

CANADA / JUDGMENT

Sargeant v. Worldspan Marine Inc.

2017 BCSC 1153

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1153 Sargeant v. Worldspan Marine Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sargeant v. Worldspan Marine Inc.,

2017 BCSC 1153

Date: 20170706

Docket: S112804

Registry: Vancouver

Between:

Harry Sargeant III

Plaintiff

(Defendant by Counterclaim)

And

Worldspan Marine Inc., Crescent Custom Yachts Inc. and

Queenship Marine Industries Ltd.

Defendants

(Plaintiffs by Counterclaim)

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Plaintiff / Defendant by Counterclaim:

K. Siddall

Defendants, Crescent Custom Yachts Inc. and Queenship Marine Industries Ltd.

No one appearing

Counsel for Worldspan Marine Inc.,

Defendants / Plaintiffs by Counterclaim:

W.G. Wharton

H. Ormiston

Place and Date of Hearing:

Vancouver, B.C.

January 13, 2017

Place and Date of Judgment:

Vancouver, B.C.

July 6, 2017

INTRODUCTION

- [1] The defendant, Worldspan Marine Inc. ("Worldspan") applies for a temporary stay of this action pending the resolution of issues of liability as between Harry Sargeant III ("Sargeant") and Worldspan in Federal Court action number T-1226-10 (the "Federal Court action").
- [2] Both proceedings have their genesis in the partial construction by Worldspan for Sargeant of a 142 foot custom yacht bearing hull number QE014226C010 (the "Vessel").
- [3] On April 29, 2011, Sargeant commenced this action, claiming damages and other relief against Worldspan for breach of fiduciary duty, breach of trust, conversion, fraud and breach of contract.
- [4] Sometime earlier, on July 20, 2010, Offshore Interiors Inc. ("Offshore") a trade creditor of Worldspan, commenced the Federal Court action. On July 28, 2010, Offshore arrested the Vessel, and later took default judgment against the Vessel. In the Federal Court action Sargeant, Worldspan, various trade creditors and others all made in rem claims against the Vessel. The Federal Court will determine the priorities of those claims and the distribution of the proceeds of sale of the Vessel.
- [5] On this application, Worldspan contends that judicial economy, the potential for conflicting findings and the doctrines of res judicata, issue estoppel and abuse of process all warrant a stay of this action pending the adjudication of Sargeant's in rem claim in the Federal Court action.

- [6] For his part, Sargeant maintains that his claims in the two proceedings are separate and distinct, and that he should be permitted to pursue this action without suffering the prejudice of delay resulting from a temporary stay of proceedings.
- [7] Sargeant has applied for an order requiring Worldspan to produce and deliver its list of documents in this action.

BACKGROUND FACTS

- [8] Before addressing the merits of Worldspan's stay application, it is necessary to trace the history of the proceedings in the British Columbia Supreme Court and in the Federal Court action. In doing so, I draw upon the helpful chronologies set out by counsel for Worldspan in his client's notice of application, and by counsel for Sargeant in his application response.
- [9] On February 29, 2008, Sargeant and Worldspan entered into a vessel construction agreement ("VCA") by which Worldspan agreed to design, construct, outfit, launch, complete, sell and deliver the Vessel to Sargeant.
- [10] Worldspan commenced construction of the Vessel in March 2008, and on May 14, 2008, Sargeant filed a builder's mortgage against the Vessel in the Vancouver Ship Registry.
- [11] By April 2010, Worldspan had received payments from or on behalf of Sargeant for the construction of the Vessel totalling US \$20,651,924.05.
- [12] Thereafter, Sargeant and Worldspan engaged in a dispute concerning the escalating costs of construction of the Vessel.
- [13] As I have previously noted, on July 20, 2010, Offshore commenced the Federal Court action and arrested the Vessel on July 28, 2010.
- [14] On April 29, 2011, Sargeant commenced this action by notice of civil claim filed against Worldspan and its affiliated companies, alleging that Worldspan and its affiliates had engaged in dishonest business practices, including fraud and the conversion of funds received from Sargeant to their own use.
- [15] In addition to damages, Sargeant sought the following relief in this action:
- (a) judgment for money had and received,
 - (b) a declaration that all money had and received by Worldspan is held on a constructive trust for Sargeant;
 - (c) an accounting;
 - (d) tracing remedies;

