping of a ship".

[42] The Judge then turned to Worldspan's argument that the Vessel remained available for delivery, notwithstanding its sale at the end of June 2014. She indicated that, in making this argument, Worldspan was relying on paragraph 7 of the Order made by the Federal Court on June 27, 2014 which provides as follows:

> The Sale Proceeds or the Comerica Security, as the case may be, shall stand in place of the Vessel and all Claimants shall look to the Sale Proceeds or the Comerica Security, as the case may be, with the same status and priority as if the Sale or posting of Comerica Security had not taken place and the Vessel had remained under arrest.

[43] The Judge found that there was no merit to Worldspan's submission since Southcott J., at paragraph 66 of his Reasons in *Worldspan No. 1*, had considered this argument and had dismissed it.

[44] This led the Judge to say, correctly in my view, that the Vessel was now in the possession of a third party, free and clear of all liens and encumbrances including the mortgage. Thus, in the Judge's view, the Vessel no longer existed for the purpose of the proceedings before her. There remained only a fund to be distributed to the *in rem* claimants. She then pointed out that the Vessel, having been sold by Order of the Federal Court, had never been in the possession of Sargeant.

[45] As a result, at paragraphs 119 and 120 of her reasons, the Judge concluded as follows:

> [119] The VCA is not relevant to the ranking of claims advanced against the sales proceeds. Insofar as it was necessary for a Court to construe certain provisions of that agreement for the purpose of determining the validity of and meaning of the Builder's Mortgage, it is neither necessary nor appropriate for me to revisit those clauses nor the findings that have been made.
>
> [120] In my opinion, the determination of any breach of the VCA is unnecessary and irrelevant to the determination of the competing claims to the sale proceeds.

[46] It is for those reasons that the Judge allowed Sargeant's motion and dismissed Worldspan's motion.

III. Analysis

A. *Offshore's appeal (A-183-19)*

[47] I will deal first with Offshore's appeal which raises two issues, namely whether the Judge erred in refusing to allow the filing of the affidavit of David Kelly sworn November 29, 2017, and that of Fred Lillian sworn November 30, 2017, and if so, whether consideration of these affidavits should lead to the conclusion that the ranking of the priorities should be changed.

[48] The Judge's Order determining Offshore's motion for a reallocation of the priorities of the *in rem* claims is clearly a discretionary order as is her decision to exclude the Kelly and Lillian affidavits. In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 [*Hospira*], we held that discretionary decisions of judges and prothonotaries of the Federal Court were to be reviewed on the basis of the standards enacted in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. Thus, questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness.

[49] Offshore points out that the Judge's refusal to allow the filing of the two affidavits stems from her December 8, 2017 Direction wherein she stated, at page 2, that "[t]he proposed affidavits do not add anything relevant to the issues for determination on the Priorities hearing and accordingly will not be accepted for filing." Offshore then says that the Judge's Direction is at odds with the Reasons that she gave, at paragraphs 42 and 46 of the impugned decision, for

not accepting the filing of the affidavits in that in those paragraphs she grounds her refusal not only on the relevance of the affidavits but on the fact that the affidavits were not filed within the time set out in the FC Claims Process Order made on August 29, 2011.

[50] These remarks lead Offshore to discuss the test applicable to the exclusion of affidavit evidence and, more particularly, as discussed in this Court's decisions in *Canada (Attorney General) v. Quadrini*, 2010 FCA 47, 393 N.R. 33 [*Quadrini*], and in *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.* 2005 FCA 50, 331 N.R. 373 [*Mayne-Pharma*], wherein the Court indicated that affidavits should not be struck unless, *inter alia*, prejudice was demonstrated or that the evidence contained therein was irrelevant.

[51] In Offshore's view, in refusing to allow the affidavits into evidence, the Judge failed to apply a test consistent with the above decisions of this Court.

[52] With regard to the late filing of the affidavits, Offshore says that it was unreasonable for the Judge to exclude the Kelly and Lillian affidavits while she accepted other affidavits also served out of time, namely those of Michael Nesbitt sworn June 7, 2017, Nadine Abram sworn August 1, 2017 and of Mervyn Monger sworn November 27, 2017, adding that these affidavits were filed only a few days earlier than those of Kelly and Lillian.

[53] With respect to relevancy, Offshore says that the Kelly and Lillian affidavits were clearly relevant and should have been allowed to form part of the evidence and considered by the Judge.

[54] Because of the conclusion which I reach with regard to the admissibility of the Kelly and Lillian affidavits, I need not set out and consider Offshore's submissions in regard to the issue of whether the inclusion of those affidavits would support the equitable altering of established priorities.

[55] I begin by saying that the Judge's refusal to admit into evidence the late affidavits of Messrs. Kelly and Lillian was made by way of a direction, on December 8, 2017, and that no appeal was taken therefrom. Although no appeal lies from a direction, it is my view that it could reasonably be argued that the Judge's determination of the admissibility of the aforesaid affidavits was, in effect, an order given orally on December 8, 2017 and thus appealable. Pursuant to paragraph 27(2)(*a*) of the Act, the appeal of an interlocutory judgment, such as the one here excluding the admissibility of the affidavits, must be taken within ten days after the judgment is rendered or within any further time that a judge of this Court might allow before or after the end of the 10 days. No demand to extend the 10 days was made to a judge of this Court. Because Sargeant did not raise this point and hence we heard no arguments in regard thereto, I will not decide the issue on that basis.

[56] However, I am of the view that there was no basis, in the circumstances of the case, for the Judge to allow the Kelly and Lillian affidavits. My reasons for this conclusion are as follows.

