

CANADA / JUDGMENT

Middleton and Malic v. Farquharson et al.

2004 BCSC 32

COURT

Supreme Court of British Columbia

DECIDED

13 January 2004

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2004BCSC0032

IN THE SUPREME COURT OF BRITISH COLUMBIA

ADMIRALTY ACTION IN REM AGAINST

THE VESSEL "OCEAN TRIBUNE"

Citation:

Middleton and Malic v. Farquharson et al.,

2004 BCSC 32

Date: 20040113

Docket: C994047

Registry: Vancouver

Between:

Mike Middleton and Loretta Malic

Plaintiffs

And

The Owners and All Others Interested in the

Vessel "Ocean Tribune", Douglas William Farquharson

and 584234 B.C. Ltd.

Defendants

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiff:

F.M. Manolis

The Defendant, Douglas William Farquharson:

In Person

Dates and Place of Trial:

November 3--7, 10 and 12, 2003

Vancouver, B.C.

INTRODUCTION

[1] This case is concerned with the duties of a mortgagee in possession who seized and subsequently sold a commercial fishing vessel known as the Ocean Tribune ("Ocean Tribune") and an appurtenant fishing licence.

ISSUES

[2] The facts and pleadings require determination of three major issues. Those are:

- (1) Was the marine mortgage under which the defendant, Douglas Farquharson ("Farquharson"), seized and subsequently sold the Ocean Tribune a valid security instrument securing the debt alleged by Farquharson?
 - (2) Did Farquharson breach his obligations as a mortgagee in possession by failing to properly maintain or repair the Ocean Tribune so that the plaintiffs are entitled to damages?
 - (3) Did Farquharson improperly transfer title to the Ocean Tribune and its appurtenant fishing licence to the defendant 584234 B.C. Ltd., pursuant to the power of sale under the marine mortgage so that the transfer must be set aside or, alternatively, so that the plaintiffs are entitled to damages?
- [3] Another issue arises concerning the alleged conversion of personal belongings of the plaintiffs from the Ocean Tribune when it was seized by Farquharson.

BACKGROUND

- [4] In 1993, Farquharson, a commercial fisherman, purchased the Ocean Tribune, a 57.2 foot wooden hull fishing vessel built in Nova Scotia in 1959.
- [5] Farquharson paid \$119,000 for the Ocean Tribune. That price included the acquisition of a Rockfish Fishing Licence and a Schedule II "C" Licence identified as C.F.V. 20968 (the "C Licence").

- [6] Farquharson almost immediately sold the Rockfish Licence, for which he had no use, for approximately \$49,000. It was then his intent to use the Ocean Tribune to fish for tuna in British Columbia waters up to 200 miles offshore, one of the fisheries permitted by the C Licence. To that end, Farquharson made various improvements to the Ocean Tribune at a cost of approximately \$30,000.
- [7] Farquharson employed the Ocean Tribune in the offshore tuna fishery in 1993 but without much success. Faced with that lack of success, he next decided to use the Ocean Tribune as a packing vessel and, to that end, leased the Ocean Tribune to the Northern Native Fishing Corporation ("Native Fishing") in Prince Rupert for the 1994 fishing season. He then purchased a smaller fishing vessel for his personal use in the 1994 British Columbia salmon fishery.
- [8] In the summer of 1994, Farquharson engaged the services of the plaintiff, Michael Middleton ("Middleton"), to act as the Master of the Ocean Tribune for the purpose of delivering the vessel from Sidney, British Columbia to Native Fishing in Prince Rupert, British Columbia. On the recommendation of Middleton, Farquharson purchased additional equipment having a value of approximately \$10,000 from Keypower Equipment Ltd. ("Keypower") to improve the utility of the Ocean Tribune as a packing vessel. Middleton was at that time a sales representative for Keypower.
- [9] After Middleton delivered the Ocean Tribune to Prince Rupert he entered into new arrangements directly with Native Fishing to act on its behalf as the Master of the Ocean Tribune for the packing duties for which she had been leased.
- [10] Troubles arose between Middleton and Native Fishing during the 1994 packing season. While I am not aware of the full extent or origin of those difficulties, the end result of the ongoing disputes between Middleton and Native Fishing's management was that the lease of the Ocean Tribune was prematurely terminated. At that time, there was a final payment of approximately \$10,000 due to Farquharson under his original lease arrangements with Native Fishing.
- [11] Farquharson testified that the \$10,000 final payment was, with his consent, paid to Middleton so that it could be used to pay Farquharson's outstanding account with Keypower for the equipment previously purchased by him through Middleton for the Ocean Tribune.
- [12] After the lease arrangements with Native Fishing came to an end, Middleton entered into an arrangement with Y & L Washington Inc. ("Y & L"), a Washington State company, to use the Ocean Tribune as a gooey duck clam packer in Y & L's operations in both northern British Columbia and Alaska for the balance of the 1994 season. Farquharson agreed to those arrangements under which he was to be paid one-half of all profits earned by Middleton as remuneration for Middleton's use of the Ocean Tribune. Farquharson testified that he agreed to those arrangements in an attempt to offset losses from the failed lease with Native Fishing.