- (e) a declaration that the VCA and Construction Mortgage charge the Vessel and all work, materials, machinery, and equipment related to the Vessel including, without limitation, all parts, material, equipment, inventory and other goods created, manufactured, ordered or delivered for placement on or incorporation into the Vessel;
 - (f) the appointment of a receiver and receiver manager;
 - (g) interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c.79; and costs.
- [16] On May 27, 2011, Worldspan and its affiliates commenced petition proceedings in the Supreme Court of British Columbia (the "CCAA proceedings"), seeking relief under the Companies' Creditors Arrangement Act, R.S.C. 1985,
- c. C-36 (the "CCAA").
- [17] On May 30, 2011, Worldspan filed a response to civil claim in this action, and on June 1, 2011, counterclaimed against Sargeant for damages for amounts allegedly payable by him under the VCA.
- [18] On June 6, 2011, I granted an initial order in the CCAA proceedings which included a stay of all rights and remedies against Worldspan.
- [19] On July 22, 2011, the Court made a claims process order in the CCAA proceedings. That order provided that any creditor that filed a Proof of Claim in the CCAA proceedings asserting an in rem claim against the Vessel under Canadian maritime law was entitled to pursue its claim against the Vessel outside the process established by the CCAA claims process order. The Court also requested the aid and recognition of the Federal Court in carrying out the terms of the CCAA claims process order.
- [20] The CCAA claims process order also provided that neither Sargeant, nor his lender, Comerica Bank, were obliged to file a Proof of Claim under the CCAA claims process, and provided for the resolution of those claims under a litigation process order also made on July 22, 2011. Under that order, the claims of Sargeant and Comerica Bank were to be determined by notice of civil claim filed by Worldspan and a counterclaim filed by Sargeant in the CCAA proceedings.
- [21] On August 29, 2011, Prothonotary Lafreniere of the Federal Court issued a claims process order for determining the value and priority of in rem claims against the Vessel (the "Federal Court claims process order").
- [22] The Federal Court claims process order required in rem claimants to file affidavits of claim, and provided that all questions relating to the right of any claimant in rem against the Vessel, and all questions concerning the priority of all in rem creditors were reserved until further order of the Federal Court, to be determined at a subsequent hearing date.
- [23] On October 13, 2011, pursuant to the Federal Court claims process order, Sargeant filed an affidavit of claim in the Federal Court action in which he stated:

My claim against the Vessel is derived from payments that were made by me or on my behalf, at my direction and for my benefit to the legal owner of the Vessel, the Defendant Worldspan Marine Inc. ("Worldspan"), totalling \$20,651,924.05 USD for the construction of the Vessel, and from the security interest in the Vessel granted to me by Worldspan to secure these payments .

- [24] In rem claims were also filed in the Federal Court action by Offshore and other trade suppliers, by Comerica Bank, and by Worldspan as the registered owner of the Vessel, for amounts allegedly owing under the VCA.
- [25] On November 18, 2011, the Federal Court dismissed Worldspan's in rem claim. Worldspan's appeal of the order dismissing its in rem claim was dismissed on January 18, 2012.
- [26] On March 5, 2013, the Federal Court ruled that Sargeant's builder's mortgage did not create a lien or charge on the Vessel. Sargeant and Comerica Bank appealed that order.
- [27] On December 19, 2013, the Honourable Justice Strickland allowed the appeal and found that Sargeant's mortgage secured the unearned advances he made to Worldspan, and that Worldspan had an obligation to repay those advances. Worldspan appealed the order of Justice Strickland to the Federal Court of Appeal.
- [28] On January 15, 2014, Sargeant commenced proceedings against Stephen Barnett and Chris Blane, the principals of Worldspan, in Vancouver Registry action No. S140301. Sargeant made allegations of dishonest business practices against those defendants similar to his allegations against Worldspan in this action. On May 20, 2014, Mr. Barnett filed a response to civil claim. Counsel for Sargeant advises that his client intends to apply to have action S140301 and this action tried together.
- [29] On July 7, 2014, the Vessel was sold by order of the Federal Court for the price of US \$5,000,000. The Federal Court has ordered that Bernard LLP, counsel for Worldspan and Offshore, hold the net proceeds of sale in trust pending resolution of the in rem claims against the Vessel and the proceeds of its sale.
- [30] On February 16, 2015, the Federal Court of Appeal, by reasons for judgment indexed as Offshore Interiors Inc. v. Worldspan Marine Inc., 2015 FCA 46, dismissed Worldspan's appeal concerning the validity of Sargeant's mortgage. Nadon J.A., writing for the Court, concluded at para. 99 that when the VCA and the builder's mortgage were properly construed, the advances made under the mortgage "must necessarily be considered as a loan to Worldspan and thus repayable".
- [31] On November 23, 2015, Sargeant brought a notice of motion in the Federal Court action (the "Venue Motion") by which he sought an order:

That the in personam claims between Sargeant and Worldspan proceed in the Supreme Court of British Columbia, leaving the in rem claims under the Builder's Mortgage and any claim under section 22.2 (n) of the Federal Courts Act to be dealt with in the Federal Court action.