[57] In the August 29, 2011 FC Claims Process Order, Prothonotary Lafrenière, at paragraph 2 thereof, wrote as follows:

> Where a claimant notifies the Monitor by September 9, 2011 that it wishes to assert a maritime claim against the Vessel, the following process will be follow[ed]:
>
> (a) after September 9, 2011, the claimant will be notified in writing by the Monitor that they are required to file an Affidavit in Federal Court;
>
> (b) the Affidavit must contain all particulars and documents in support of the claim against the Vessel, specifying the nature of the claim in order that the Court can determine if such a claim constitutes an *in rem* claim, and the priority position to be given to the claim.
>
> (c) the Affidavit must be filed in the Federal Court of Canada, Vancouver Registry, on or before 4 p.m. PST on the 21st day following the day that the *in rem* creditor received the written notification; and
>
> (d) where an *in rem* creditor does not file an Affidavit as specified above within the time specified, the *in rem* claim of such creditor shall be barred unless the Court grants an extension.
>
> [My emphasis].

[58] This now leads me to a brief discussion of Rule 492 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules) which reads as follows:

Directions	**Directives**
492(1) The Court may, in making an order under rule 490 or 491 or at any time thereafter, give directions as to	**492(1**) La Cour peut, au moment où elle rend l'ordonnance de vente des biens, au moment où elle statue sur la requête visée à la règle 491 ou à tout moment ultérieur, donner des directives au sujet :
(*a*) notice to be given to possible claimants to the proceeds of sale;	*a*) des avis à donner aux personnes qui pourraient réclamer un droit sur le produit de la vente;
(*b*) advertising for other such claimants;	*b*) de la publicité à faire à leur intention;
(*c*) the time within which claimants must file their claims; and	*c*) du délai dans lequel ces personnes doivent déposer leur réclamation;

(*d*) the procedure to be followed in determining the rights of the parties.	*d*) de la procédure à suivre pour déterminer les droits des parties.
Claims barred	**Fin de non-recevoir**
492(2) A claim that is not made within the time limited and in the manner prescribed by an order of the Court under subsection (1) is barred, and the Court may proceed to determine other claims and distribute the money among the parties entitled thereto without reference to any claim so barred.	**492(2)** Une fin de non-recevoir est opposée à toute réclamation qui n'est pas déposée dans le délai et de la manière prévus dans l'ordonnance rendue en vertu du paragraphe (1), et la Cour peut statuer sur les autres réclamations et répartir le produit de la vente entre les parties qui y ont droit sans tenir compte de la réclamation à laquelle une fin de non-recevoir a été opposée.

[59] Rule 492(1) allows the Federal Court, in making orders under Rules 490 and 491 which deal with the sale of a ship under arrest and the payment of the proceeds of sale thereof, to give directions, inter alia, with respect to the time within which *in rem* claimants must file their claims and the procedure to be followed in determining the rights of the claimants.

[60] In the present matter, the FC Claims Process Order, made pursuant to Rule 492(1) is dated August 29, 2011. Pursuant to that Order, the *in rem* claimants filed their respective claims within the time prescribed by the Order, and, in compliance thereof, affidavits containing the particulars and the documents in support of their respective claims were filed.

[61] More particularly, in support of its claim, Offshore filed the affidavits of Robert Ruzzi sworn May 17, 2011 and October 5, 2011 and that of David Kelly sworn on October 5, 2011. As to Restaurant, its claim was supported by the affidavit of Fred Lillian sworn October 3, 2011.

[62] As I have already explained between August 2011, when the FC Claims Process Order was made and December 2017, when the Judge was called upon to determine the priority of the *in rem* claims, the Federal Court had to determine a number of procedural motions brought by the parties some of which led to appeals to this Court. However, as far as I can tell from the record, neither Offshore nor Restaurant, prior to the end of November or early December 2017, attempted to file additional affidavits in support of their claims. The new affidavits, on which Offshore and Restaurant now seek to rely, were filed in support of Offshore's motion and Motion Record dated December 1, 2017.

[63] As I indicated earlier, Offshore relies on this Court's decisions in *Quadrini* and *Mayne-Pharma* to the effect that the Court should not strike out all or parts of affidavits unless prejudice is demonstrated and that the evidence sought to be included in the record is irrelevant. It is also Offshore's position that the test applied by the Judge was not in accordance with our decisions.

[64] In my respectful view, the test on which Offshore relies is not the applicable test which should have guided the Judge in the present matter.

[65] There can be no question that whether the new affidavits should have been accepted by the Judge depends on the specific circumstances of the case. In my view, the circumstances herein do not support Offshore's position that the Judge erred in refusing to allow the filing of the affidavits. While it is correct to say, as Offshore does, that the Judge refused to admit the late affidavits on the ground of relevance only in her December 8, 2017 Direction, I do not believe that, in the end, anything turns on this. If the Judge was wrong in excluding the affidavits on

relevancy, she ought to have refused them on the basis that they were not filed within the delay set out in the FC Claims Process Order and that Offshore did not offer a reason or explanation as to why the information which appears in these affidavits was not put before the Court earlier, either as part of the 2011 affidavits or at a time prior to the end of November 2017.

[66] In *Royal Bank of Scotland Plc v. Kimisis III (The)*, [2000] F.C.J. No. 909, 186 F.T.R. 300, 2000 CanLII 15751, Prothonotary Hargrave had to determine whether a document could be filed at a late stage of the proceedings, *i.e.* 14 months past the time prescribed for filing affidavits and documents by an order made under Rule 492(1). After referring to his decision in *Governor and Company of the Bank of Scotland v. The Nel*, 1998 CanLII 9120 (FC), [1999] 2 F.C. 417, 161 F.T.R. 267, wherein he had denied the Bank of Scotland leave to file a supplemental affidavit of claim on the grounds that Rule 492(2) barred the filing of late affidavits, and for which position he had relied on this Court's decision in *National Bank of Greece S.A. v. The Polar Paraguay*, 1986 F.C.J. No. 234, A-39-86, he indicated that he had to change his view by reason of the further decision of this Court in *Macoil Inc. v. Polar Paraguay*, 1988 F.C.J. No. 358 in A-303-86 where the Court held that the trial Judge had erred in concluding that he had no jurisdiction to enlarge the time fixed for the filing of claims against the proceeds of sale of a ship under then Rule 1008(2) (now 492(2)). This led the Prothonotary to say, at paragraph 7 of his reasons, that:

> This change of direction in *Macoil Inc. v. Polar Paraguay* is certainly more equitable than the hard and fast Rule in *National Bank of Greece v. The Polar Paraguay*. Yet in the present instance it is of no particular assistance to Proios Maritime S.A., who have not explained why the document was overlooked, not only in preparing the initial claim, but also in what was perhaps a cursory

> overnight search in July of 1999, yet turned up in a similar overnight request and search in May of 2000.

