Federal Court of Appeal | Cour d'appel fédérale

Date: 20141015

Docket: A-101-14

Citation: 2014 FCA 231

CORAM: **NADON J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

WESTSHORE TERMINALS LIMITED PARTNERSHIP by its General Partner WESTSHORE TERMINALS LTD., WESTSHORE TERMINALS INVESTMENT CORPORATION, and WESTAR MANAGEMENT LTD.

Appellants

and

LEO OCEAN, S.A., KAWASAKI KISEN KAISHA LIMITED ('K'-LINE), AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIPS "CAPE APRICOT", "ASIAN GYRO", "BORON NAVIGATOR", "CIELO DI AMALFI", "LEO ADVANCE", "LEO AUTHORITY", "LEO FELICITY", "LEO MONO", "LEO OSAKA", "LEO PERDANA", "MEDI GENOVA", "MOL PARAMOUNT", "MOL SOLUTION", "OOCL OAKLAND", "ROYAL ACCORD", "ROYAL CHORALE", and "ROYAL EPIC"

Respondents

and

TOKEI KAIUN COMPANY LIMITED, JEFFREY MCDONALD, SEASPAN ULC, "SEASPAN OSPREY", "SEASPAN RESOLUTION" and "CHARLES H. CATES VII"

Defendants

Heard at Vancouver, British Columbia, on June 9, 2014.

Judgment delivered at Ottawa, Ontario, on October 15, 2014.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. INTRODUCTION

[1] In this appeal, the appellants seek to set aside an order (2014 FC 136) made by Madam Justice Heneghan (the Judge) on February 7, 2014 wherein she held that a legally binding agreement was entered into by the appellants pursuant to which they agreed to waive their right to arrest sister ships of the respondent Leo Ocean, S.A.'s (Leo) ship, the "Cape Apricot" (the Vessel) in consideration of security being provided by Leo for their claim of damage against the Vessel.

[2] The Judge further held that pursuant to subsection 43(8) of the *Federal Courts Act*, R.S.C, 1985, c. F-7 (the Act) the appellants could not arrest both the "Cape Apricot", *i.e.* the ship which caused the damage giving raise to their claim, and a sister ship thereof. The relevant legislation is set out in the appendix to these reasons.

[3] For the reasons that follow, I am of the opinion that the Judge was correct in concluding as she did and that, as a result, the appeal should be dismissed.

II. FACTS

[4] There is no real dispute between the parties with regard to the relevant facts. There is, however, a real dispute with regard to the legal consequences which flow from these facts. A brief summary of the facts will therefore suffice to put the issues in proper context.

[5] The Vessel is owned by Leo. On December 7, 2012 while at the port of Vancouver, British Columbia at a marine terminal facility situated at Roberts Bank, owned by the appellants, the Vessel struck and damaged part of the trestle leading from the shore to Berth #1 of the terminal.

[6] As a consequence, Berth #1 became unusable until repairs were effected and parts replaced. It was estimated at the relevant time that at least two months or more would be required to restore the operability of the Berth and that the cost to the appellants would be in the order of $60 million.

[7] Following the allision, the Vessel was sent to Berth #2 of the marine terminal, the only remaining Berth, where it commenced loading coal.

[8] On December 7, 2012, the appellants commenced an action in the Supreme Court of British Columbia (the BCSC) and arrested the Vessel at Berth #2.

[9] Between December 7, 2012 and December 11, 2012, the parties, through their respective solicitors, namely Mr. Peter Roberts for the appellants and Mr. Gary Wharton for Leo, negotiated the release of the Vessel from arrest. More particularly, their negotiations dealt with the amount of security required for the release of the Vessel and the availability of sister ships to satisfy the security required by the appellants.

[10] During the course of negotiations Mr. Wharton expressed his view to Mr. Roberts that security for the appellants' claim was limited to the value of the Vessel and that the right to arrest a sister ship was "weak".

[11] On December 11, 2012, Mr. Wharton sent an email to Mr. Roberts advising him that he was instructed by Leo and the Japan shipowners' mutual protection and indemnity association (P & I Club) to issue a Letter of Undertaking (LOU) in the sum of $26 million so as to secure the release of the Vessel from arrest.

[12] In short, the LOU provided that the P & I Club and Leo agreed to submit to the jurisdiction of both the BCSC and the Federal Court, that upon demand bail would be furnished in an amount not exceeding US$26 million and that the appellants' recourse and recovery for damage "shall not be limited by the terms of the [LOU]".

[13] In consideration of the LOU, the appellants were to agree to release the Vessel from arrest and to refrain from arresting any other ship owned by Leo.