- [32] The Venue Motion, and a motion by Worldspan for a declaration that any amounts that may be due and owing by Sargeant to Worldspan under the VCA have priority over any security interest of Sargeant and Comerica Bank (the "Worldspan Priority Motion") were heard by the Honourable Mr. Justice Southcott of the Federal Court on December 14, 2015.
- [33] By reasons for decision indexed as *Offshore Interiors Inc. v. Worldspan Marine Inc.*, 2016 FC 27, Justice Southcott dismissed both Sargeant's Venue Motion and Worldspan's Priority Motion.
- [34] Dealing with the Venue Motion, Justice Southcott set out Sargeant's position at para. 75:
- [75] Sargeant submits that absent a substantive reason to the contrary, a party is entitled to choose the jurisdiction in which it wishes to proceed (*Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78 at para 75). He explains that, from the beginning, he had chosen the BCSC, having commenced his action against Worldspan in that Court in 2011, and notes that the BCSC has in personam jurisdiction over that action, which it has exercised.
- [35] Justice Southcott gave the following reasons for dismissing the Venue Motion:
- [85] I acknowledge Sargeant's argument that, absent a substantive reason to the contrary, a party is entitled to choose the jurisdiction in which it wishes to proceed. Such reasons are often adjudicated based in part on forum non conveniens considerations, in the context of a motion to a court to stay its own proceeding or, more rarely, to enjoin a party from proceeding in another court. However, neither of the parties has moved for a stay or an injunction or argued the principles applicable to either of those remedies. Rather, the Sargeant's Motion is framed as a request for an Order that the in personam claims between Sargeant and Worldspan proceed in the BCSC, leaving the in rem claims under the Builder's Mortgage between those parties, and any claim under section 22(2)(n) of the Federal Courts Act, to be addressed in this proceeding.
- [86] The relief sought by Sargeant raises a number of difficulties. First, the requested relief as framed reads as requiring the parties to pursue litigation in another court. No authority has been cited to support the request for an Order of this sort. The relief sought is in substance better characterized as prohibiting the parties from pursuing in the Federal Court the adjudication of any in personam disputes that are relevant to the determination of the in rem claims. However, as noted above, the Sargeant Motion has not been framed or argued as a request for a stay of the Federal Court proceeding.
- [87] Second, while Sargeant relies on the proposition that a party is entitled to choose the jurisdiction in which it litigates, its position, that it commenced action in the BCSC and should be entitled to have certain disputes determined there, ignores the fact that Sargeant also chose the Federal Court as the jurisdiction for pursuit of its in rem claim against the Vessel. To the extent that resolution of any underlying in personam liability issues are necessary in order to adjudicate Sargeant's in rem claim, this follows from Sargeant invoking

the Federal Court's in rem jurisdiction.

[88] Third, Sargeant's position, that the appropriate procedure is for the Federal Court's process for adjudication of in rem claims to be placed in abeyance pending adjudication of certain in personam disputes in the BCSC, is inconsistent with the objective that the Federal Court judicial sale process provide a relatively summary mechanism for adjudication of in rem claims and their competing priorities.

[95] While paragraph 14 of the BC Claims Process Order does not expressly identify the forum for adjudication of either in rem claims or the in personam liability necessary to establish them, in my view it does represent a recognition that one depends on the other. My decision on this motion is premised simply on the Court continuing to exercise the entirety of its in rem jurisdiction. I intend this decision to be consistent with Justice Pearlman's Order and accordingly respectful of the jurisdiction of the BCSC.

[96] For these reasons, the Sargeant Motion will be dismissed.

[Emphasis added.]

[36] Worldspan's Priority Motion concerned the interpretation of s. 12.1 of the VCA. That section provided that Worldspan, as the Builder, would retain title to the Vessel until delivery to the Owner, Sargeant. By s. 12.1 the Builder granted to the Owner:

A continuing first priority security interest to the vessel, . . . to secure any sums advanced or paid to Builder under this Agreement; provided, however, that such security interest shall be subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant to this Agreement.