[67] The Prothonotary concluded that the document which Proios Maritime S.A. was attempting to add to the evidence should not be admitted. He so concluded because of his view that the document at issue had always been available and that allowing it into evidence would be unfair to the other parties, indicating that the point of Rule 492(2) was to ensure that the determination of the *in rem* claims and their priority was made within a reasonable time so as to lead to a just, most expeditious and least expensive determination. In the Prothonotary's view, allowing the additional material into the record, at a late stage of the proceedings, would defeat the purpose of the Rule. The Prothonotary concluded his reasons by stating that further material could indeed be allowed into evidence where there existed special circumstances justifying the admission thereof which circumstances had to be fully explained.

[68] In my view, the test set out by the Prothonotary is the correct one. It is clear in the present matter that Offshore and Restaurant have not shown the existence of any special circumstances which would justify the admission of the late affidavits of Kelly and Lillian. I also point out that the purpose of these affidavits is to put before the Court facts which occurred between January and May 2010, and thus, there can be no doubt that the evidence had been available to Offshore and Restaurant for a long period of time. Why this evidence was not provided by Offshore and Restaurant in the affidavits which they filed in 2011 has not been explained. In addition, at no time between the filing of the 2011 affidavits and December 1, 2017, *i.e.* two weeks prior to the hearing of Worldspan's motion and the motion regarding to priorities, was an attempt made by Offshore and Restaurant to file amended or additional affidavits. Consequently, I can see no

basis on which the Judge could have concluded that the late affidavits should be admitted into evidence.

[69] One further point. Sargeant, in response to Offshore's arguments, referred us to the test applicable under Rule 312 which allows the Court to grant leave to a party to file additional affidavits in the course of an Application under Part V of the Rules. In *Forest Ethics Advocacy Assistance v. Canada (National Energy Board)*, 2014 FCA 88, 2014 F.C.J. No. 356, Stratas J.A., sitting as a Rule 369 judge, indicated, relying on this Court's decision in *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General*), 2009 FCA 101 at para. 2, that for the Court to authorize the filing of additional material, it had to be satisfied that the material was not available when the earlier affidavit had been filed, that the evidence to be adduced was relevant and that no prejudice would result from the filing of the additional material.

[70] It is clear in the present matter that the evidence which Offshore and Restaurant seek to put before the Court, by way of the late affidavits of Kelly and Lillian, was available when the earlier affidavits were filed. It is also clear that the admission of the late affidavits would cause prejudice to Sargeant who has not had the opportunity to cross-examine on these affidavits and no opportunity to rebut the information contained therein. This could only have been remedied by adjourning the hearing on the motions scheduled for December 13 and 14, 2017, which were finally being heard six years after the making of the FC Claims Process Orders.

[71] I therefore conclude that the Judge made no reviewable error in refusing to allow the admission of the late affidavits. Even if I were of the view that that the Judge erred in her

December 8, 2017 Direction by refusing the admission of the affidavits on the basis of relevance, this would have allowed us to render the judgment which ought to have been rendered. As I have made it clear, such judgment would have refused the admission of the late affidavits because the late filing was not justified in the circumstances of the case.

[72] Offshore did not argue that, based on the 2011 affidavits, the Judge's decision with regard to the reordering of the priorities was wrong. It only argued that she erred in refusing the admission of the late affidavits and on the basis of the evidence contained therein, she ought to have concluded there were grounds to reorder the priorities. As I conclude that the late affidavits are not part of the evidence, the only conclusion possible is that the Judge made no error in refusing to reallocate the priorities.

IV. Conclusion

[73] For theses reasons, I would dismiss Offshore's appeal with costs in favour of Sargeant.

[74] I now turn to Worldspan's appeal in A-171-19.

A. *Worldspan's appeal (A-171-19)*

[75] This appeal arises from the Judge's determination of the motions presented by Sargeant (on August 1, 2017) and by Worldspan (on August 21, 2017). As I have already indicated, she allowed Sargeant's motion for a declaration that it was unnecessary, for the final determination of priorities in respect of the *in rem* claims against the Vessel, to determine whether any breach

of the VCA had occurred and she dismissed Worldspan's motion for an order that Sargeant was in breach of the VCA.

[76] The issue raised by the appeal is whether, in so concluding, the Judge made a reviewable error. For the reasons that follow, I conclude that she made no such error.

[77] At paragraphs [35] to [46] of these reasons, I explained the Judge's rationale for the conclusion that she reached in regard to the two motions. I pointed out that in concluding as she did, the Judge found considerable support for her findings in her Court's decisions in *Offshore No. 1* and in *Worldspan No. 1*, both of which were upheld by this Court in *Offshore No. 2* and in *Worldspan No. 2*.