[14] Following receipt of Mr. Wharton's email, Mr. Roberts informed Mr. Wharton that the terms of the LOU were acceptable to the appellants, subject to a number of minor changes. In an email sent at 8:09 a.m. on December 11, 2012 to Mr. Wharton, Mr. Roberts stated "Once you send me a signed copy, I will consent to the release of the arrest and, subsequently, will file the required release in the BCSC".

[15] At 10:29 a.m. on December 11, 2012, the signed copy of the LOU was sent to Mr. Roberts together with a draft release of arrest.

[16] Shortly thereafter, the appellants had a change of heart regarding the agreement contained in the LOU. More particularly, during a conference call in which Mr. Wharton, Mr. Roberts and Mr. David McEwen, a highly regarded maritime lawyer whose experience with regard to ship arrests is considerable, also counsel to the appellants, participated, the appellants advised Mr. Wharton that the clause in the LOU preventing the appellants from arresting a sister ship of the Vessel was unacceptable to them. Mr. Wharton, in turn, advised Messrs. Roberts and McEwen that there was a binding agreement and that Leo was therefore entitled to have its Vessel released from arrest.

[17] Because of their differences, the parties agreed to seek a hearing before the BCSC in the afternoon so as to resolve their conflicting positions. Although Mr. McEwen sought Mr. Wharton's consent to have the Vessel moved from Berth #2, Mr. Wharton refused to accede to this demand until the Court dealt with the terms of the release.

[18] The parties appeared later in the day before a Judge of the BCSC and the appellants sought an order permitting the Vessel to be moved. However, the Judge agreed with Leo that the Vessel could not be moved until the question of the binding nature of the agreement had been decided and thus, the Judge put the matter over for hearing on the following day.

[19] To avoid further delays, it was agreed between the parties that a second LOU would be agreed to, similar in terms to the first one, but without the clause pertaining to the waiver of sister ship arrest. It was also agreed that the second LOU would not be binding unless a Court ruled that the first LOU was not binding and that under Canadian law a claimant could arrest both the offending ship and a sister ship.

[20] The appellants, both before the Judge and now before us, say that their agreement to the first LOU is not binding on them. Leo says that the agreement is binding and that there is no basis to conclude otherwise.

III. THE APPELLANTS' SUBMISSIONS

[21] I will now set out the appellants' submissions which will explain why the parties disagree as to the binding nature of the agreement contained in the first LOU. These submissions address the two issues before us on this appeal, namely the binding nature of the agreement and whether, pursuant to subsection 43(8) of the Act it was open to the appellants to arrest not only the Vessel but also a sister ship thereof.

[22] The appellants firstly argue the issue arising from subsection 43(8) of the Act. They say that the Judge erred in concluding that they could not arrest more than one ship.

[23] In support of their view, they refer to Prothonotary Hargrave's decision in *Norcan Electrical Systems Inc. v. FB XIX (The)*, [2003] F.C.J. No. 904, 2003 FCT 702 (*Norcan*) where, at paragraph 14, he opined that Canadian law did not place a limit on the number of sister ships which could be arrested. The appellants also invoke the view expressed by Professor William Tetley, Q.C. in a number of his works, namely *Maritime Liens and Claim*, 2nd ed., (Montréal: International Shipping Publications, 1998) at 1041-1042, "Arrest Attachment and Related Maritime Procedures", Tulane Law Review, (1999), Vol. 73 at 1895- 1924 [Arrest Attachment], and *International Maritime and Admiralty Law*, (Toronto: Carswell, 2003) at 776-778, that under Canadian law more than one ship can be arrested by a claimant to secure a claim.

[24] The appellants say that in failing to consider the views of both Prothonotary Hargrave and Professor Tetley, the Judge erred. They further say that the Judge was wrong to consider the *1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships*, (May 10, 1952), 439 UNTS 193 / UKTS 47 (1960), Cmnd. 1128 [Arrest Convention 1952] which provides that a claimant can arrest either the "offending ship" or "any other ship" owned by the owner of the offending ship. The appellants point out that Canada did not adopt the Arrest Convention 1952 nor did it schedule it. To the contrary, they say that Canada enacted legislation, *i.e.* subsection 43(8) of the Act, which imposes no limit on the number of ships which a claimant can arrest to secure his claim.

[25] Thus, in the appellants' view, the Judge not only did not give subsection 43(8) a "fair, large and liberal construction and interpretation" as required by section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 but she read subsection 43(8) down so as to make it accord with the Arrest Convention 1952.

[26] The remainder of the appellants' submissions address the issue of mistake which, in their view, renders the agreement contained in the first LOU unenforceable. In brief, the appellants argue that during the negotiations which led to the impugned agreement of December 11, 2012, Mr. Wharton, an experienced maritime lawyer, advised its counsel, Mr. Roberts, who had no experience in matters pertaining to the arrest and release of ships, that security could not exceed the value of the Vessel and that the appellants' right to arrest a sister ship was, at best, "weak" and that it was on his acceptance of that advice that Mr. Roberts agreed to the terms of the first LOU.