- [13] On October 7, 1994, after Y & L's clam harvesting season had ended, and while Middleton was in the process of bringing the Ocean Tribune back to Sidney, she ran aground off Oak Bay near Victoria and severely damaged.
- [14] The Ocean Tribune was, however, insured for losses of up to \$150,000 and Farquharson determined to have the vessel repaired with insurance monies. He then intended to dispose of the Ocean Tribune to recoup his losses since she had not performed well as a tuna fishing vessel in 1993 and had made no money as a packer during the 1994 season under Middleton's stewardship.
- [15] Farquharson testified that he eventually received an offer to purchase the Ocean Tribune and the C Licence for \$135,000. He also testified that Middleton then approached him requesting that he sell the vessel to Middleton and his spouse, the plaintiff Loretta Malic ("Malic"), for the same price.
- [16] The plaintiffs offered to take the Ocean Tribune before repairs were completed on an "as is" basis provided that they would also receive an assignment of the insurance proceeds of up to \$150,000 as well as the right to direct the repair works. Farquharson eventually agreed to accept that offer because of his longstanding association with Middleton but Middleton and Malic then had difficulty in raising the whole of the agreed upon \$135,000 purchase price.
- [17] Although he stated that he was not interested in being a banker, Farquharson eventually agreed to accept a \$100,000 cash payment and to provide vendor financing of \$35,000 for one year at 10 percent per annum interest in order to assist the plaintiffs to acquire the Ocean Tribune.
- [18] That vendor financing arrangement was ultimately evidenced by a \$35,000 Promissory Note (the "First Note") dated November 7, 1994 that was secured by a Collateral Marine Agreement (the "First Collateral Marine Agreement") and ancillary security documentation all dated November 7, 1994 including an assignment of the C Licence (the "First Assignment") and a marine mortgage (the "First Marine Mortgage") of the Ocean Tribune which was registered with the Canadian Department of Transport's Ship Registry.
- [19] During the negotiations for the purchase of the Ocean Tribune by the plaintiffs and after the completion of those arrangements, Middleton oversaw the necessary repairs to the vessel, at a cost of approximately \$131,000 paid by Farquharson's insurers.
- [20] At the start of the 1995 fishing season, the plaintiffs once again took the Ocean Tribune to the Prince Rupert area and before leaving, Middleton borrowed a further \$2,000 from Farquharson.
- [21] The plaintiffs used the Ocean Tribune as a packer in British Columbia and Alaskan waters in 1995 as well as in 1996, during which, according to Middleton's testimony, they earned profits of approximately \$30,000 to \$40,000.

- [22] The plaintiffs did not, however, pay either the \$35,000 principal or any of the accrued interest due to Farquharson on December 31, 1995. Middleton also made no payment towards the \$2,000 loan he received from Farquharson in 1995 before the Ocean Tribune left for Prince Rupert.
- [23] Farquharson testified that after the plaintiffs had left for Prince Rupert in 1995, he learned that Middleton had not paid the Keypower account in the amount of approximately \$10,000 from the final lease payment from Native Fishing as had been agreed. He testified that once he learned of that default he paid the account himself.
- [24] Middleton denied both the receipt of \$10,000 from Native Fishing as well as any obligation to pay the Keypower account. He did not, however, dispute the \$2,000 personal loan or the failure to pay any monies due under the First Note, the First Assignment or the First Marine Mortgage when those monies became due on December 31, 1995.
- [25] Although the First Note became due and payable on December 31, 1995, Farquharson testified that he was out of British Columbia at the time and did not immediately press for repayment. He also testified, however, that when he returned and attempted to recover the funds, he received only unfulfilled promises from Middleton and in fact had such little contact with Middleton that he did not know where the Ocean Tribune was located. Finally, in an attempt to recover the monies owed to him, he engaged the services of a private investigator to attempt to locate the vessel.
- [26] The Ocean Tribune was eventually found by that private investigator at Port Edward near Prince Rupert. Subsequently, in late October of 1996, Farquharson had the Ocean Tribune seized and moved to Prince Rupert. He then travelled to Prince Rupert with two prospective crew members with the intent to take possession of the Ocean Tribune and return her to Sidney.
- [27] Once Farquharson arrived in Prince Rupert, however, Middleton and Malic negotiated the release of the Ocean Tribune from seizure. A compromise was reached whereby the plaintiffs agreed to pay a total of \$25,000 to Farquharson in late December of 1996 and early January of 1997. They also executed a new \$35,000 Promissory Note (the "Second Note") dated January 17, 1997 bearing interest at 10 percent per annum with a due date of October 31, 1997.
- [28] The Second Note was secured by a new collateral marine agreement (the "Second Collateral Marine Agreement") dated January 17, 1997 as well as a new marine mortgage of the Ocean Tribune (the "Second Marine Mortgage") dated January 28, 1997 and a new assignment of the C Licence (the Second Assignment") dated January 23, 1997. The Second Marine Mortgage was registered with the Department of Transport on March 3, 1997 and the Second Assignment of the C Licence was registered in the British Columbia Personal Property Security Registry on March 21, 1997.

- [29] Middleton testified that the \$25,000 payment made by the plaintiffs by way of two installments in December of 1996 and early January of 1997, was made on account of the First Collateral Marine Agreement, First Note, First Marine Mortgage and First Assignment so that the Second Collateral Marine Agreement, Second Note, Second Marine Mortgage and Second Assignment were not reflective of the actual amounts then outstanding on the plaintiffs' debt for the purchase of the Ocean Tribune. The plaintiffs also now allege that the \$25,000 payment was extracted from them as a penalty which effectively created an interest rate under the Second Note Second Marine Mortgage and Second Assignment that contravened the provisions of s. 347 of the Criminal Code of Canada, R.S.C., 1985, c. C-46 (the "Criminal Code").
- [30] The propositions that the \$25,000 payment was made on account of their original debt owing for the purchase of the Ocean Tribune or was improperly extracted as an unenforceable penalty under the Criminal Code are the underpinnings of the plaintiffs' claims that the Second Collateral Marine Agreement, Second Note, Second Marine Mortgage and Second Assignment do not reflect the amounts actually owing by the plaintiffs or are unenforceable security instruments.
- [31] Farquharson disputes those allegations. He testified that the \$25,000 payment was a one time lump sum payment of accrued interest and other monies then owing by the plaintiffs to Farquharson to secure the release of the Ocean Tribune and that the \$35,000 principal amount owing under the First Note and related security documents for the purchase of the Ocean Tribune still remained outstanding. He testified that the \$25,000 payment was a negotiated amount to satisfy: the approximately \$10,000 owing on the Keypower debt that Middleton had not paid; the \$2,000 personal loan made in 1994 that remained unpaid; the outstanding interest (approximately \$7,000) owing on the \$35,000 First Note as of December 1996; and the costs of seizing and recovering the Ocean Tribune including private investigators' fees, travel accommodation, expenses for himself and his proposed crew to and in Prince Rupert, and legal fees relating to the seizure and preparation of new security documents.
- [32] After the plaintiffs negotiated the release of the Ocean Tribune from the seizure in late 1996 and early 1997, there was again little contact between the plaintiffs and Farquharson. Farquharson was out of the country for much of 1997 and again wholly lost track of the whereabouts of the Ocean Tribune. Once again, the plaintiffs did not pay any of the amounts due under the Second Note or its related security instruments by the second due date, so Farquharson once more retained the services of bailiffs to locate and seize the Ocean Tribune. Attempts to locate the vessel in and around Prince Rupert failed but in mid-February 1998, an employee of Farquharson discovered the Ocean Tribune moored in Indian Arm near Vancouver.