[78] I begin by setting out the grounds upon which Worldspan argued before the Judge that she ought to make the order sought by its motion. These grounds are clearly set out at paragraph 4 of Worldspan's motion where it says:

> The position of Worldspan, supported by the *In Rem Trade Creditors* ("IRTC"), is as follows:
>
> (a) Sargeant/Comerica are clearly in breach for non-payment of Claims Certificates after December of 2009;
>
> (b) Worldspan has no obligation to deliver the Vessel prior to such payment (section 3.2 of the VCA);
>
> (c) There is no relevant, express re-payment obligation in the VCA;
>
> (d) The "crystalizing" event of re-payment of advances resulting from non-delivery due to judicial sale has not and will not occur as a result of paragraph 7 of the Sale Order of June 27, 2014;

(e) No other provision or crystallizing event currently exists requiring repayment of advances. As such, Sargeant/Comerica currently have no amounts to be set off against amounts owing to Worldspan;

(f) The Vessel remains, at law, under arrest and capable of "delivery" if Sargeant/Comerica can establish entitlement. Delivery would extinguish the advances loan;

(g) Sargeant/Comerica were offered delivery by the Court and rejected the opportunity having elected not to take delivery, they cannot now obtain a remedy based on the failure of delivery;

(h) Any failure of Worldspan to pay creditors is a direct result of Sargeant/Comerica's breach and cannot be relied upon by Sargeant/Comerica; and

(i) Sargeant/Comerica currently owe in excess of 6.2 million USD.

[Appeal Book, Vol. 1, tab 11, pp. 70-71]

[79] In its Notice of Appeal filed on May 10, 2019, Worldspan set out the grounds for its appeal. First, it says that the Judge erred in finding that the mortgage was independent of the VCA. In its view, the VCA was the controlling document and consequently the mortgage was subject to its terms and conditions.

[80] Second, contrary to the Judge's determination that the Vessel was no longer available for delivery to Sargeant, Worldspan says that by reason of the Federal Court's order of sale of the Vessel of June 27, 2014, the Vessel remained available for delivery to Sargeant.

[81] Third, Worldspan says that the Judge erred in finding that the arrest and sale of the Vessel altered the rights and obligations as between it and Sargeant.

[82] Lastly, Worldspan says that the Judge erred in finding that its arguments relating to the breach of the VCA were to be dealt solely in the *in personam* proceedings commenced in the BC Court.

[83] Consequently, Worldspan seeks an order from this Court declaring that a determination of the issue of whether there has been a breach of the VCA is relevant and necessary for the determination of the priorities of the *in rem* claims and that Sargeant is in breach of the VCA by reason of his failure to pay Claims Certificates when due. In the alternative, Worldspan asks that we remit the above questions to the Federal Court for redetermination.

[84] In its Memorandum of Fact and Law, and orally before us, Worldspan made, in essence, two arguments in support of its position that we should intervene. The first argument is that the sale of the Vessel did not change the status of the claims or their priority because, notwithstanding its sale by the Federal Court, the Vessel remains available for delivery pursuant to the order made by the Court. Thus, in Worldspan's view, the question which must be answered is whether Worldspan can still deliver the Vessel and, if it cannot do so, whether Sargeant is responsible for its inability to deliver.

[85] Worldspan submits that Sargeant is not entitled to the delivery of the Vessel without paying the sums which are owed to it and that Sargeant, in the circumstances of the case, has no right to the repayment of his advances.

[86] Worldspan further submits that breaches of the VCA are a relevant factor and, more particularly, because a breach of the VCA by Sargeant led to its failure to deliver the Vessel to Sargeant. In other words, Worldspan says that Sargeant's breach of the VCA rendered delivery of the Vessel impossible. Worldspan says that Sargeant's failure to pay the Claims Certificates presented to him left Worldspan in a negative cash flow position. At paragraph 83 of its Memorandum of Fact and Law Worldspan says that Sargeant's failure "directly caused Worldspan to default in payment of its creditors. Worldspan could not withstand Sargeant's failure to pay amounts due under Section 4.2 [of the VCA]."

[87] Worldspan further says that payment by Sargeant of the Claims Certificates was a condition precedent to Worldspan's obligation and ability to pay its subcontractors and hence to complete the Vessel and deliver it to Sargeant.

[88] Worldspan's second argument is that the Federal Court was bound to determine what it characterizes as "[t]he Fundamental Question: Who Owed What To Whom in May of 2010?" (Appellant's Memorandum of Fact and Law, heading of para. 91).

[89] This assertion leads Worldspan to engage in a discussion of the various terms and conditions of the VCA. More particularly, Worldspan proceeds to make detailed calculations based on these terms and conditions, namely: sections 4.2, 7 and 24 of the VCA. After making such calculations, Worldspan says that Sargeant owes it, as of May 1, 2010, the sum of US$3,996,635.02 plus interest at a rate of 8% per year. Thus, according to Worldspan, Sargeant owes it the sum of US$6,874,212.23.

[90] Thus, Worldspan seeks an order that the Judge's decision be set aside and that judgment in its favor be entered for the above mentioned amount.

[91] As to Sargeant's motion, as I have already indicated, it simply asks the Court to declare that any breach of the VCA is irrelevant with regard to the determination of the priorities of the *in rem* claims against the Vessel. Because of the conclusion which I reach in regard to Worldspan's motion, it is unnecessary for me to address the specific arguments made in regard to Sargeant's motion. My reasons in respect of Worldspan's motion are such that they dispose of both motions.

[92] Before addressing Worldspan's submissions, and the specific grounds on which these submissions rely, it is necessary to closely examine what the Federal Court, and this Court, decided in *Offshore No. 1* and *No. 2* and *Worldspan No. 1* and *No. 2*.

[93] In *Offshore No. 1*, Strickland J. allowed an appeal from a decision of Prothonotary Lafrenière who held, on March 5, 2013, that Sargeant's mortgage did not create a lien or charge in the Vessel. In Strickland J.'s view, Sargeant's mortgage secured the advances that he made to Worldspan and that Worldspan was obliged to repay them. She made the following remarks at paragraphs 72 and 74 of her Reasons:

> [72] Even if I had not found this I would have concluded that, interpreting the transaction as a whole to determine the intent of the parties and within the relevant factual matrix, the Builder's Mortgage and VCA implied an obligation to repay the unearned advances which created a potential debt that would, in effect, crystallize upon failure to deliver the Vessel in these circumstances. Although there was no actual "loan" there was a potential debt created by the provisions of

> the VCA and Sargeant secured the satisfaction of the potential debt by way of the Builder's Mortgage.
>
> …
>
> [74] Here, the potential debt was created by the advances that would not be earned until delivery. The satisfaction of that debt would have occurred by delivery of the Vessel. As that did not occur, and the VCA contractual terms that would have otherwise governed the parties upon default have no application in these circumstances, the debt crystallized and satisfaction would be achieved by repaying the advances, accounts of which were kept by both parties.
>
> [My emphasis].