[37] In *Offshore Interiors*, Justice Southcott summarized the positions of Worldspan and Sargeant on the Priorities Motion at para. 45:

Reduced to simple terms, Worldspan's proposed interpretation of the relevant language of Section 12.1 of the VCA is that payment of any amounts owing by Sargeant to Worldspan represents a contractual condition which must be satisfied before Sargeant has the right to invoke its security under its Mortgage. In contrast, Sargeant's interpretation is that Section 12.1 operates in the present circumstances to give Worldspan a contractual right of set-off, such that Worldspan can deduct, from the amount of Sargeant's Mortgage claim, any amounts that Sargeant owes Worldspan for unpaid installments under the VCA. I note that it is Sargeant's position that no such amounts are owing by it to Worldspan, but the determination of that issue is not before me on the Worldspan Motion.

[38] At para. 48, Justice Southcott noted that both the Federal Court and the Federal Court of Appeal had previously decided that Worldspan, as the owner of the Vessel, could have no in rem claim against its own property. It followed that Worldspan had no claim capable of being afforded any particular priority among the competing in rem claims against the proceeds of sale of the Vessel. However, on the Priority Motion Worldspan, rather than

seeking a priority determination, was inviting the Court to interpret s. 12.1 of the VCA in a manner that would provide it with a defence to Sargeant's in rem claim, on the ground that Sargeant could not assert his claim under the mortgage until he had made all outstanding instalment payments under the VCA.

- [39] Ultimately, Justice Southcott concluded that s. 12.1 did not bar Sargeant from receiving monies owed to him until Worldspan had been paid in full. On his construction of the VCA as a whole, Justice Southcott preferred Sargeant's interpretation that s. 12.1 created a right by Worldspan to deduct amounts owed to it pursuant to the VCA from any mortgage claim by Sargeant.
- [40] On December 1, 2016, by reasons for judgment indexed as *Worldspan Marine Inc. v. Harry Sargeant III and Comerica Bank*, 2016 FCA 397, the Federal Court of Appeal dismissed Worldspan's appeal from Justice Southcott's dismissal of the Priority Motion. The Federal Court of Appeal found the court below had made no reversible error in concluding that Sargeant was not required to pay Worldspan any amounts he might be found to owe to Worldspan under the VCA as a condition of exercising his rights under the builder's mortgage.
- [41] The Federal Court has not yet determined priorities among the in rem claimants.
- [42] On June 19, 2017, following a recent case management conference in the Federal Court action, the Honourable Madam Justice Strickland issued directions requiring Worldspan to serve and file a motion on or before August 21, 2017 seeking determination of whether a breach of the VCA is necessary or relevant to the final resolution of the in rem claims, and, if so, what party breached the VCA and the impact of the breach, if any, on the priority of the in rem claims. Justice Strickland also directed that Worldspan's motion will be heard on December 13 and 14, 2017, and that the priorities hearing will be heard immediately after that motion.

ISSUES

- [43] On the stay application, the following questions arise for determination:
- (a) does Justice Southcott's decision on the Venue Motion engage the doctrines of res judicata or issue estoppel?
 - (b) would Sargeant's prosecution of his claims in this action constitute an abuse of process?
 - (c) should this Court exercise its discretion to order a temporary stay of proceedings pending resolution of the in rem claims in the Federal Court action?

DISCUSSION AND ANALYSIS

Res Judicata and Issue Estoppel

[44] The doctrines of res judicata and issue estoppel serve the law's interest in finality to litigation. As Justice Binnie explained *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at para. 18:

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[45] Under the principle of res judicata, once a dispute is finally adjudicated, it is not subject to re-litigation.

[46] In *Danyluk*, the Court at para. 24 cited with approval the following definition of issue estoppel from the judgment of Middleton J.A., of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

[47] The elements of issue estoppel are:

- (1) the same question has been decided;
- (2) the judicial decision which is said to create the estoppel is final;
- (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Danyluk at para. 25.

[48] Decisions on interlocutory applications are final for the purpose of issue estoppel where no appeal is taken and the decision becomes binding upon the parties: *Newmarch Mechanical Constructors Ltd. v. Hyundai Auto Canada Inc.* (1994), 18 O.R. [3d] 766 at 768-769 (Ont. Gen. Div.).

[49] Here, *Worldspan* must establish that the preconditions for the operation of issue estoppel are met, and that the Court should exercise its discretion to apply the doctrine.