[27] The appellants say that Mr. Wharton's advice to Mr. Roberts, who understood this advice to be correct, was erroneous. In their view, it is clear that more than one ship can be arrested under Canadian law and that security is not limited to the value of the offending ship. More particularly, they say that they were entitled to security above and beyond the value of the arrested ship, *i.e.* to a sum representing the interest that would accrue if the full value of the arrested ship had been paid into Court.

[28] Thus, the appellants say that because of common mistakes between Mr. Wharton and Mr. Roberts regarding the amount of security to which the appellants were entitled and the number of ships which the appellants could arrest, the agreement should be set aside.

[29] These mistakes, the appellants say, were mistakes of law which destroyed the basis of the agreement contained in the first LOU.

[30] At page 39 of their memorandum of fact and law, the appellants put their argument as follows:

> Here, the erroneous belief on the part of both parties that the amount of security was capped at the value of the Vessel and that the appellants could not arrest a sister ship were fundamental to the agreement. The estimate of the claim amount was much greater than the value of the Vessel. The contracting parties intended to provide (Leo), and to obtain (Westshore), the maximum security provided by law. Limiting the security to the value of the Vessel was a common mistake as of the essence of what was contracted for, as the very purpose of the LOU was obtain security for Westshore's losses. The acceptance of only the value of the Vessel, and the waiver of sister ship rights, was determinative of the security obtained.

[31] As a result, the appellants seek a declaration that no binding agreement exists between them and Leo with regard to the first LOU preventing them from arresting a sister ship and that subsection 43(8) of the Act allows them to arrest sister ships of the Vessel so as to obtain additional security for their claim.

IV. ANALYSIS

A. *Is the LOU binding on the appellants?*

[32] I will first deal with the question pertaining to the agreement contained in the first LOU. In my view, the Judge correctly concluded that there was no error which could vitiate the agreement. Because I agree essentially with her reasoning on this question, I shall set out her reasons more fully.

[33] She began her analysis by recognizing that a contract could be set aside by reason of mistakes on the part of one or both parties thereto because it meant that there was no consensus at idem: see *Colonial Investments vs. Bortland*, (1911), 1 WWR 171, 19 WLR 588.

[34] She then turned to the first mistake raised by the appellants, *i.e.* that Mr. Roberts had erroneously been advised by Mr. Wharton that the right to arrest more than one ship was weak and thus of little help to the appellants. She reviewed the evidence which consisted of the affidavits of Messrs. Roberts, Wharton and Nick Desmarais, a lawyer and corporate secretary of the appellants, which led her to conclude that Mr. Wharton had not given any advice to Mr. Roberts. In the Judge's view, Mr. Wharton, as counsel to Leo, was obviously under duty as a solicitor to give advice to his client but not to Mr. Roberts nor to the appellants.

[35] She then dealt with the suggestion made by the appellants that Mr. Roberts had no experience regarding ship arrests by saying that Mr. McEwen had been retained by the appellants and was therefore available for consultation and advice to Mr. Roberts. Thus, if Mr. Roberts was

uncertain about some of the questions discussed with Mr. Wharton, it was open to him to raise these matters for discussion with Mr. McEwen.

[36] Consequently, as the terms of the LOU had been freely negotiated between counsel for the appellants and for Leo and, as no mistake had been found to vitiate the agreement, the parties were bound to give effect to their agreement. Further, the Judge made it clear that she was not convinced that Mr. Wharton's view of the matter was wrong. In the end, she concluded, as I do, that there is no right to arrest more than one ship.

[37] With regard to the second mistake, *i.e.* that Mr.Wharton had advised Mr. Roberts that the security was limited to the value of the offending Vessel, she also concluded that there was no mistake.

[38] In her opinion, Mr. Wharton's view was correct. In so concluding, she referred to *Norcan* where Prothonotary Hargrave, at paragraph 10 of his reasons, on the authority of the *Staffordshire, The* (1872), 1 Asp. M.L.C. 365 (P.C.) at page 372; *Charlotte, The*, [1920] P. 78 (Adm.) at page 80 and by Kenneth C. McGuffie, P.A. Fugeman and P.V. Gray, *British Shipping Laws: Admiralty Practice*, Vol. 1, (London: Stevens & Sons Ltd., 1964) at page 140, held that a claimant's entitlement to bail was limited to the value of the offending ship.

[39] I cannot find any basis on which I could disturb the Judge's conclusions on the alleged mistakes. I would add that it is clear from the evidence that all concerned, Messrs. Roberts, McEwen and Wharton were uncertain as to whether the appellants could arrest a sister ship in

addition to arresting the offending ship as that issue had never been properly addressed by the Federal Court or this Court nor by any other Court in Canada.