[94] On June 9, 2014, this Court, in *Offshore No. 2*, dismissed Worldspan's appeal from Strickland J.'s decision. Of relevance to the appeal are paragraphs 120, 121, 122 and 125 of the decision.

> [120] Offshore's argument regarding delivery is premised on its assertion that Sargeant is indebted to Worldspan due to his failure to pay his advances. Consequently, following Offshore's reasoning, Worldspan had no obligation to deliver the Vessel. However, this assertion is disputed by Sargeant. He argues that he was over-billed by Worldspan. In any event, the issue of whether Sargeant or Worldspan or both of them were in breach of the VCA is one that has yet to be determined by a court. It is clear, however, that the VCA does not address the situation where the Vessel has been arrested by a third-party creditor before either Sargeant or Comerica could ask for delivery and subsequently has been sold by the Court. While it is true that the VCA imposes upon Worldspan the obligation to deliver the Vessel, such an obligation is not mentioned in the Builder's Mortgage nor in that part of the VCA which provides that Worldspan, upon demand of Sargeant, will execute a mortgage in his favour. Therefore, it can hardly be said that the Builder's Mortgage was intended solely to secure delivery of the Vessel.
>
> [121] If Offshore's position is to be accepted, Sargeant would effectively have had to conduct ongoing monitoring of Worldspan's accounts with third party creditors (such as Offshore) in order to ensure that it did not enter into any arrangements or default on any of its financial obligations. In turn, if Worldspan did enter into an arrangement or default on its obligations to any third party, Sargeant would have had to immediately sue for delivery of the Vessel before the third party arrested the Vessel. Failing that, he would have been left without an

> effective remedy. Such an interpretation of the effect of the VCA and the Builder's Mortgage is clearly a commercial absurdity.
>
> [122] I can therefore detect no error on the Judge's part when she found that failure on the part of Worldspan to deliver the Vessel to Sargeant gave rise to an obligation to repay the advances.
>
> […]
>
> [125] The Judge found that there was an obligation to repay the advances to Sargeant on the basis of her reading of both the VCA and the Builder's Mortgage. In other words, she interpreted the contractual documents and determined that it was the parties' intention that should delivery of the Vessel not take place, Sargeant would be entitled to be repaid the advances which had not yet been earned. In so interpreting the contractual documents, the Judge considered, correctly in my view, other provisions in the VCA which obliged Worldspan, in specific circumstances, to repay the advances to Sargeant. I can find no error on the part of the Judge in regard to this finding.
>
> [My emphasis].

[95] In *Worldspan No. 1*, Southcott J. dealt with two motions. The first one, presented by Worldspan, was that any amounts owed by Sargeant to it pursuant to the VCA were to be paid in priority over any security interest that Sargeant might have under the mortgage. Southcott J. dismissed Worldspan's motion. In concluding that there was no obligation on the part of Sargeant to pay Worldspan any amount he might owe under the VCA, as a condition to the exercise of his rights under the mortgage, Southcott J. made it clear that Sargeant was not precluded from obtaining the return of his advances until payment was made to Worldspan. Rather, in his view, Worldspan was entitled to set off against those advances amounts owed to it pursuant to the VCA. Paragraph 64 of Southcott J.'s decision reads, in part, as follows:

> …. The formula that then applies does not preclude Sargeant from obtaining refund of its advances until it has paid Worldspan, but rather provides for refund of those advances subject to prescribed adjustments. It is difficult to reconcile these contractually prescribed mechanisms with Worldspan's proposed

> interpretation of Section 12.1. However, they can be reconciled with Sargeant's interpretation that Section 12.1 creates a right by Worldspan to deduct amounts owed to it pursuant to the VCA from any Mortgage claim by Sargeant.
>
> [My emphasis].

[96] Southcott J. also dealt with Worldspan's argument that the proceeds resulting from the sale of the Vessel by the Federal Court had replaced the Vessel for the purposes of the VCA and that Sargeant could obtain delivery of the Vessel, or rather of the proceeds, once he had paid Worldspan the amounts outstanding under the VCA. Southcott J. dismissed this argument and stated at paragraph 66:

> I do not agree that this is a correct interpretation of the Sale Order. The effect of an order for judicial sale of a vessel is that the proceeds replace the vessel as the subject of the competing *in rem* claims. It is not intended to be read as supplementing the terms of the VCA as Worldspan argues.
>
> [My emphasis].

[97] As I indicated at paragraph [17] of these reasons, this Court dismissed Worldspan's appeal of Southcott J.'s decision. Thus, this Court upheld the judge's determination that Sargeant was not obliged to pay Worldspan any amount which might be owed to it pursuant to the VCA as a condition to the exercise of his rights under the mortgage.

[98] In *Worldspan No. 1*, Southcott J. also dismissed the other motion before him, *i.e.* Sargeant's motion which sought an order from the Court to the effect that the *in personam* claims between Sargeant and Worldspan had to proceed before the BC Court. In so deciding, Southcott J. made the following remarks at paragraph 93 of his reasons:

> I emphasize that this conclusion is not intended to suggest that *in personam* proceedings should be commenced in this Court and therefore should not give rise to the "procedural fog" that Sargeant expressed concern would impact other claimants. Rather, my conclusion is that this Court's *in rem* jurisdiction includes whatever liability and quantification determinations, including defence arguments raised by the vessel owner, are necessary to adjudicate the *in rem* claims.
>
> [My emphasis].

[99] What can we take from these decisions? First, there can be no doubt whatsoever that Sargeant's advances must be repaid by Worldspan and that payment of any amount that Sargeant might owe to Worldspan under the VCA does not constitute a bar to the exercise of his rights under the mortgage. However, as Southcott J. correctly concluded in *Worldspan No. 1*, Worldspan is entitled to set off against the proceeds of sale payable to Sargeant any amount which might be owed to it for breaches of the VCA.