- [50] Justice Southcott's decision on the Venue Motion was not appealed and is therefore final. The parties to the Venue Motion were the same as the parties on this stay application. However, the question of whether these proceedings should be stayed was not before Justice Southcott.
- [51] As Justice Southcott observed, the Venue Motion was not framed as an application for a stay of proceedings in the Federal Court, or for an order enjoining a party from proceeding in another court. Justice Southcott characterized the relief sought by Sargeant on the Venue Motion as prohibiting the parties from pursuing in the Federal Court the adjudication of any in personam disputes relevant to the determination of the in rem claims.
- [52] As Justice Southcott explained, his decision to dismiss the Venue Motion was premised on the Federal Court continuing to exercise the entirety of its in rem jurisdiction. At para. 93 of his reasons, Justice Southcott concluded the Federal Court's in rem jurisdiction included whatever liability and quantification determinations, including defence arguments raised by the vessel owner, that were necessary to adjudicate the in rem claims. In my view, that conclusion is consistent with the principle of comity between superior courts, as reflected in orders of both this Court and the Federal Court, including the terms of the CCAA process order, to which I have previously referred.
- [53] I conclude that the same question has not been decided on the Venue Motion as arises on this application, and that accordingly, the doctrines of res judicata and issue estoppel are not engaged here.

Abuse of Process

- [54] The doctrine of abuse of process permits the court to use its inherent power to prevent the misuse of its procedure in ways that would bring the administration of justice into disrepute. The doctrine is flexible, and may be invoked where the specific requirements of issue estoppel are not met, but where allowing the litigation to proceed would violate "judicial economy, consistency, finality and the integrity of the administration of justice": *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 at para. 37.
- [55] The CCAA claims process order and the Federal Court claims process order each contemplated that the Federal Court, in the exercise of its in rem jurisdiction, would have the power to adjudicate those in personam claims necessary to the determination of the in rem claims against the Vessel. The litigation process order made in the CCAA proceedings permitted Worldspan and Sargeant to proceed with their in personam claims in the British Columbia Supreme Court. Sargeant now seeks to exercise his right to have his in personam claims adjudicated in this Court. He maintains that his in personam claims for damages for fraud and conversion do not raise any issue the Federal Court will have to decide in determining the parties' in rem claims. The prosecution in this Court of those in personam claims that do not overlap with issues the Federal Court must decide in the exercise of its in

rem jurisdiction would not undermine the integrity of the judicial process. In these circumstances, I am not persuaded that litigation of Sargeant's in personam claims for fraud and conversion in this Court would amount to an abuse of process. However, I must still consider whether or not a temporary stay pending the Federal Court's resolution of the in rem claims is appropriate.

Stay of Proceedings

- [56] The Court's jurisdiction to grant a stay, either under s. 8(2) of the Law and Equity Act, R.S.B.C. 1996, c. 253, or pursuant to its inherent jurisdiction, must be exercised cautiously, taking into account all relevant factors and the potential prejudice the parties would incur if the stay is granted or refused: *Peh v. Strata Plan LMS 3837*, 2008 BCSC 291 at para. 62.
- [57] The factors for the court to consider in exercising its discretion, as stated by Willcock J. (as he then was) in *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2013 BCSC 751 at paras. 32 and 33 are:
- (a) whether the related pleadings will have a material impact on the issues that arise in the case, or whether the result in the related proceedings could effectively resolve the litigation;
 - (b) whether the stay will promote judicial economy and efficiency by avoiding unnecessary and costly additional expenditures of judicial and legal resources;
 - (c) whether the stay sought is temporary or permanent;
 - (d) the length of delay caused by the temporary stay relative to the length of time of the litigation in general;
 - (e) the risk of inconsistent verdicts; and
 - (f) other factors, including fairness and prejudice, the balance of convenience, and the appropriate conduct of the parties.

The Court should also bear in mind that:

- (a) the plaintiff should be entitled to the fruits of the judgment;
- (b) the decision at trial should be considered to be correct until reversed by an appellate court;
- (c) it may be appropriate to import into the analysis the test on an interim injunction; and
- (d) the test on an interim injunction requires the court to ask whether there is merit in the appeal, whether irreparable harm will result if the stay is refused, and whether the balance of convenience favours the granting of the stay.

- [58] Worldspan submits that it will be prejudiced if it must continue to take steps in this proceeding before the in rem claims are determined in the Federal Court action. Worldspan also contends that a temporary stay will cause no prejudice to Sargeant, and that the Federal Court action will fully determine the claims of the parties.