- [33] Farquharson then retained counsel to assist him in once again seizing the vessel. His lawyer then contacted Mr. Peter Powers ("Powers") of Accurate Bailiffs and Collection Agency Ltd. ("Accurate Bailiffs") in Burnaby, British Columbia. Powers seized the Ocean Tribune on February 16, 1998 and then caused it to be removed to storage facilities operated by Sea Tech Marine ("Sea Tech") on Shelter Island by the South Arm of the Fraser River.
- [34] The Notice of Seizure served by Accurate Bailiffs on February 16, 1998 was delivered pursuant to the Second Marine Mortgage and the Second Assignment of the C Licence and stated that the total debt then due to Farquharson under those security documents was \$40,464.07.
- [35] Powers testified that when he seized Ocean Tribune and had her transported to Sea Tech, he told Farquharson that the vessel would have to be taken out of the water. He stated that it was always his practice to remove a seized vessel from the water because in his experience a vessel could not be otherwise adequately secured against removal to a location where it could not be found. Accordingly, when the Ocean Tribune was moved to Sea Tech, she was removed from the water and was left on land until October 20, 1998 when Farquharson attempted to have her put back into the water.
- [36] During that period of approximately 10 months there were numerous discussions amongst Farquharson and his lawyers and Middleton and his accountant and lawyers concerning the seizure of the Ocean Tribune and the potential repayment of the debts owed by the plaintiffs to Farquharson so that the Ocean Tribune could be released from the seizure. One possible suggested arrangement was a lease of the Ocean Tribune to Farquharson by a company incorporated by Middleton.
- [37] In contemplation of the completion of that lease arrangement, which had the potential of seeing monies earned by the Ocean Tribune go toward reducing the plaintiffs' debt obligations to Farquharson, Middleton entered into arrangements with Sea Tech to undertake repairs to the Ocean Tribune, including repairs to its exterior planking to overcome difficulties that had been caused by the vessel's wooden hull drying due to having been left out of the water. Middleton did not, however, pay for those repairs. He also eventually ceased all negotiations with Farquharson concerning redeeming or refinancing the Ocean Tribune without ever making any payments towards the plaintiffs' still outstanding debts.
- [38] In response, Farquharson attempted to return the Ocean Tribune from land to the water in October of 1998. As it turned out, however, the repairs and re-corking directed by Middleton were insufficient to prevent an almost unimpeded flow of water into the Ocean Tribune when it was placed into the water on slings and removed from the land. After that failed effort to float the Ocean Tribune, Farquharson was required to have Sea Tech complete a full re-corking and repair of the vessel's wooden hull. That work was finally completed in November of 1998 after which the Ocean Tribune was successfully returned to the water.

- [39] The total cost to Farquharson of the repairs commissioned and directed by Middleton and those which Farquharson incurred after the first attempt to float the Ocean Tribune together with Sea Tech's charges for storage for 11 months and its charges to lift the vessel out of, and back into, the water exceeded \$47,500. In addition, Farquharson had incurred fees of approximately \$4,000 to locate and seize the Ocean Tribune for the second time.
- [40] When the Ocean Tribune was put back into the water in November of 1998, Farquharson caused it to be moved to moorage in Steveston. He then undertook maintenance as well as further repairs that would once again make the Ocean Tribune usable for tuna fishing. He testified that it was likely that during that period, or in early 1999, he suggested to Middleton that the plaintiffs should "give over" the Ocean Tribune to him.
- [41] When the plaintiffs made no further overtures towards redemption or refinancing, Farquharson determined, in approximately March of 1999, that he needed to take steps to recoup his losses by a possible sale or by the retaking of title to the vessel himself. He consulted his lawyers who then arranged for and conducted a process to sell the Ocean Tribune and the C Licence pursuant to the Second Marine Mortgage and the Second Assignment of the C Licence.
- [42] Pursuant to that sale process, the Ocean Tribune was offered for sale on an "as is, where is" basis that requested sealed bids from interested parties during a 21 day bidding period closing on May 29, 1999. To that end, the Ocean Tribune and the C Licence were advertised for sale in editions of The Vancouver Sun and The Province newspapers over three weekends in May of 1999 as well as in the Commercial Boats and Licences section of The Westcoast Fisherman during May of 1999.
- [43] When enquiries were made about the sale of the Ocean Tribune and the possibility of arranging to inspect the vessel, his lawyers referred those enquiries to Farquharson.
- [44] When the bidding period was about to end, Farquharson considered it unlikely that any offers would be received. He was, however, concerned that an extremely low bid could be tendered that could cause him to lose his significant investment in the Ocean Tribune without recompense if he did not make a protective offer. At that time his investment exceeded \$100,000 comprised of: the outstanding debt obligations of the plaintiffs; the recovery and seizure costs of Accurate Bailiffs; the storage and repair costs of Sea Tech; moorage fees in Steveston; and, legal fees related to the failed negotiations with the plaintiffs and the conduct of the sale by his lawyers.
- [45] Accordingly, on May 28, 1999, Farquharson made a sealed offer to purchase the Ocean Tribune and the C Licence for \$75,000. He testified that if an offer had been received for a greater amount he would have been prepared to accept the loss of the balance of his investment so that the matter would finally be at an end.