[100] It is also clear from these decisions that Worldspan can no longer argue that the proceeds resulting from the sale of the Vessel by the Federal Court have replaced the Vessel for the purposes of its delivery to Sargeant and of the VCA. In other words, the Vessel, contrary to what Worldspan argues, cannot be delivered to Sargeant. As a result, Worldspan's arguments, found between paragraphs 57 and 90 of its Memorandum of Fact and Law, based on Worldspan's preparedness to deliver the Vessel, are of no relevance for the determination of the appeal. Delivery of the Vessel did not occur and can no longer occur.

[101] In my respectful view, the only question remaining for determination in this appeal is whether Worldspan is entitled to offset from the proceeds of sale payable to Sargeant any amount Sargeant might owe to it under the VCA. Thus, contrary to the Judge's determination, I

am of the view that before making an order in regard to the payment of the proceeds of sale of the Vessel to Sargeant, the question of possible breaches of the VCA by Sargeant had to be addressed.

[102] For the reasons that follow, I conclude that there is no amount that can presently be offset from Sargeant's claim and that, as a result, Sargeant, by reason of the priority of his mortgage claim, is entitled to payment of the proceeds of sale of the Vessel. Thus, although I am of the opinion that the Judge erred in not considering the question of possible breaches of the VCA, I must conclude that her error is of no consequence.

[103] At paragraph 120 of this Court's reasons in *Offshore No. 2*, we indicated that the dispute between Sargeant and Worldspan relating to possible breaches of the VCA was a question which had yet to be determined. In *Worldspan No. 1*, in determining Sargeant's motion that the *in personam* claims between him and Worldspan should proceed only in the BC Court, Southcott J. indicated that Worldspan was entitled to offer a defense to Sargeant's *in rem* claim in the Federal Court and that any amount which might be owed by Sargeant to Worldspan could be offset from the proceeds payable to Sargeant (*Worldspan No. 1* at paras. 64, 91, 92 and 93)

[104] What appears clearly from Worldspan's motion and the arguments which it has made before the Judge and now before us, and which were also made before Southcott J. in *Worldspan No. 1*, is that what it truly seeks is the determination of a very complicated dispute on who breached the VCA. More particularly, Worldspan says that Sargeant is at fault for its failure to pay its subcontractors which, in the end, led to the arrest of the Vessel by Offshore and its

inability to deliver the Vessel to Sargeant. Worldspan says that responsibility for that chain of events rests clearly upon Sargeant's shoulders while Sargeant says that Worldspan is solely responsible for the arrest and its failure to deliver the Vessel, *as per* the contractual agreement found in the VCA.

[105] This dispute is what led Sargeant to commence legal proceedings for damages against Worldspan in the BC Court on April 29, 2011, wherein he made a number of allegations against Worldspan, including breach of fiduciary duty, breach of trust, conversion, fraud and breach of contract. Specifically, Sargeant alleged that Worldspan had engaged in dishonest practices, including fraud and the conversion of funds received from Sargeant to its own use. These assertions led Sargeant to seek judgment for money had and received, a declaration that all money had and received by Worldspan be held in a constructive trust for Sargeant, and for an accounting.

[106] On May 30, 2011, Worldspan filed a defense to Sargeant's action and counterclaimed against Sargeant for damages for amounts allegedly payable by him under the VCA. Thus, the proceedings in the BC Court clearly raise the issue regarding the alleged breaches of the VCA.

[107] On February 2, 2016, Worldspan sought an order from the BC Court staying the proceedings commenced by Sargeant in that Court pending the determination by the Federal Court of the issues pertaining to the priorities of the *in rem* claimants and more particularly the priority of Sargeant's claim based on his mortgage.

[108] By judgment dated July 6, 2017 (2017 BCAC 1153), the BC Court dismissed Worldspan's application. In his careful and thorough reasons for judgment, Pearlman J. of the BC Court held that no prejudice would result to Worldspan if its application was denied. In his view, Sargeant's claims based on fraud and conversion were distinct claims from, and did not overlap with the *in rem* proceedings in the Federal Court action. He also found that the balance of convenience favoured the dismissal of Worldspan's application. Of relevance to these proceedings are his remarks found at paragraph 65 of his reasons where he said:

> Sargeant chose to pursue his *in rem* claim against the Vessel (and the proceeds of sale that now stand in place of the Vessel) in the Federal Court. In the course of determining priorities of the in rem claims and the distribution of the proceeds of sale of the Vessel, the Federal Court will address *in personam* issues concerning the interpretation and application of the VCA as it relates to Worldspan's claim for the set off of amounts alleged to be owed by Sargeant for unpaid claims certificates. However, the Federal Court action will not resolve Sargeant's tort claims for fraud and conversion. The result in the Federal Court action will not effectively resolve this litigation.

[109] As the above remarks of Pearlman J. show, he was of the view that Worldspan was entitled to set off from the proceeds payable to Sargeant any amount which Sargeant might owe to it for breaching the VCA. Pearlman J.'s view is thus similar to that expressed by Southcott J. in *Worldspan No. 1*. I believe that that position is correct. As I have already indicated, this is the dispute which Worldspan is asking us to dispose of in this appeal. With respect, we are clearly not in a position to make this determination. In the following paragraphs of these reasons, I will explain why I am of that view.

[110] I return to the grounds upon which Worldspan relies for its motion, which appear at paragraph [78] of these reasons. In my view, grounds (b), (c), (d), (e), (f), and (g) have either

been disposed of in *Offshore No.* 1 and *Offshore No. 2* and in *Worldspan No.1* and *Worldspan No. 2* or they are no longer relevant. As I indicated earlier, Worldspan's submissions regarding whether Sargeant is entitled to exercise his rights under the mortgage are no longer in issue. These have already been dealt with in previous decisions.

