

CANADA / JUDGMENT

Middleton et al v. Owner & Farquharson et al

2000 BCSC 1621

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA
ADMIRALTY ACTION IN REM AGAINST
THE VESSEL "OCEAN TRIBUNE"

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.
DEFENDANT/APPLICANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HOOD

Counsel for Defendant/Applicant R. S. Watts

Counsel for Plaintiffs W.G. Wharton

Date and Place of Hearing: November 2, 2000

Vancouver, BC

- [1] The Defendants apply for an Order pursuant to Rule 19(24) that the in rem action against the Defendant vessel, "OCEAN TRIBUNE" be struck from the Statement of Claim, as disclosing no reasonable cause of action, or, alternatively, as being vexatious or frivolous, for want of jurisdiction; that as a result the arrest of the vessel "OCEAN TRIBUNE" be set aside. The motion is opposed by the Plaintiffs on the basis that the Defendants have not discharged the onus upon them under Rule 19(24) of establishing that it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action in rem, or that it is vexatious or frivolous, for want of jurisdiction.
- [2] The ultimate issue is whether this Court has jurisdiction to entertain the Plaintiffs' claims in rem. On the motion it is whether the Defendants have established that it is plain and obvious, that is, beyond a reasonable doubt, that the Court does not have jurisdiction for the reasons asserted by them.

THE FACTS

- [3] On January 17, 1997, the Plaintiffs executed a Promissory Note in the amount of \$35,000.00 in favour of the Defendant Farquharson, and payable in full on October 31, 1997. The Note was secured by a Marine Mortgage on the fishing vessel "OCEAN TRIBUNE", which was registered on March 3, 1997. The parties also entered into a Collateral Marine Agreement in respect of the vessel on January 17, 1997, which further evidences the agreement between the parties.
- [4] As of October 31, 1997, the amount due on the Note had not been paid, and a formal demand for payment was issued on December 8, 1997. No payment was received in response to the demand. As a result, the Defendant, Farquharson, seized the vessel on February 16, 1998, and thereby became a Mortgagee in Possession.
- [5] A survey of the vessel conducted by S.I. Hopkinson, Marine Surveyors Limited, on January 30, 1998, two weeks before it was seized, estimated the value of the vessel to be approximately \$310,000.00. The vessel was subsequently appraised by Western Marine Surveyors Ltd., in May 1999 at a market value of \$35,000.00.
- [6] Not having been paid on the Note Mr. Farquharson elected to advertise the vessel for sale by sealed bid in May 1999. After a twenty-one day bidding period, only one bid had been received for the vessel, and that was from the Defendant, 584234 B.C. Ltd., in the amount of \$75,000.00. 584234 B.C. Ltd., is a company controlled by Mr. Farquharson. The bid was accepted and the vessel was transferred to 584234 B.C. Ltd., in the Victoria B.C. Ships Registry on or about June 7, 1999.
- [7] On August 3, 1999, the Plaintiffs commenced action and arrested the vessel. In their Statement of Claim the Plaintiffs' claim that the sale of the vessel to 584234 B.C. Ltd., was part of a plan to deprive the Plaintiffs of their equity in it, and that the sale is therefore void

and unenforceable. Alternatively, they claim that the sale amounts to a conversion of their equity in the vessel. Finally they allege that the sale was imprudent and below market value; that delays and other acts of the Defendants resulted in the substantial decline of the vessel's market value, and the deprivation of the Plaintiffs' equity in the vessel.

- [8] In their prayer for relief the Plaintiffs claim damages for loss or diminution of equity in the vessel and for conversion, condemnation of the vessel, a declaration that the sale from the Defendant Farquharson to 584234 B.C. Ltd., is null and void, a declaration that the Defendant Farquharson's rights under the mortgage are unenforceable as having not been exercised within a reasonable length of time, and an accounting for all profits and revenue derived from the use of the vessel, and so on. I observe here that underlying a claim for condemnation of the vessel, and a claim that the Mortgagee's rights are no longer enforceable, is a claim for possession of the vessel.