- [46] As it turned out, Farquharson's offer of \$75,000 was the only offer made by the close of bidding on May 29, 1999 and then, on the advice of his lawyers, Farquharson learned that the purchase should not be made in his own name. Pursuant to that advice, title to the Ocean Tribune was transferred to a newly incorporated company, the defendant 584234 B.C. Ltd., of which Farquharson was the sole shareholder. That transfer was made pursuant to the power of sale under the Second Marine Mortgage. The C Licence was transferred into the name of the same company pursuant to the Second Assignment of the C Licence.
- [47] Although the sum of \$75,000 was never actually paid by 584234 B.C. Ltd. to Farquharson, I am satisfied that the amount remains a debt due and owing to him by 584234 B.C. Ltd. Further, although it may have been possible for Farquharson to maintain a claim against the plaintiffs for the difference between the amounts owing under the Second Note, Second Collateral Marine Agreement, Second Marine Mortgage and the Second Assignment of the C Licence, he has determined to treat the re-taking of possession and title to the Ocean Tribune and C Licence as having extinguished any further obligations of the plaintiffs to him in relation to those agreements and debts.
- [48] After the completion of the sale of the Ocean Tribune and the C Licence to 584234 B.C. Ltd., Farquharson continued to ready the vessel for the upcoming tuna fishing season. On August 3, 1999, however, the plaintiffs caused the Ocean Tribune to be arrested by issuance of a Warrant in these proceedings. To do so the plaintiffs invoked the "in rem" provisions of Rule 55 of the Supreme Court Rules, B.C. Reg. 221/90 alleging:
- (1) damages for the loss or diminution of equity in the Ocean Tribune caused while Farquharson was a mortgagee in possession;
 - (2) damages for conversion of the plaintiffs' property taken from the Ocean Tribune by Farquharson while a mortgagee in possession; and
 - (3) damages for conversion of the plaintiffs' equity in the Ocean Tribune.
- [49] Farquharson subsequently applied to have this Court dismiss those claims and release the Arrest Warrant for lack of jurisdiction. On that application, Hood J. ruled that the plaintiffs' claim should not be struck under the provisions of Rule 19(24) because it was not plain and obvious (based upon the allegations then before the Court which must be accepted as factual on such an application), that the claim in rem would fail. See: *Middleton v. Ocean Tribune (The)*, 2000 BCSC 1621.
- [50] The Ocean Tribune has remained under Arrest since that date and although Farquharson has resided on it, he has not been able to use it in any way to generate income pending the final disposition of the issues in this case.

ANALYSIS AND DISCUSSION

- [51] The plaintiffs allege that:

- (1) the \$25,000 payment made in December of 1996 to obtain the release of the Ocean Tribune under the first seizure was extracted from them as a penalty that created an effective interest rate under the Second Note, Second Marine Mortgage and Second Assignment that contravened the provisions of s. 347 of the Criminal Code;
- (2) it was not necessary for Farquharson to have the Ocean Tribune removed from the water in February of 1998 after the second seizure and that his subsequent failure to ensure that the vessel was put back into the water before its planking could dry out resulted in significant damage to the Ocean Tribune for which he is responsible to the plaintiffs as a mortgagee in possession;
- (3) Farquharson's failure to effect sufficient repairs to ensure that the Ocean Tribune would again float when the first attempt to do so was made in October of 1998, constituted a further breach of his duty to them as a mortgagee in possession that not only resulted in damage to the Ocean Tribune but also reduced its market value;
- (4) when Farquharson took steps to once again make the Ocean Tribune usable as a tuna fishing vessel, he did so with intent to attempt to improperly regain title to the vessel for his own profit and to their detriment; and
- (5) the sale to 584234 B.C. Ltd. under the power of sale in the Second Marine Mortgage was deliberately conducted to deprive them of their legitimate equity in the Ocean Tribune entitling them to a right in rem to the Ocean Tribune by way of an order for condemnation of the Ocean Tribune divesting the defendant, 584234 B.C. Ltd., of its title to the Ocean Tribune.

[52] Also, the plaintiffs seek damages for the alleged conversion of personal property that was on board the Ocean Tribune but was not returned by Farquharson to them after the second seizure of the Ocean Tribune by Accurate Bailiffs.

Is the Second Marine Mortgage under which Farquharson seized and sold the Ocean Tribune a valid security instrument securing the debt alleged by him?

[53] Determination of this issue requires an assessment of the credibility of both Farquharson and Middleton.

[54] As I have noted, Middleton testified that the \$25,000 payment made by the plaintiffs in two installments in December of 1996 and January of 1997 after the first seizure of the Ocean Tribune was made on account of the First Note, First Collateral Marine Agreement, First Marine Mortgage and First Assignment so that the Second Note, Second Collateral Marine Agreement, Second Marine Mortgage and Second Assignment were not reflective of the actual amounts then outstanding on the plaintiffs' debt for the purchase of the Ocean Tribune.

- [55] Farquharson testified that the \$25,000 payment was a one time lump sum payment of accrued interest and other monies then owing by the plaintiffs and that the \$35,000 principal amount owing under the First Note and related security documents for the purchase of the Ocean Tribune still remained outstanding. He testified that the \$25,000 payment satisfied: the approximately \$10,000 owing on the Keypower debt that Middleton had not paid; the \$2,000 still owing on the personal loan made in 1994; the outstanding interest (approximately \$7,000) owing on the \$35,000 First Note as of December 1996; the costs of locating and seizing Ocean Tribune including private investigators' fees, travel accommodation expenses for himself and his proposed crew to and in Prince Rupert; and, legal fees.
- [56] Although Middleton denied that he had received any funds from Native Fishing as alleged by Farquharson or that he was obligated to pay the Keypower account, he did not deny the \$2,000 loan or that the plaintiffs had made no payments on that debt or the amounts owing under the First Note.
- [57] I have determined that I do not accept Middleton's evidence concerning the \$25,000 payment made by the plaintiffs to obtain release of the Ocean Tribune after the first seizure. I reach that conclusion because:
- (1) Middleton's evidence is entirely inconsistent with the new security documentation that both he and Malic signed in January of 1997;
 - (2) neither Middleton nor his accountants or lawyers ever suggested that the \$25,000 payment was a payment on account of the original debt or was extracted as a penalty under the Criminal Code until after the Ocean Tribune had been sold to 584234 B.C. Ltd.;
 - (3) Farquharson's evidence that the \$25,000 payment was made to retire outstanding debts other than the \$35,000 principal owing on the First Note is consistent with the existing state of the financial relations between the plaintiffs and Farquharson. In that regard, I accept that Middleton had wrongfully failed to pay the Keypower account and was thus indebted to Farquharson for that \$10,000 which I find was satisfied by the \$25,000 payment; and
 - (4) although Middleton testified that Malic was present during the discussions leading to the payments totalling \$25,000 in December of 1996 and January of 1997, she did not testify at trial notwithstanding that I was informed that she had come to British Columbia from Nova Scotia for this trial. I have determined that I should draw an adverse inference against both plaintiffs arising from her failure to testify on this critical issue.
- [58] I have accordingly determined that the plaintiffs' assertion that Farquharson extracted a criminal rate of interest is entirely without merit. I further find that the Second Marine Mortgage and Second Assignment of the C Licence were each valid and subsisting security instruments that secured the sum of \$40,464.97 that was due and owing to Farquharson on February 16, 1998 when Accurate Bailiffs affected the second seizure of the Ocean Tribune.