[111] What remains at issue are ground (a) to the effect that Sargeant is in breach of the VCA for non-payment of Claims Certificates after December 2009 and grounds (h) and (i) to the effect that Sargeant is liable for Worldspan's failure to pay its subcontractors and that consequently he owes it a sum in excess of 6.2 million USD. These grounds beg the question as to whether Sargeant or Worldspan, or both, are in breach of the VCA.

[112] It is important to say that Worldspan's arguments, both orally and in its Memorandum of Fact and Law, take as their premise that Sargeant is in breach of the VCA and hence liable for the amounts it says are owing to it by reason of its failure to pay its subcontractors. The problem with Worldspan's premise is that Sargeant has not conceded on any point nor as he made any admission in regard to Worldspan's allegations of breach. Thus Sargeant does not agree with Worldspan's position but, to the contrary, he says that Worldspan is the party that breached the VCA. A brief examination of the affidavits in the record will easily demonstrate why this Court cannot resolve the issues raised by Worldspan.

[113] In bringing its motion, Worldspan relied on a number of affidavits, namely that of Michael Nesbit sworn October 14, 2011, that of Sargeant sworn October 7, 2011, that of Cynthia B. Jones sworn October 14, 2011 and that of Michael Nesbit sworn June 7, 2017. As to Sargeant,

for the purposes of his motion, he relied on his affidavit sworn October 13, 2011 and on that of Cynthia B. Jones sworn October 7, 2011, and that of Michael Nesbit sworn October 14, 2011.

[114] In addition to the above affidavits, I note that Worldspan, in its Memorandum of Fact and Law, also relies on the affidavit of Dave Kelly sworn November 29, 2017 which affidavit is not part of the record before us. Worldspan also relies, in its Memorandum of Fact and Law, on the affidavit of Mervyn Monger sworn November 27, 2017. At paragraph 1 of that affidavit, after declaring that he was a representative of Sargeant, Mr. Monger attaches, as exhibit "1" to his affidavit, a copy of an affidavit that he swore on April 28, 2011 in the context of the proceedings commenced by Sargeant in the BC Court. I will begin with a brief examination of that affidavit.

[115] Commencing at paragraph 27 of his affidavit of April 28, 2011, Mr. Monger explains the events which led Sargeant to cease the funding of the construction of the Vessel. More particularly, he explains, at paragraph 31, that he was informed in early November 2009 by Jim Hawkins, Worldspan's Shipyard Manager, that the cost of construction of the Vessel would exceed the budget by approximately 10%. Mr. Monger then states, at paragraph 34, that Jim Hawkins advised him in February 2010 that the expected cost of completing the vessel was now approximately US$28 million. At that time, Comerica and Sargeant had already advanced to Worldspan over US$20 million. (Mervyn Monger's Affidavit, Appeal Book, Vol. IV, Tab. 24, paras 27 and 31).

[116] In view of this, Sargeant informed Mr. Monger that he was not prepared to continue with the project unless he was given an explanation as to why the cost of construction had increased

by US$8 million in the span of 3 months. This led Mr. Monger to request access to the books and records of Worldspan, which request was originally denied by Mr. Taubeneck, Worldspan's President and Chief Executive Office. Mr. Monger then states, at paragraph 39, that it became evident by March 2010 that Worldspan could not continue to meet its obligations under the VCA. He then states that, at the end of April 2010, Sargeant instructed Worldspan to cease construction of the Vessel. Mr. Monger also states that, on May 18, 2010, he was advised by Mr. Taubeneck that the majority of the shipyard's employees had been laid off because no funds were available to meet the payroll.

[117] Mr. Monger also indicates, at paragraph 43 of his affidavit, that he and Sargeant met with the principals of Worldspan, namely: Chris Blane and Steve Barnett, on June 16, 2010, in Palm Beach, Florida, and that a tentative agreement was reached to move ahead with the construction of the Vessel on the basis that Worldspan would limit the cost of construction to US$27 million, with any additional costs to be the responsibility of Worldspan.

[118] Hence, on August 17, 2010, Sargeant's lawyers sent a proposed *addendum* to the VCA to Worldspan's lawyers. On September 16, 2010, Worldspan's lawyers wrote to Sargeant's lawyers indicating that, *inter alia*, the cost of construction would be in the vicinity of US$29 million and that project delays had resulted by reason of Sargeant's failure to pay Claims Certificates for the period of January to April 2010.

[119] Then, commencing at paragraph 52 of his affidavit, Mr. Monger states that Worldspan agreed to provide limited access to its books and records and that he attended the shipyard for

approximately 8 days over a 3 week period in February 2011 to review documents presented to him in support of the amounts claimed in the Claims Certificates. Mr. Monger then asserts that Dan Pascoe, Worldspan's Chief Financer Office, admitted to him, during the course of his inspection, that Worldspan had overbilled Sargeant but that Worldspan intended on making good to Sargeant the overbilled amounts (Mervyn Monger's Affidavit, Appeal Book, Vol. IV, Tab. 24, para. 53, p. 674).

[120] Mr. Monger also indicates that Lee Taubeneck had admitted that he had been instructed by Chris Blane and Steve Barnett to use funds received from Sargeant in respect of the construction of the Vessel to pay unrelated debts of Worldspan so as to "keep the business going" (Mervyn Monger's Affidavit, Appeal Book, Vol. IV, Tab. 24, para. 57, p. 674).

[121] Needless to say, Mr. Monger's above assertions are serious allegations which, before the rights and wrongs under the VCA can be determined, must be addressed at some point. So far, they have not been addressed by the Federal Court nor by the BC Court.

[122] I now turn to the affidavits of Michael Nesbit, a Chartered Accountant who was engaged by Worldspan. In his affidavit of October 14, 2011, filed in support of Worldspan's *in rem* claim against the Vessel, Mr. Nesbit states that Sargeant was late in making payments from the beginning of the construction project and that his payment delinquency became chronic and continuous culminating in Sargeant owing to Worldspan the sum of US$6,643,082.59. In Mr. Nesbit's view, Sargeant's failure to pay the Claims Certificates on time had a devastating

financial effect on Worldspan and its subsidiaries. However, Mr. Nesbit does not address the reasons for which Sargeant was delinquent or was refusing to make the agreed to payments.