[40] In Mr. Wharton's view, that right was "weak" while Mr. McEwen believed that there were good arguments to be made for arresting more than one ship. It is in that context that the first LOU was negotiated. With respect, it was open to the appellants to refuse to sign the first LOU and have the matter determined by the Courts.

[41] It thus cannot be said, in the circumstances of this case, that Mr. Roberts was mistaken as to the law. He obviously was uncertain but he was not the only one. What he received from Mr. Wharton during the course of the negotiations was not legal advice but simply Mr. Wharton's opinion as to what he believed the law to be.

[42] The appellants were clearly aware of the uncertainties regarding the right to arrest more than one ship and made a decision to agree to the terms of the first LOU in full light of divergent opinions on the issue. The words of the British Columbia Court of Appeal in *Mayer v. Mayer Estate*, (1993) 8 W.W.R. 735, 1993 CanLII 6861 at paragraph 17 are apposite:

> … But where it is apparent that a statement is, and would be understood as, an expression of opinion, whether as to law or anything else, the person to whom it is made must, as I have said, know that it may be in error, and anyone who chooses to act on such a statement in such circumstances does so with that knowledge. …

[43] Here Mr. Roberts, I have no doubt, did not consider Mr. Wharton's view as advice or as a definite statement of the law but rather as Mr. Wharton's opinion as to the prevailing law. He must have known that Mr. Wharton's view could be in error but notwithstanding that decided to

advise his client that the terms of the first LOU should be agreed to. Thus, no mistake as to law was made.

[44] In any event, as I have already indicated earlier, I am of the opinion that Mr. Wharton's view on the right to arrest more than one ship was correct. I will now turn to that issue in respect of which I conclude that the appellants, having arrested the offending Vessel, could not arrest a sister ship under subsection 43(8).

B. *Does subsection 43(8) allow the appellants to arrest more than one ship?*

[45] I begin by reproducing subsections 43(2) and 43(8) of the Act which are relevant to the exercise of the Federal Court's jurisdiction *in rem*. These provisions read as follows:

43. …	43. […]
(2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court.	(2) Sous réserve du paragraphe (3), elle peut, aux termes de l'article 22, avoir compétence en matière réelle dans toute action portant sur un navire, un aéronef ou d'autres biens, ou sur le produit de leur vente consigné au tribunal.
(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.	(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.

[46] As is clearly apparent from the two provisions, subsection 43(2) allows the Court to exercise its *in rem* jurisdiction "against the ship … that is the subject of the action" whereas subsection 43(8) allows the Court to exercise its *in rem* jurisdiction "against any ship that, at the

time of the action is brought, is owned by the beneficial owner of the ship that is the subject of the action".

[47] In other words, subsection 43(2) allows a party to arrest a ship that causes damage to its property, *i.e.* here the "Cape Apricot" and subsection 43(8) allows a party to arrest a ship owned by the beneficial owner of the offending ship, *i.e.* a sister ship.

[48] There can be no doubt that a claimant, such as the appellants in this appeal, can institute proceedings and name more than one ship as defendants in its statement of claim. That is precisely what the appellants have done here by naming as defendants, not only the "Cape Apricot" but sixteen other ships which they believe to be sister ships of the "Cape Apricot".

[49] The question is, however, whether the appellants should be entitled to obtain from the Federal Court the issuance of more than one warrant of arrest for the same claim. More particularly, on the facts of this case, can the appellants, having obtained a warrant for the arrest of the "Cape Apricot", obtain a warrant to arrest one or more of its sister ships.

[50] The Judge concluded that the appellants could not arrest a sister ship because of her view that the wording and the history of subsection 43(8) precluded multiple arrests. Her analysis leading to that conclusion pertains exclusively to the wording of subsection 43(8) of the Act. Although she does not consider subsection 43(2) in reaching her conclusion, I am of the opinion that she nonetheless came to the correct result.

[51] The Judge's rationale is as follows. In her view, the question to be asked was whether subsection 43(8) allowed multiple arrests, stating that the "scope of that right involves the interpretation of subsection 43(8)" (para. 68 of her reasons) which she then proceeded to do.

[52] She began by referring to the Arrest Convention 1952 and more particularly to article 3(1) thereof which provides that a claimant can arrest either the offending ship or a sister ship. She then pointed out that subsection 43(8) had been enacted by Parliament, coming into force on February 1992, and that the subsection had not yet had the benefit of judicial interpretation.

[53] She then turned to the subsection and opined that its scope depended on the meaning of the words "any ship". She referred to both English and French dictionaries for definitions of the words "any" and "de tout navire", adding that she was bound to consider, by reasons of section 13 of the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.), both the English and French versions of the subsection.

[54] This led her to ask whether the word "any" was ambiguous. In her view, both the words "any" and "de tout navire" were ambiguous. Thus, she had to consider the context in which these words were found and used.