Did the defendant, Farquharson, breach his obligations as a mortgagee in possession by failing to properly maintain or repair the Ocean Tribune so that the plaintiffs are entitled to damages?

- [59] The authorities establish that a mortgagee in possession owes a duty to a mortgagor to take reasonable care of the goods seized and will be liable for any loss resulting from negligence in the taking of such care.
- [60] The standard of care expected of a mortgagee in possession is that care which a reasonable man would exercise in looking after his own chattels. To that end, in the context of a mortgagee in possession of a seagoing vessel, see: *Marriott v. the Anchor Reversionary Company* (1861), 31 L.J. Ch. 571; *H.F. Russell Sea Foods Ltd. v. Mason and Mason* (1979), 36 N.S.R. (2d) 322, [1979] N.S.J. No. 677 (N.S.S.C.(T.D.)); and *Rollinson v. Surrey Credit Union*, [1984] F.C.J. No. 3 (T.D.).
- [61] I am not satisfied that the plaintiffs have established that Farquharson breached the duty of care that he owed to them after his seizure of the Ocean Tribune such that they are entitled to damages. I reach that conclusion for the following reasons:
- (1) Powers testified that he told Farquharson that the Ocean Tribune should be taken out of the water when he seized the vessel. While Farquharson knew that there was a possibility that this could result in some drying of the wooden hull it was, in my view, not negligent of him to follow Powers' advice. Under the plaintiffs' control, the Ocean Tribune had twice gone missing to the extent that Farquharson had found it necessary to incur the costs of hiring investigators to find and seize the vessel. Further, when the Ocean Tribune was initially removed from the water in February of 1998, Farquharson could not reasonably have anticipated that it would remain out of the water for in excess of 10 months.
 - (2) After the Ocean Tribune was taken out of the water, Middleton made many unfulfilled promises to forestall action by Farquharson in realizing upon his security. Further, Middleton took over responsibility for the readying of the vessel for re-entry into the water by determining what repairs were necessary and then engaging Sea Tech to complete the re-corking of the vessel to the extent he determined necessary to safely put the Ocean Tribune back into the water. Middleton then failed to pay for those repairs which turned out to be insufficient as further time passed and the drying of the hull continued.
 - (3) To the extent that the Ocean Tribune was kept out of the water for a longer period than should likely have occurred, I find that the plaintiffs and particularly Middleton were responsible for those events as well as for the insufficiency of the repair work undertaken at Middleton's direction.

- (4) Middleton's delay in redeeming or refinancing the Ocean Tribune as promised and his failure to pay for the repair work that he ordered and directed, resulted in Farquharson becoming responsible for both the repair costs and for the longer than necessary or anticipated storage bills that he was eventually required to pay. This increased the plaintiffs' debt to him while delaying realization upon the Second Marine Mortgage and the Second Assignment of the C Licence.
- (5) Although Farquharson admitted that he "took a chance" that the Ocean Vessel would leak on October 20, 1998 when he first attempted to have her put into the water, I am not satisfied that it was unreasonable for him to do so given the funds that he had already been forced to expend on re-corking the vessel because of the plaintiffs' failure to pay its accounts.
- (6) In any event, when the attempt to re-float the vessel was made, Farquharson directed the immediate cessation of that attempt when the Ocean Tribune began to seriously leak and I am not satisfied that the plaintiffs have established on a balance of probabilities that the first attempt resulted in damage to the vessel. In that regard, I accept Farquharson's evidence that although water did reach the level of the Ocean Tribune's engine compartment, it did not compromise her engine.

Did the defendant, Farquharson, improperly transfer title to the Ocean Tribune and its appurtenant licence to the defendant, 584234 B.C. Ltd., pursuant to the power of sale under the Second Marine Mortgage and the Second Assignment so that those transfers must be set aside or, alternatively, so that the plaintiffs are entitled to damages?

[62] The plaintiffs allege that Farquharson breached his duty to them as a mortgagee in possession because he:

- (1) did not to sell the C Licence independently of the Ocean Tribune immediately after seizing the vessel;
- (2) did not place the Ocean Tribune with a broker to conduct the sale and market the vessel for a reasonable period of time;
- (3) did not undertake all necessary work on the Ocean Tribune to obtain a valid Canadian Steamship Inspection ("CSI") Certificate resulting in the sale of the vessel on an "as is where is" basis; and
- (4) purchased the Ocean Tribune himself through 584234 B.C. Ltd. at a price far less than its actual value.

[63] The plaintiffs also allege that when Farquharson took steps both in late 1998 and early 1999, and while the Ocean Tribune was offered for sale to again make her usable as a tuna fishing vessel, he intended to improperly regain title to the vessel for his own profit and to deprive the plaintiffs of their equity.