[123] In his further affidavit of June 7, 2017, filed in the context of a motion instituted by Sargeant in 2014 to relocate the Vessel from Worldspan's premises in Maple Ridge, B.C. to a shipyard owned or controlled by Sargeant in Richmond, B.C., Mr. Nesbit deals with a number of issues arising from Sargeant's motion to relocate the Vessel but does not address any of the issues pertaining to the VCA in respect of which Worldspan seeks a determination by this Court. In other words, Mr. Nesbit's affidavit is of no help to us in determining whether Sargeant is in breach of the VCA.

[124] Next is the affidavit of Cynthia B. Jones, Vice President, Special Assets Group with Comerica Bank. Her affidavit was filed in support of Sargeant's *in rem* claim against the Vessel. In her affidavit, Ms. Jones explains the relationship between Sargeant and Comerica Bank in respect of the Construction Loan Agreement dated August 14, 2009. She further indicates that her bank advanced US$9,400,000.00 to Sargeant and that Sargent is indebted to the bank for that amount. She also says that a sum of US$20,682,520.92 has been advanced by Sargeant to Worldspan under the VCA (Cynthia B. Jones' affidavit, Appeal Book, Vol. II, pp. 250-253).

[125] Next, is the affidavit of Sargeant sworn October 13, 2011. In his affidavit, filed in support of his *in rem* claim against the Vessel, Mr. Sargeant explains his understanding of the VCA and the mortgage. He also indicates and explains his arrangements with Comerica Bank leading to the Construction Loan Agreement. Finally, he speaks to the payments which he made following

receipt of Worldspan's Claims Certificates (Harry Sargeant III's affidavit, Appeal Book, Vol. II, pp. 291-295).

[126] In my view, none of the affidavits, other than that of Mr. Monger, are of any help to us in regard to a determination of possible breaches of the VCA. More importantly, we are unable, on the evidence before us, to determine whether Sargeant is in breach of the VCA for non-payment of Claims Certificates and, if so, whether his breach led to Worldspan's failure to pays its subcontractors. We are also not in a position to address questions of credibility which clearly arise from the view put forward by Mr. Monger in his affidavit and the position taken by Worldspan that Sargeant's non-payment of Claims Certificates is the determinative event insofar as the VCA is concerned. How the Judge, in the context of the motion before her, and this Court, in the context of this appeal, could possibly resolve the dispute between Worldspan and Sargeant is beyond my understanding. It is also important to remember that one of the basis, if not the most important one, of Worldspan's arguments is that it is still capable of delivering the Vessel pursuant to terms and conditions of the VCA. On that premise, Worldspan says that section 4.2 of the VCA applies and that, as a result, Sargeant is indebted to Worldspan. Unfortunately for Worldspan, as I have indicated earlier, delivery of the Vessel is no longer possible. Consequently, Worldspan's arguments predicated on its ability to deliver the Vessel are of no consequence to the determination of this appeal.

[127] The VCA was entered into in February 2008, the Vessel was arrested on July 28, 2010, and it was sold by the Federal Court on June 27, 2014. Sargeant commenced proceedings in the BC Court on April 29, 2011 and Worldspan filed a defense and counter-claim to Sargent's action

at the end of May 2011. These proceedings, as I have explained, relate directly to the possible breaches of the VCA but they have not progressed. To the contrary, Worldspan sought, in February 2016, to have these proceedings stayed. This Court was not made aware of any further development with regard to the BC proceedings.

[128] Counsel for Worldspan did not provide us any explanation as to why the dispute concerning the VCA has not progressed in the BC Court nor why the VCA issues were not clearly put before the Federal Court for determination other than by Worldspan's motion. As the appeal shows, Worldspan is attempting to have the VCA litigation decided in the context of a simple motion with very limited evidence. As Mr. Monger's affidavit reveals, Sargeant clearly disputes that he is in the wrong with regard to the VCA. The accuracy of this evidence deserves to be tested by way of a more fulsome proceeding than the one that Worldspan brought before the Federal Court and which is now on appeal before this Court. It may well be that a full trial of these issues will, in the end, be required for a Court to come to a determination. However, as I have already explained, we are not in a position to determine if Sargeant, or Worldspan, is at fault for the failure to complete the construction of the Vessel and to deliver it to Sargeant.

[129] Considering that almost 10 years have now gone by, one may have doubts as to whether the VCA dispute will ever be resolved. So far, the protracted nature of the dispute is reminiscent of Charles Dickens' *Jarndyce and Jarndyce* in Bleak House. If my memory serves me well, this fictional case was never resolved in a way that was satisfactory to any of the parties involved. In any event, the present dispute shall not be resolved by us in this appeal. Thus, since there is no amount which Worldspan can offset against the proceeds payable to Sargeant, I see no basis to

disturb the Judge's order that Sargeant is entitled to the proceeds of sale of US$5 million less the sums payable in respect of the sheriff's fees and disbursements.

V. Conclusion

[130] For these reasons, I would dismiss Worldspan's appeal with costs in favour of Sargeant.

[131] A copy of these reasons will be filed in each of the appeals.

"M. Nadon"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-171-19 AND A-183-19
DOCKET:	A-171-19
STYLE OF CAUSE:	WORLDSPAN MARINE INC. v. HARRY SARGEANT III AND COMERICA BANK
AND DOCKET:	A-183-19
STYLE OF CAUSE:	OFFSHORE INTERIORS INC. AND RESTAURANT DESIGN AND SALES LLC v. HARRY SARGEANT III AND COMERICA BANK
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	DECEMBER 1, 2020
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	WEBB J.A. LEBLANC J.A.
DATED:	JUNE 29, 2021

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