[55] She noted that the words were used in the context of *in rem* actions where the power to arrest was available to a claimant and that the Arrest Convention 1952, to which Canada was not a party, dealt with the arrest of sister ships. In her view, the ambiguity of the words "any" and "de tout navire" was answered by the use of the singular "ship" in the English text and "navire"

in the French text. In particular, she opined that the words "any ship" and "de tout navire" suggested that one ship was intended by the subsection because otherwise Parliament would have used the words "any ships" or "any other ship" and "de tous navires" (paras. 87 and 88 of her reasons).

[56] The Judge then stated that there was no evidence of Parliament's intention to confer to claimants the right to arrest more than one ship "when the Convention makes it clear that only one ship may be arrested, that is either the offending ship or another ship that meets the requirement of article 3" (para. 90 of her reasons).

[57] The Judge concluded her analysis of the issue by saying as follows at paragraphs 91 and 92 of her reasons:

> [91] Shipping is an international enterprise and ships from the international community frequent Canadian waters. In the absence of evidence to the contrary, I am not prepared to find that the Parliament of Canada intended to introduce a radical change in the matter of multiple arrests of ships, without a clear expression of that intention.
>
> [92] I am satisfied that subsection 43(8) of the Act does not give the right to multiple arrests. It follows that the [appellants] are not entitled, as a matter of law, to arrest a sister ship to the Vessel, once they had exercised their right to arrest the offending ship.

[58] I agree with the Judge's determination that the appellants could not arrest more than one ship. Having arrested the "Cape Apricot", the offending ship, they were precluded from arresting a sister ship. However, I would answer the question by a slightly different approach.

[59] Subsection 43(8) deals only with the Federal Court's exercise of its jurisdiction *in rem* against sister ships. In other words, subsection 43(8) does not address the question of whether a claimant can arrest both a sister ship and the offending ship.

[60] I have already set out the appellants' arguments on this question. These arguments are restricted to the question of whether subsection 43(8) allows for the arrest of more than one ship. Thus, the appellants must be saying that subsection 43(8) allows for the arrest of more than one sister ship in addition to the arrest of the offending ship under subsection 43(2).

[61] The appellants say that the Judge erred because she failed to consider the view taken by Prothonotary Hargrave in *Norcan* and that of Professor Tetley in his books and articles. For example, in his article Arrest Attachment, Professor Tetley says at page 1924 that "In Canada sister ship arrest is permitted for any maritime claim under section 22 of the Act; and more than one ship may be arrested on a claim". However, Professor Tetley cites no authority in support of his view. Professor Tetley's view can be contrasted with that of authors Edgar Gold, Aldo Chircop and Hugh Kindred, in *Essentials of Canadian Law: Maritime Law* (Toronto: Irwin Law, 2003) at page 776 under the heading of "Arrest of Multiple Sister Ships?", where they opine that because Canada did not incorporate article 3(3) of the Arrest Convention 1952 into the Act, the question of whether "Parliament intended Canadian law to differ from the provisions" of the Arrest Convention 1952 remains an open question. However, in their opinion, the better view based on UK authority "and such Canadian authority as currently exist" is that multiple ships arrest are not permissible under Canadian law.

[62] With great respect for Professor Tetley's view, I believe that he is wrong and that Professor Gold et al. are correct.

[63] I have no hesitation in adopting the Judge's analysis of subsection 43(8). Consequently, I can find no error in the Judge's analysis of the subsection and in her conclusion that the provision does not allow for the arrest of more than one sister ship. If the appellants' submissions regarding subsection 43(8) were correct, a claimant could arrest, in addition to the offending ship, any number of sister ships to secure its claim. Needless to say, such a change would constitute a dramatic departure from the practice which has prevailed in most maritime countries for at least a century.

[64] In my view, however, the true question to be determined in this appeal is not whether subsection 43(8) confers a right of multiple arrests, which it does not, but whether a claimant can ask the Federal Court to exercise its jurisdiction *in rem* both under subsections 43(2) and 43(8) in regard to the same claim and thus obtain the issuance of more than one warrant of arrest to secure his claim. To that question, my answer is that the appellants could either proceed under subsection 43(2) to secure the arrest of the "Cape Apricot" or under subsection 43(8) to secure the arrest of a sister ship. Having elected to proceed under subsection 43(2), the appellants are barred from seeking an arrest under subsection 43(8).

[65] It should be borne in mind that until a ship is served with the statement of claim *in rem* and is arrested (inevitably the service of the action and the arrest of the ship occur simultaneously), the Court's jurisdiction *in rem* is not exercised. This question was dealt with by

the English High Court, Queen's Bench Division (Admiralty Court) in *Owners of Cargo Lately Laden on Board the Berny v. Owners of the Berny*, [1977] 2 Lloyd's Rep. 533 (Q.B. Adm. Ct.), [1978] 1 All E.R. 1065 (*the Berny*). In that case, the issue before the Court was a claimant's right to commence legal proceedings *in rem* against more than one ship in respect of the same cause of action.