- [64] The plaintiffs allege that those actions entitle the plaintiffs to a right in rem divesting 584234 B.C. Ltd. of its title to the Ocean Tribune.
- [65] All of these allegations bring into question the extent and nature of the duty of a mortgagee in possession to take reasonable care in effecting a prompt and reasonable sale of a repossessed vessel.
- [66] In argument, counsel for the plaintiffs submitted that the precise nature of the duty owed by a mortgagee in possession in exercising the power of sale under a mortgage is an open question in British Columbia. See: *Degelder Construction Co. v. Dancorp Developments Ltd.*, [2000] B.C.J. No. 1484 (S.C.) at ¶ 94--97, 78 B.C.L.R. (3d) 256, 2000 BCSC 1095. Counsel suggested that the debate is centred upon whether the test is a subjective or an objective one.
- [67] In *Northland Bank (In Liquidation) v. Kocken* (1998), 50 B.C.L.R. (3d) 201 at ¶ 9, 103 B.C.A.C. 165 (C.A.), the Court of Appeal delineated the issue in these terms:

The alternative claim in negligence raises an issue as to the nature of the duty owed by a lender to a borrower when realizing on security. The question is whether the duty is limited to the exercise of good faith and the avoidance of wilful default in selling the asset: *J. & W. Investments Ltd. v. Black* (1963), 38 D.L.R. (2d) 251 (B.C.C.A.), a subjective test; or the duty involves an obligation to act reasonably to obtain true market value: *Cuckmere Brick Co. v. Mutual Finance Ltd.*, [1971] 2 All E.R. 633 (Eng. C.A.), an objective test. The learned trial judge applied the higher test and found no breach of duty. Since I am in substantial agreement with his application of the evidence to the test, I do not find it necessary to settle the controversy. On the facts of this case the defendants were unable to satisfy either test.

- [68] Counsel for the plaintiffs submits that this case should be decided pursuant to the objective test enunciated by the English Court of Appeal in *Cuckmere Brick* rather than by the subjective test established by the British Columbia Court of Appeal in *J & W Investments* because, as Southin J.A. stated in *Columbia Trust Co. v. Larsen* (1986), 6 B.C.L.R. (2d) 369, [1986] B.C.J. No. 677 (S.C.), when the British Columbia Court of Appeal followed its earlier *J & W Investments* decision in *Gulf and Fraser Fisherman's Credit Union v. Calm C. Fish Ltd. et al.*, [1975] 3 W.W.R. 474, there was no mention made of *Cuckmere Brick* and it appears as though it was not brought to the Court's attention. Alternatively, counsel says that Farquharson's actions in relation to the sale of the Ocean Tribune fail to meet even the standards of the lower subjective test in *J & W Investments*.

- [69] As to those submissions I observe that:

- (1) the decision in *J & W Investments* remains binding upon this Court; and
- (3) I am, in any event, not satisfied that the plaintiffs have established a breach of duty by Farquharson regardless of whether the lower standards of the subjective test in *J & W Investments* or the higher ones of the objective test in *Cuckmere Brick* are applied.

[70] As a background to that latter conclusion, it is necessary to set forth in more detail the differences between the two tests.

[71] In *J & W Investments*, Tysoe J.A. stated (at p. 273):

With respect, it appears to me that to say that a mortgagee must take reasonable steps and precautions to obtain a proper price is somewhat misleading, for the mortgagor will have recourse against the mortgagee only if the failure to take reasonable steps and precautions can be described as fraudulent, wilful or reckless and has resulted in the property being sacrificed. In my view, whether or not a mortgagee has taken such reasonable steps and precautions is a matter to be taken into consideration in determining whether he has performed the duty stated by Lord Herschell in *Kennedy v. De Trafford* to be to exercise the power of sale in good faith and without any intention of dealing unfairly with his mortgagor and, in case of a breach of duty, what would have been realized if those steps and precautions had been taken, but that is all. As it is such a matter, it is desirable for me to say something as to the meaning that should be attached to the term "proper price" and to the expression "reasonable steps and precautions".

He went on to say (also at p. 273):

Whether "reasonable steps and precautions" have been taken will depend upon all the circumstances of the particular case. The conduct of the mortgagee must be looked at bearing in mind that he has his own interests to consider as well as those of the mortgagor

[72] In *Cuckmere Brick*, Salmon L.J. stated (at pp. 643 to 644):

Counsel for the defendants contends that the mortgagee's sole obligation to the mortgagor in relation to a sale is to act in good faith; there is no duty of care, and accordingly no question of negligence by the mortgagee in the conduct of the sale can arise. If this contention is correct it follows that, even on the facts found by the learned judge, the defendants should have succeeded. It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that, in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare, for example, *Kennedy v de Trafford* [[1896] 1 Ch. 762, on appeal [1897] A.C. 180] with *Tomlin v Luce* [(1889) 43 Ch. D. 191 at 194.] The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours' Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value

at the date of the sale.

- [73] I will now consider both the "subjective" and "objective" tests in the context of the plaintiffs' allegations against Farquharson's actions as a mortgagee in possession that culminated in the sale of the Ocean Tribune to 584234 B.C. Ltd.
- (1) Failure to sell the C Licence independently of the Ocean Tribune immediately after seizing the vessel.
- [74] The plaintiffs adduced the evidence of Randy Grant ("Grant"), an experienced commercial fishing vessel salesman, that in his opinion the fair market value of the C Licence between February of 1998 and June of 1999 was approximately \$60,000. He based that assessment upon an estimate of approximately \$1,000 per foot of the length of the vessel to which it was appurtenant. Grant also testified that the C Licence was marketable independently of the Ocean Tribune since it could attach to a different vessel of up to the 57 foot length of the Ocean Tribune. Grant also based his opinions of value on two sales which occurred in late 1999. While that evidence is of some value, it also shows that there was a very limited market for such licences and also that such sales often involved trades.
- [75] Farquharson's evidence in cross-examination was that he assessed the value of the C Licence as being approximately \$40,000 in 1998 and 1999. Notwithstanding Farquharson's obvious interest in this dispute, I find that his assessment of value is at least as reliable as that of Grant. I say that because of Farquharson's many years of experience as a commercial fisherman and boat owner who had experienced first hand the serious diminution in value of commercial fishing licences in British Columbia in the mid 1990's due to the reduction in salmon quotas.
- [76] The plaintiffs submit that even if Farquharson's assessment of value is valid, since the total debt owing to Farquharson upon seizure in February of 1998 was only approximately \$41,000, he should have immediately sold the C Licence to reduce or retire the debt. They say that his failure to do so was both unreasonable in the context of the subjective test and a breach of his duty to obtain fair market value under the objective test. The plaintiffs also submit that Farquharson's failure to immediately sell the C Licence calls into question any bona fide intention to retire the debt in a timely fashion.
- [77] I would have more sympathy for the plaintiffs' position concerning the sale of the C Licence if it were not an argument advanced in circumstances where the plaintiffs had never suggested the independent sale of the C Licence, and in circumstances where Middleton was not only both continually promising redemption of the debt, but also negotiating for the continued use of the Ocean Tribune to earn monies under a new lease arrangement.
- [78] Further, by the time that those redemption promises and negotiations came to an impasse when Middleton chose to approach the matter solely through the involvement of lawyers, Farquharson had become indebted to Sea Tech for at least an additional \$20,000 as a consequence of storage costs and Middleton's failure to pay for the maintenance and repairs

for which he had contracted. Thus the sale of the C Licence now postulated would not, even at the value suggested by Grant, have resulted in the retirement of the plaintiffs' debt obligations.