THE LAW

- [9] The jurisdiction of this Court to entertain an action in rem against the ship is statutory and subject to certain limitations. An action may only be brought in rem against a ship, where the same may be brought in the Federal Court of Canada, in cases where a claim for relief is made under Canadian Maritime Law, or any other law of Canada, relating to navigation and shipping.
- [10] In this regard Rule 55(2) of the B.C. Rules of Court provides as follows:
- (2) Except to the extent that jurisdiction has been otherwise specifically assigned, an action may be brought in rem against a ship or other property that may be brought in rem in the Federal Court of Canada in all cases in which a claim for relief is made under or by virtue of Canadian Maritime Law or any other law of Canada relating to navigation and shipping.
- [11] In the Federal Court of Canada the circumstances under which in rem jurisdiction arises are set out in s.22 of the Federal Court Act R.S.C., 1985, c.F-7. In this regard s.43(2) of the Federal Court Act provides:
- (2) Jurisdiction in rem - Subject to ss.(3) the jurisdiction conferred on the Court by s.22 may be exercised in rem against a ship, aircraft or other property that is the subject of the action, or against any proceeds of sale thereof that have been paid into Court. (My emphasis).

Subsection (3) need not be considered here.

- [12] Section 22(1) of the Federal Court Act sets out a general provision of maritime jurisdiction, in language very similar to that of Rule 55(2) of the B.C. Rules of Court. That section provides as follows:

22(1) NAVIGATION AND SHIPPING - The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian Maritime law, or any law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specifically assigned.

- [13] It is conceded that if there is in rem jurisdiction, it is granted by s.22(2)(a) and (c). Section 22(2) provides or sets out some 19 specific heads of jurisdiction granted to the Federal Court. And as I say, by virtue of s.43(2), those jurisdictions may be exercised in rem against a ship, aircraft or other property provided that it is the subject of the action. I observe here that the cases show that in order to establish that the property seized is the subject of the action, it is enough to establish that there is some nexus or connection between the property seized and the cause of action.
- [14] I will observe here that the menu of jurisdictions in s.22(2) is wide ranging. They range from claims arising out of the activities of the ship, for example, damage or loss caused or sustained by a ship, to claims arising out of an agreement or contract pertaining to the ship, for example, a claim in respect of a mortgage or charge, or contract of marine insurance, or a contract to construct, repair or tow a ship, and so on, and finally to a claim with respect to title, possession or ownership of a ship or any part interest therein.
- [15] I will set out here the provisions of s.22(2)(a) and (c), being the only jurisdictional provisions relevant to the case at Bar:
- (2) MARITIME JURISDICTION - Without limiting the generality of ss.(1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following:
- (a) any claim with respect to title, possession or ownership of a ship, or any part interest therein, or with respect to the proceeds of sale of a ship, or any part interest therein;...
- (c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry, or respondentia for which a ship or part interest therein or cargo was made security; ...
- [16] In my opinion the ultimate issue will turn on the meaning to be given to these two sub-sections, and the characterization of the true nature of the matters in dispute. In this regard it will be seen that Mr. Watts, for the Defendants, characterizes the dispute as a contractual dispute between a borrower and a lender. The cause is not about the vessel itself. It is about what was done in executing on the security for the loan, the vessel. There is therefore no in rem jurisdiction.

- [17] Mr. Wharton, for the Defendants, on the other hand characterizes the dispute as involving a void and unenforceable sale of the vessel, by a Mortgagee in Possession, a mortgage and an equitable part interest in the vessel; all of which he says gives rise to jurisdiction in rem under sub-sections (a) and (c). In his written argument Mr. Wharton put his position as follows:

The subject matter of the dispute between the Plaintiffs and the Appellants is integrally connected to marine matters, either specifically under ss.22(2)(a) and 22(2)(c) or generally under ss.21(1) and therefore falls within Federal Court jurisdiction. The dispute relates directly to title, possession or ownership of a vessel and is therefore part of Canadian maritime law. Alternatively, the dispute concerns matters of breach of the implied terms of a marine mortgage and a collateral marine agreement and as well claims in tort for conversion of the vessel and conversion of the property owned by the Plaintiffs previously located on the vessel and therefore concerns Canadian maritime law. Accordingly, by virtue of Rule 55(2) of the British Columbia Rule of Court and the combination of s.43(2), 22(1) and 22(2) of the Federal Court Act this in rem action is within the jurisdiction of the Supreme Court of British Columbia.