[66] After noting that prior to the adoption by the UK of the Arrest Convention 1952, the Court's *in rem* jurisdiction could only be invoked against the ship which was the subject matter of the action, Brandon J. (as he then was), then referred to subsection 3(4) of the *Administration of Justice Act 1956* (the 1956 Act) which permitted a claimant to invoke the court's *in rem* jurisdiction against either the offending ship or a sister ship thereof.

[67] Brandon J. then asked himself whether the existing practice of commencing proceedings against more than one ship was permissible. After explaining why it was convenient for claimants to file proceedings against more than one ship, although only one could be arrested, he turned to the 1956 Act where the words "the jurisdiction may be invoked by an action *in rem*" are found. This led him to ask what these words meant, *i.e.* was the mere issuance of a writ sufficient to invoke the jurisdiction *in rem* or whether the writ had to be served to invoke the *in rem* jurisdiction.

[68] He opined that if the issuance of the writ was sufficient to invoke the *in rem* jurisdiction then the practice of naming more than one ship in proceedings could not be upheld. On the other hand, if it was the service of the writ upon the ship which invoked the *in rem* jurisdiction then the

practice was a good one. In other words, if the *in rem* jurisdiction is invoked only upon the service of the action on the ship, nothing prevents a claimant from naming more than one ship in its proceedings.

[69] Brandon J. then went to the heart of the matter. He pointed out that although the words "the jurisdiction may be invoked" had replaced the expression "the jurisdiction may be exercised", the process, in his view, remained the same.

[70] He then made the point that although he was not bound by the Court of Appeal's decision in *Owners of the Monte Ulia v. Owners of the Banco*, [1971]1 Lloyd's Rep. 49 (C.A.), [1971] 1 All E.R. 524 (*the Banco*), where the issue before him had only been considered indirectly, he agreed with the opinion expressed in that case by the majority of the Court of Appeal. He specifically referred to two passages of that decision where Denning, M.R. and Megaw, L.J. expressed the view that the court's jurisdiction *in rem* was not invoked by the issuance of the writ but rather by the service thereof on the ship and the execution of the warrant of arrest (see Denning, M.R., [1971] 1 AllER 524 at 523 and Megaw, L.J., [1971] AllER 524 at 538).

[71] Consequently, as the appellants did here, it is entirely permissible to name more than one ship in a statement of claim *in rem*. The question remains, however, can more than one ship be served with the statement of claim *in rem* and arrested in Canada?

[72] Until the adoption of the Arrest Convention 1952 and its incorporation into domestic law, it was not possible in most countries, including the UK and Canada, to arrest a ship other than

the offending ship. In the UK, the law now allows for the arrest of only one ship, either the offending ship or a sister ship (see subsection 21(8) of the *Supreme Court Act 1981* (U.K.), 1981, c. 54 and Tetley at pages 1924 to 1928 of Arrest Attachment).

[73] Subsection 43(8) came into force in Canada in February of 1992. The provision only deals with the arrest of sister ships. It does not say whether a sister ship can be arrested in addition to the offending ship. Until that enactment, arrests were restricted to the arrest of the offending ship. By enacting subsection 43(8) did Parliament intend to break rank with those countries, like the UK, which either adopted the Arrest Convention 1952 or incorporated its provisions within their domestic legislation? I do not believe Parliament so intended.

[74] My view is that Parliament, in enacting subsection 43(8), intended to confer upon claimants in Canada the right to arrest a sister ship in lieu of the offending ship. Thus, where a claimant is unable to arrest the offending ship under subsection 43(2) because that ship is not available for arrest in Canada or if that ship's value is insufficient to properly secure its claim, the claimant may resort to subsection 43(8) and arrest a sister ship of the offending ship. By enacting subsection 43(8) Parliament conferred a true benefit to claimants, a benefit which was unavailable prior to the enactment of the provision.

[75] In other words, Parliament did not, in my view, intend for the Federal Court to exercise its jurisdiction *in rem* under both subsections 43(2) and 43(8) for the same claim. Although the word "or" does not appear in section 43, I cannot see how the provisions can be read otherwise. The fact that Canada did not adopt the Arrest Convention 1952 does not, as the appellants

suggest, militate in favour of concluding that Canada intended to go its separate way with regard to ship arrests.