- (2) Failure to place the Ocean Tribune with a broker to conduct the sale and failure to market the vessel for a reasonable period of time.
- [79] Grant offered the opinion that without its C Licence the Ocean Tribune had a fair market value of between \$90,000 and \$150,000 between January of 1998 and June of 1999. Further, Grant assumed a six month marketing period with extensive advertising to obtain that fair market value.
- [80] Based upon Grant's opinion evidence, the plaintiffs allege that the 21 day sealed bid sales process employed by Farquharson was not reasonable even under the subjective test in J & W Investments. They also say that the fact that only \$75,000 was obtained from 584234 B.C. Ltd. pursuant to the sealed bid process establishes that the process was objectively flawed under the test in Cuckmere Brick in that it failed to obtain the true market value for the Ocean Tribune and the C Licence at the date of sale.
- [81] I am not satisfied that the fair market value of the Ocean Tribune without the C Licence was as high as that postulated by Grant on behalf of the plaintiffs. I say that because:
- (1) Grant's valuation was based upon the assumption that the Ocean Tribune either had an active Canadian Steamship Inspection ("CSI") Certificate or was in a condition that would have qualified the vessel to receive an active CSI Certificate when it was sold in June of 1999. In fact, the CSI Certificate that was in place when Farquharson sold the Ocean Tribune in 1995 had expired in February of 1999 while under seizure. As I will later discuss, the lack of a valid CSI Certificate has a serious detrimental effect on a commercial fishing vessel's fair market value.
- (2) Grant assumed that Middleton had expended approximately \$179,000 in vessel improvements to the Ocean Tribune in 1996 and 1997. He did not know that virtually all of those improvements were performed in 1995 to repair the vessel to the condition in which she had been before she had been run aground in 1994.
- (3) The total fair market value of the Ocean Tribune and the C Licence in late 1994 in a "to be fully repaired" condition (as evidenced by the arms-length sale from Farquharson to the plaintiffs) was \$135,000 and there is, in my view, no reliable evidence to suggest that, with the difficulties experienced in the British Columbia salmon fishing industry after 1994, there was a general increase in the value of large commercial fishing vessels and licences. For that reason I also reject an appraisal prepared by Mr. Ian Hopkinson ("Hopkinson") on behalf of the plaintiffs in January of 1998 offering the opinion that the Ocean Tribune was worth \$310,000 without reference to the C Licence. In my view, that assessment is wholly unrealistic and unreliable.

- (4) Farquharson adduced the opinion evidence of Mr. Paul Dupré ("Dupré"), an experienced Marine Surveyor, who prepared an assessment of value on June 2, 1999. Dupré offered the opinion that:

The general condition of this vessel is indicative of extensive deferred maintenance overall. Both the machinery space and the working decks display evidence of several years of inactivity.

The Canadian Steamship Inspection certification for this vessel has expired, (reportedly in February of 1999).

Due to the downsizing of the fishery and the consequent condition of the market for industry related vessels, and in view of the condition and C.S.I. status noted above it is the opinion of the undersigned surveyor that an estimated current market value for this vessel of approximately \$35,000.00 is fair and reasonable. This value determined using the surveyor's knowledge, brokerage consultants and periodicals reflecting current market conditions. This value is based on the recent sales of similar and comparably equipped vessels.

It should be noted that the value as stated above reflects the undersigned surveyor's opinion that although this is a substantial vessel it now has very limited economic viability. The threefold combination of the condition of the fishery, the lack of CSI, and the considerable repair costs necessary to return this vessel to reasonable usability has minimized its application to the extent that the relatively low value as stated above is certainly supportable.

- (5) While Dupré's assessment was obtained by Farquharson after the purchase of the Ocean Tribune and its C Licence by 584234 B.C. Ltd. in order to support the reasonableness of the \$75,000 sale price, I am satisfied that the assessment was not improperly influenced by that fact or by Farquharson.

[82] In all of the circumstances, I am not satisfied that the plaintiffs have proven on a balance of probabilities that the total fair market value of the Ocean Tribune and its appurtenant C Licence was significantly more than \$75,000 between February of 1998 and June of 1999.

[83] Further, although a more prolonged exposure to potential purchasers as well as more advertising may have resulted in a higher price being obtained, I am not satisfied that such a higher price was likely to be obtained or that the sealed bid process invoked was unreasonable in all of the circumstances especially given that the sale was conducted on an "as is where is" basis because of the lack of a valid CSI Certificate.

- (3) Failure to undertake all necessary work on the Ocean Tribune to obtain a valid CSI Certificate resulting in the sale of the vessel on an "as is where is" basis.

[84] The plaintiffs submit that as a mortgagee in possession Farquharson had a positive obligation to put the Ocean Tribune in a condition that would result in obtaining a fair market value of \$90,000 to \$150,000 without the appurtenant C Licence as suggested by Grant.