- [18] In submitting that the facts of the present case give rise to no cause of action that falls within either head of jurisdiction, Mr. Watts suggested that the Courts have interpreted s.22 quite strictly. I did not find this to be the case generally speaking. On the contrary, the Courts seem to interpret the Federal Court's jurisdiction over maritime law rather broadly. For example, see the decisions of the Supreme court of Canada in *Antares Shipping Corp. v. THE CAPRICORN*, [1980] 1 S.C.R. 553, and *Monk Corp. v. Island Fertilizer Ltd.*, [1991] 1 S.C.R. 779.
- [19] In *Antares*, the action was for specific performance of a contract for the sale of a ship. The Federal Court of Appeal had concluded that s.22(2)(a) should not be construed as including an action for specific performance of a contract of sale. In reaching this conclusion the Court of Appeal expressly followed American admiralty authorities, which apparently apply a narrow interpretation to admiralty jurisdiction. In the Supreme Court, Ritchie, J., speaking for the Court, declined to follow the restrictive interpretation in favour of the English practice, which he described as forming the foundation of Canadian maritime law. In this regard he cites the following passage from pg.39 of Roscoe's work on *The Admiralty Jurisdiction and Practice of High Court of Justice*, 5th Ed. 1931:

This jurisdiction is now, by the Supreme Court of Judicature (Consolidation) Act, 1925, vested in the High Court, and is assigned to the Probate Division. In pursuance of the authority thus conferred upon it, the Court of Admiralty acquired ample jurisdiction to adjudicate upon all questions of title, and wherever it became necessary it would enquire into the validity of an alleged sale, or concerning any other circumstances which affected the right of the property in the ship. (The italics are mine).

Finally, Mr. Justice Ritchie found that the provisions of s.22(2)(a) of the Federal Court Act constituted existing federal statutory law coming within the class of subject of navigation and shipping, and expressly designed to confer jurisdiction to the Federal Court for claims of the kind advanced by the Appellant.

- [20] Mr. Watts referred to *Corostel Trading Inc. v. The Owners and all others interested in the Ship "CATALINA"* and the said ship "CATALINA" (1986), 6 F.T.R. 233 (Fed.TD) which he described as a case similar to the case at Bar, involving a contract of purchase and sale of a ship. There was no nexus between the claim on the contract and the ship. The contract debt just happened to involve the ship. Hence, he said, the claim in rem was struck.
- [21] I observe here that in *Corostel Trading Inc.* the Court did not decline jurisdiction simply because the case involved a contract. That was not what the case was about. It was about a claim for quantum meruit against one of the parties to the contract. The nexus, as Mr. Wharton points out, was one step removed. The claim simply did not have sufficient nexus to the vessel.
- [22] Counsel also referred to *Westview Sable Fish Co. et al v. The Ship "NEEKIS" et al* (1986), 31 D.L.R. (4th) 709, a decision of Rouleau, J. in the Federal Court, Trial Division. In that case the Plaintiffs commenced an action in rem alleging that certain fishing traps had been lost as a result of negligent actions of those on board the Defendant ship. The Defendant successfully moved for an order to strike out the in rem action.
- [23] It was held that there was no damage to the ship, nor damage arising out of a collision, nor any damage related to navigation which could sustain the action in rem. Counsel submitted that there must be a direct connection between the vessel itself and the cause of action. The ship must be involved in the wrong doing in question. In "NEEKIS", as in the case at Bar, the ship was not involved in any wrong doing, and no claim relating to navigation is made. An action in rem would not lie for conversion of the fishing traps. Similarly in the case at Bar, an action in rem would not lie for conversion of the ship or the gear aboard.
- [24] In my view, the "NEEKIS". case is distinguishable. Given Counsel's submissions, this is clear when one remembers that in that case the issue was whether or not an in rem action could be sustained under s.22(2)(d) of the Federal Court Act. That subsection grants jurisdiction for any claim for damages or for loss of life or for personal injury caused by a ship either in collision or otherwise; and, of course, the ship had to be directly involved in the wrong doing.
- [25] Counsel also relied on *Scandia Shipping Agencies Inc., v. The "ALAM VERACRUZ"* (1977), 148 F.T.R. 164, wherein it was also found that an in rem proceeding will only lie if there is a "connection" to the vessel, and the "NEEKIS" case was cited. There the claim was for damages for non-performance and termination of a marine brokerage agreement. It was found that the property seized, the bunkers of the ship and its freight, had no connection with the cause of action advanced. Again, in my opinion, the case is distinguishable.