[76] Although there is no direct authority in Canada regarding the interpretation of subsections 43(2) and 43(8), other than the decision below, I find considerable support in the decision of Prothonotary Hargrave, whose experience and knowledge of maritime law and its practice in Canada were highly regarded by the whole of the maritime law community, in *Elecnor S.A. v. Soren Toubro (The)*, [1996] 3 F.C. 422, 1996 CanLII 4057 (*Elecnor*). In that case, the owners of the ship brought a motion to set aside an order dated January 15, 1996 made by the Prothonotary granting an extension of time to a claimant to arrest the offending ship beyond the twelve months prescribed by the *Federal Courts Rules*, SOR/98-106, *i.e.* within twelve months of the issuance of the statement of claim.

[77] The Prothonotary had made his order because the offending ship had not entered Canadian waters within the twelve months following the issuance of the statement of claim. However, in February or March 1996 the offending ship came to Canada which allowed the claimant to obtain security for its claim in the form of a P & I letter or undertaking.

[78] The owners filed a motion to set aside the Prothonotary's order of January 15, 1996 on the ground that a sister ship of the offending ship had been in the port of Vancouver in May and June 1995, arguing that the claimant, in seeking the extension of time, had failed to inform the Prothonotary of its presence in Canada during the initial currency of the statement of claim. The owners further argued that under Canadian law the claimant was obliged to seek out sister ships

of the offending ship and to add them to the style of cause. Hence, having failed to name in its action the sister ship which had entered the jurisdiction and to arrest her, the claimant was barred from seeking the extension which the Prothonotary had granted.

[79] The Prothonotary rejected the owners' motion.

[80] First, he pointed out that a plaintiff could not be forced to sue a party against its will. He then turned to subsection 43(8) which, in his view, was permissive and not mandatory. In other words, a plaintiff could sue a sister ship but did not have to.

[81] He then remarked that section 43 of the Act paralleled the Arrest Convention 1952 in that a claimant "may arrest either the wrongdoing ship or a sister ship in respect of certain maritime claims" (para. 13), adding, at paragraph 16 of his reasons, that sister ship proceedings "is a security device which the plaintiff may utilise, if it desires". The whole of his paragraph 16 is very persuasive and I reproduce it in full:

> Sister ship proceedings are a security device which a plaintiff may utilize if it desires. There are risks in proceeding against sister ships, including that a sister ship may not provide the appropriate amount of security, or that the arrested ship may not be a sister ship at all, thus leaving the plaintiff open to a claim for damages for wrongful arrest. The entries in Lloyd's List of Shipowners are not always clear or current. A plaintiff ought to have the choice to either sue the wrongdoing vessel, at minimal risk, or to balance the risk and benefit of a sister ship action.
>
> [Emphasis added]

[82] In other words, if I understand the Prothonotary correctly, his view is that a claimant must be extremely careful in proceeding to arrest a sister ship because that ship may not be, in

law, a sister ship and if it is, its value may be less than that of the offending ship. The implication of these pitfalls is made clear from his concluding words that a "plaintiff ought to have the choice to either sue the wrongdoing vessel, at minimal risk, or to balance the risk and benefit of a sister ship action". Thus, as a claimant cannot arrest both an offending ship and a sister ship, it must exercise great caution in proceeding against one or the other.

[83] In support of his view, the Prothonotary referred to both *the Banco* and *the Berny* decisions. In *the Banco*, Lord Denning, M.R. opined that a plaintiff having sued both the offending ship and a number of sister ships need not arrest the first one within the jurisdiction but could wait until the most suitable ship entered the jurisdiction (para. 20, Prothonotary's reasons).

[84] In the Berny, Mr. Justice Brandon also averred to the fact that a plaintiff could not be forced to "elect irrevocably" between the offending ship and a sister ship "until he knows that a suitable ship is about to come, or has come, within the jurisdiction" (para. 24, Prothonotary's reasons).

[85] In my opinion, Prothonotary Hargrave's view that section 43 of the Act parallels the Arrest Convention 1952 and that a claimant has the option of arresting either the offending ship or a sister ship is correct. Although section 43 does not say expressly that a claimant must proceed under either subsection 43(2) or 43(8), I do not see how it can be read otherwise. Reading the section in such a way, not only accords with the Arrest Convention 1952 but also accords with what I believe Parliament intended when it enacted subsection 43(8), *i.e.* to grant

claimants in Canada an alternative when the offending ship was not available in Canada for arrest or where its value was insufficient to secure the claim.

[86] I believe that had Parliament intended to break rank with the international maritime community in regard to the right of arrest, which as I have already said, would constitute a dramatic departure from the accepted practice, section 43 would no doubt have been worded very differently so as to make it clear that in Canada claimants were not restricted to one vessel to secure their claim.

[87] Before concluding, I wish to briefly deal with the appellant's arguments that the Judge failed to address Prothonotary Hargrave's remarks in *Norcan* that there was no limit under Canadian law as to the number of sister ships which could be arrested. In *Norcan*, at paragraph 14 of his reasons, after having set out subsection 43(8) of the Act, the Prothonotary stated that "[e]vident here is that there is no limit, under the Canadian sister ships legislation on the number of ships which may be arrested".