- [85] The evidence establishes that in early 1999 Farquharson did not know the cost of putting the Ocean Tribune into a condition that would result in the obtaining of valid CSI certification. The necessary inspection process itself could have cost between \$6,000 to \$8,000 and the costs to carry out any work necessary to obtain certification could not be ascertained without such inspection.
- [86] The plaintiffs' submission concerning the alleged unreasonableness of Farquharson's failure to expend an unknown amount of money to inspect and then improve the marketability of the Ocean Tribune must, in my view, be assessed in relation to the circumstances that existed in May of 1999. At that time:
- (1) the plaintiffs owed Farquharson approximately \$50,000 in unpaid principal and accrued interest under the Second Collateral Marine Agreement, Second Mortgage and Second Note;
 - (2) Farquharson had incurred additional debt with Sea Tech for maintenance, repair and storage costs of at least \$45,000 which arose both during and after the time the plaintiffs had made continual refinancing promises and had themselves contracted with Sea Tech for, but had not paid, at least \$20,000 in maintenance and repair costs;
 - (3) Farquharson had incurred charges for investigators and bailiffs in excess of \$4,000 to locate and seize the Ocean Tribune and was facing further storage costs arising from the continued failure of the plaintiffs to pay their debts as well as legal and other costs relating to the conduct of the sale process; and
 - (4) Farquharson knew that the Ocean Tribune and its C Licence had sold for \$135,000 in late 1994 when it was in "as new" condition given the assignment and expenditure of more than \$131,000 in insurance repair monies as part of that transaction.
- [87] In those circumstances, whether looked at subjectively or objectively, it was not unreasonable for Farquharson to fail to expend more monies to improve the Ocean Tribune for sale purposes, let alone commit to unknown improvement costs. In my view, even under the objective test in *Cuckmere Brick*, a mortgagee in possession has no obligation to incur expense to improve the condition or marketability of a chattel to obtain a better price for the defaulting mortgagor unless the work arose from the mortgagee in possession's own actionable failure to maintain the chattel in reasonable condition. Those circumstances did not exist in this case.
- (4) Purchase of the Ocean Tribune by Farquharson through 584234 B.C. Ltd.
- [88] The plaintiffs allege that when Farquharson took steps in late 1998 and early 1999 and while the Ocean Tribune was offered for sale to once again make the Ocean Tribune usable as a tuna fishing vessel, he did so with intent to improperly regain title to the vessel for his own profit and to deprive the plaintiffs of their equity.
- [89] I am satisfied that there is no merit to those allegations.

- [90] In my view, Farquharson attempted to and did, in fact, act honourably throughout in his dealings with the plaintiffs. He had no obligation to reach an accommodation with them after the first seizure but did so. After the second seizure he again negotiated in good faith towards a refinancing, redemption or other creative arrangement by which the plaintiffs could repay their debts to him, all the while being required by reason of the plaintiffs' unfulfilled promises and defaults, to expend even more monies to protect his own investment in the Ocean Tribune.
- [91] I accept Farquharson's explanation that he made his own \$75,000 sealed bid solely as a protective bid to preclude the loss of the entirety of his investment. Recovery of any deficiency balance from the plaintiffs was unlikely and it is in my view telling that he was prepared to face the loss of up to \$25,000 in June of 1999 if someone had offered more than his protective bid.
- [92] I find that while Farquharson did take steps to improve the Ocean Tribune in 1998 and 1999, both before and during the sale process, he did so only to keep his options open and not out of bad faith or for any other improper motive. I also find that the sale of the Ocean Tribune to the newly incorporated company 584234 B.C. Ltd. was done on the advice of his lawyers and without any intention to deprive the plaintiffs of any equity they may still have had in the Ocean Tribune in June of 1999.
- [93] It follows that the plaintiffs' claims for damages and their claim in rem relating to the seizure and sale of the Ocean Tribune and the C Licence must be dismissed.
- [94] That leaves for consideration the plaintiffs' claims concerning the alleged conversion of certain personal chattels that they say were on board the Ocean Tribune when it was seized by Associated Bailiffs on February 16, 1998.
- [95] The plaintiffs' conversion claims initially included many items that had been purchased by them in replacement or improvement of equipment on the Ocean Tribune over the years as older equipment deteriorated due to wear or obsolescence. Such items were the property of the Ocean Tribune and as such were charged by the Second Marine Mortgage. No claim for conversion can be maintained in relation to those chattels which were properly seized and sold under a valid security instrument.
- [96] The same is not true, however, with respect to: a fax machine; a Kenwood stereo cassette deck; a VCR tape deck; a Realistic FM Transceiver; a ship's clock and barometer; a four cell Maglite flashlight; an unquantifiable number of pre-recorded and self-recorded compacts discs and cassette tapes; a hand held Reliable torch, two car speakers; or two chest style freezers, all of which were not returned to the plaintiffs by Associated Bailiffs or Farquharson after the Ocean Tribune was seized.

- [97] The total value of all of those personal chattels when purchased was approximately \$2,000. They were, however, all used chattels that were at least one to four years old at the time of seizure. In particular, the freezers were rusted and had no monetary value. I am satisfied that in the condition they were in the total value of these personal chattels that were left on board the Ocean Tribune was approximately \$1,000.
- [98] I am satisfied that since Farquharson and his agents, Associated Bailiffs, failed to return the personal chattels I have listed above to the plaintiffs, Farquharson is obligated to compensate the plaintiffs for their loss.
- [99] I accordingly find that the plaintiffs are entitled to judgment against Farquharson in the amount of \$1,000 for the loss of the listed personal chattels together with interest on that amount from and after February 16, 1998 pursuant to the provisions of the Court Order Interest Act, R.S.B.C. 1996 c. 79 until the date of this judgment.

COSTS

- [100] The plaintiffs have been wholly unsuccessful in this litigation on the major issues before the Court. They also interfered with the defendants' lawful use and enjoyment of the Ocean Tribune from and after their Arrest of the Ocean Tribune on August 3, 1999 on the basis of entirely unsubstantiated allegations of wrongdoing by the defendants concerning the reasonableness and propriety of the sale of the Ocean Tribune to 584234 B.C. Ltd.
- [101] The plaintiffs were, however, somewhat successful concerning their claims relating to the conversion of their personal chattels although in an amount far less than that which they originally advanced. Further, the amount which they recovered was well within the jurisdiction of the Provincial Court of British Columbia.
- [102] In all of those circumstances, I have determined that the defendants are entitled to their costs of this proceeding throughout based upon one set of costs on Scale 3 with the exception of the costs of their Rule 19(24) application that was dismissed by Hood J. with costs against them. The costs of that application as well as the damage award of \$1,000 and Court Order Interest arising from the plaintiffs' personal chattel conversion claim will be set off against the defendants' costs and disbursements after assessment.

"B.M. Davies, J."

The Honourable Mr. Justice B.M. Davies

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