- [26] Mr. Wharton, for the Plaintiffs, said the sale of the vessel was void and unenforceable. It was not an arms-length sale by a Mortgagee in Possession. The case is primarily about the actions of Mr. Farquharson as a Mortgagee in Possession. He pointed out that two weeks before the vessel was seized, it was appraised at \$310,000.00, net of any fishing license. He asserted that Mr. Farquharson held the vessel for one and one half years during which time it experienced a partial sinking, and diminished the Plaintiffs' value by 90%, to the appraised value of \$35,000.00. There are genuine issues to be tried pertaining to Mr. Farquharson's conduct pertaining to the vessel, and the Plaintiffs' equitable interest in it, while a Mortgagee in Possession. It is, he submitted, an in rem claim.
- [27] Mr. Wharton referred to the decision of the House of Lords in *Republic of India and Others v. India Steamship Company Limited*, an October 1997 decision, which contains a historical perception of the in rem jurisdiction. He suggested that Mr. Watts' submission pertaining to the "NEEKIS" case was misleading, if he was suggesting that for there to be in rem jurisdiction the vessel had to be directly involved, and a "wrongdoer". He pointed out that this personification theory fell into decline after the passing of the Judicature Acts. In the "NEEKIS" case it was the people on board the vessel that committed the tortuous act. The Court simply said that it could not attribute those acts to the ship. There was simply no nexus between the claims being advanced and the vessel. I have already noted that the court was not concerned with s.22(2)(a) or (c) in the "NEEKIS" case.
- [28] Counsel also pointed out that it is not a principle that an in rem action must be connected to navigation of a vessel. There are many in rem cases which have nothing to do with navigation. A claim relating to a mortgage is a good example. Further, s.22(2)(c) of the Federal Court Act specifically provides for jurisdiction in any claim in respect of a mortgage. And I would refer to Antares Shipping Corp., as well.
- [29] Mr. Wharton submitted that the point to be addressed in determining if there is in rem jurisdiction is the nexus question. Without deciding who will win, the Court has to decide whether the case is about a vessel, or an interest in a vessel. On the facts of the case, the Court cannot conclude otherwise. We are not simply dealing with a chattel, as suggested by Mr. Watts. It is a registered vessel, with a mortgage registered under the provisions of the Canada Shipping Act. Counsel submitted that "it does not get much wetter than that".

DISPOSITION

Is There In Rem Jurisdiction?

- [30] As I have said, this issue will turn on the Court's interpretation of s.22(2)(a) and (c) and s.43(2), and its characterization of the claims advanced by the Plaintiffs. Does the answer to the question what is this case really about, bring it within these provisions?

- [31] I believe that if asked the parties would agree that at the time that Mr. Farquharson seized the vessel under and by virtue of the mortgage, and related loan agreement, the Court had such jurisdiction. Then the question arises, was this jurisdiction somehow lost during the time that Mr. Farquharson was a Mortgagee in Possession and his impugned conduct took place? And in any event, the Statement of Claim discloses serious questions of law and the facts which are fit to be tried.
- [32] The Court of Appeal has repeatedly said that when dismissing an application under Rule 19(24)(a), nothing should be said by the Rule 18A Trial Judge which could be construed as in any way prejudicing any issue of law or fact at trial. In some cases this is easier said than done, short of the Chambers Judge simply dismissing the application. This includes opining on the qualitative nature of the Plaintiffs' claims, which of course must be considered on the basis that every fact alleged is true. I therefore decline Mr. Watt's urging that I should decide the ultimate issue on this application.

Should The Claim In Rem Be Struck Pursuant to Rule 19(24)

- [33] It is my opinion that the claim in rem should not be struck. The Defendants have not met the onus upon them of meeting the plain and obvious rule outlined in *Hunt v. Carey Can. Inc.*, [1990] 2 S.C.R. 959, which rule has been repeatedly followed by the Court of Appeal. That being the case the in rem cause will not be struck.

- [34] The application is dismissed with costs.

"S.W. Hood, J."

The Honourable Mr. Justice S.W. Hood

Vancouver, B.C.

10 November 2000

February 5, 2001 -- Memorandum to the Legal Publishers issued as directed by Mr. Justice Hood advising that on page 2, paragraph 3, fifth line, should read:

"... on the fishing vessel "OCEAN TRIBUNE", which was registered on March 3, 1997. The parties ..."

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