[88] In my respectful view, the Prothonotary's statement does not stand for the proposition that a sister ship can be arrested, in addition to the arrest of the offending ship, to secure the same claim.

[89] In *Norcan* there were two Court actions for necessaries supplied to four different vessels. Action T-1959-02 was against the vessels "FB XIX" and "FB XX", both of which had been arrested in that action. The second action, T-2091-02, was against the vessels "FB XXII" and

"FB XXIII". The motions before the Court were to set bail in action T-1959-02 and to either strike the claim in action T-2091-02 or to set bail in that action. The issue was whether the "FB XIX" and "FB XX", two vessels already under arrest in action T-1959-02 could be arrested in action T-2091-02 to secure the claims for necessary supplied to the "FB XXII" and "FB XXIII". The resolution of this issue turned on the apparent contradiction between the English and French versions, of subsection 43(8) and the proper interpretation of the ownership requirements.

[90] When applied to the facts of the case before him, the Prothonotary's remarks, which the appellants invoke in support of their submissions, are correct in that there were four independent *in rem* claims, each of which could support the arrest of a sister ship. However, the Prothonotary's statement cannot mean what the appellants urge us to conclude in this appeal. In other words, the right to arrest multiple sister ships for a single claim was not in issue in *Norcan*.

[91] At paragraph 10 of his reasons in *Norcan*, Prothonotary Hargrave made it clear that the rule in Canada was that a claimant was entitled to bail in an amount which was sufficient to cover its reasonably arguable best case, together with interest and costs but was limited to the value of the offending vessel. The Prothonotary went on to state that "This cap on bail applies even though the claim, costs and interest may exceed the value of the arrested ship". Thus, in my view, the Prothonotary did not intend to depart from the accepted practice that a claimant can only arrest one ship to secure its claim.

[92] With that perspective in, it should not be forgotten that the right to arrest a ship is a procedural device. That device should not be used to allow claimants to obtain security which exceed the value of the offending ship or the value of the sister ship arrested in lieu of the offending ship.

V. CONCLUSION

[93] For these reasons, I would dismiss the appeal with costs.

"Marc Nadon"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Johanne Trudel J.A."

RELEVANT LEGISLATION

- *1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships*, (May 10, 1952, Brussels), 439 U.N.T.S. 193, UKTS 47 (1960) Cmnd. 1128:

ARTICLE 3	**Art. 3**
(1) Subject to the provisions of para. (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q).	1. Sans préjudice des dispositions du par. 4 et de l'art. 10, tout Demandeur peut saisir soit le navire auquel la créance se rapporte, soit tout autre navire appartenant à celui qui était, au moment où est née la créance maritime, propriétaire du navire auquel cette créance se rapport alors même que le navire saisie est prêt à faire voile, mais aucun navire ne pourra être saisi pour une créance prévue aux alinéas o, p. ou q de l'article premier à l'exception du navire même que concerne la réclamation.

- *Federal Courts Act*, R.S.C., 1985, c. F-7:

43. …	**43.** […]
(2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court.	(2) Sous réserve du paragraphe (3), elle peut, aux termes de l'article 22, avoir compétence en matière réelle dans toute action portant sur un navire, un aéronef ou d'autres biens, ou sur le produit de leur vente consigné au tribunal.
…	[…]
(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.	(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.

- *Interpretation Act*, R.S.C., 1985, c. I-21:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**12.** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-101-14
STYLE OF CAUSE:	WESTSHORE TERMINALS LIMITED PARTNERSHIP by its General Partner WESTSHORE TERMINALS LTD., WESTSHORE TERMINALS INVESTMENT CORPORATION, and WESTAR MANAGEMENT LTD. v. LEO OCEAN, S.A., KAWASAKI KISEN KAISHA LIMITED ('K'-LINE), AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIPS "CAPE APRICOT", "ASIAN GYRO", "BORON NAVIGATOR", "CIELO DI AMALFI", "LEO ADVANCE", "LEO AUTHORITY", "LEO FELICITY", "LEO MONO", "LEO OSAKA", "LEO PERDANA", "MEDI GENOVA", "MOL PARAMOUNT", "MOL SOLUTION", "OOCL OAKLAND", "ROYAL ACCORD", "ROYAL CHORALE", and "ROYAL EPIC" AND TOKEI KAIUN COMPANY LIMITED, JEFFREY MCDONALD, SEASPAN ULC, "SEASPAN OSPREY", "SEASPAN RESOLUTION" and "CHARLES H. CATES VII"
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CONCURRED IN BY:	GAUTHIER J.A. TRUDEL J.A.

DATED: OCTOBER 15,2014

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