- [59] In support of its application for a temporary stay, Worldspan relies upon *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2001 BCCA 105 and *Delsom Estates Ltd. v. Delta (District)*, [1994] B.C.J. No. 1917 (S.C.).
- [60] In *Ainsworth*, the Attorney General and the Minister of Finance appealed from the judgment of a chambers judge refusing their application for a temporary stay of the plaintiff's action for negligent misrepresentation. The plaintiff alleged the Minister of Finance made negligent representations concerning the availability of a federal Special Investment Tax Credit ("SITC"). The appellants sought a temporary stay pending the outcome of proceedings in the Tax Court, where the plaintiff challenged an assessment by the Minister of National Revenue denying *Ainsworth* the SITC it had requested. In granting the temporary stay, the Court of Appeal held that *Ainsworth* was seeking to attain the same economic end result by different routes. The Court observed, at para. 14, that success in the Tax Court by the plaintiff would render the misrepresentation action "superfluous and unnecessary". The temporary stay served to prevent unnecessary and costly duplication of judicial and legal resources.
- [61] *Ainsworth* is distinguishable from the case at bar. Here, there is not the same congruence between the relief sought in the Federal Court and the British Columbia Supreme Court as obtained in *Ainsworth*. In the Federal Court action, Sargeant claims priority to the proceeds of sale of the Vessel. Although Sargeant has made an in rem claim against the Vessel for US \$20,945,924.05, the most he might recover in the Federal Court action is limited to the net proceeds of sale of the Vessel, which total \$5 million. Offshore and other trade suppliers have competing in rem claims against the net proceeds of sale of the Vessel. The Federal Court and Federal Court of Appeal have determined that Worldspan has no in rem claim. However, Worldspan's in personam rights under s. 12.1 of the VCA remain to be adjudicated in the Federal Court action. The Federal Court will determine the extent to which those rights constitute a defence to Sargeant's in rem claim against the proceeds of sale of the Vessel.
- [62] Sargeant's damages in this action may exceed his recovery in the Federal Court action. If Sargeant succeeds on his intended application to have this action tried together with his claims against Barnett and Blane, and is successful in his claims for fraud and conversion, then he may have other avenues of recovery available to him, beyond whatever he may realize through his in rem claim in the Federal Court action.
- [63] This case is also distinguishable from *Delsom*. There, a landowner brought a petition for judicial review seeking declarations, orders in the nature of mandamus and an injunction concerning access to its land disrupted by the construction of new roads. *Delsom* had also applied to the Expropriation Compensation Board for compensation. The Court granted the applications of Delta and the Ministry of Highways for a temporary stay pending the outcome of the expropriation compensation proceedings. The objective of those proceedings was to make the expropriated or injuriously affected landowner economically whole.

- [64] Here, Sargeant's potential recovery in the Federal Court action is limited to whatever amount that Court allows on his in rem claim against the proceeds of sale of the Vessel. Further, in Delsom, the Court struck portions of the petition against both the Minister and the Corporation of Delta as disclosing no reasonable cause of action. No such attack is made on the pleadings in this action.
- [65] Sargeant chose to pursue his in rem claim against the Vessel (and the proceeds of sale that now stand in place of the Vessel) in the Federal Court. In the course of determining priorities of the in rem claims and the distribution of the proceeds of sale of the Vessel, the Federal Court will address in personam issues concerning the interpretation and application of the VCA as it relates to Worldspan's claim for the set off of amounts alleged to be owed by Sargeant for unpaid claims certificates. However, the Federal Court action will not resolve Sargeant's tort claims for fraud and conversion. The result in the Federal Court action will not effectively resolve this litigation.
- [66] I turn next to consider whether a temporary stay will promote judicial economy and efficiency by avoiding unnecessary expenditures of judicial time and resources. The Federal Court action will not dispose of all of Sargeant's claims in this action. Sargeant intends to pursue his fraud claim in this court regardless of the outcome of his in rem claim in the Federal Court action. A stay will not save the parties the time and expense of a trial of this action.
- [67] The trial of Sargeant's claims in fraud and conversion against Worldspan will require examinations for discovery, which are available in this action, but not in the summary in rem proceedings in the Federal Court action.
- [68] I bear in mind that Worldspan seeks a temporary, rather than permanent stay. The priorities hearing in the Federal Court will not proceed until mid-December, at the earliest. A stay of this action, if granted, would remain in effect for at least six months.
- [69] There appears to be little risk of inconsistent verdicts. Sargeant has only raised his claims for fraud and conversion in this action. The adjudication of Sargeant's in personam claims for fraud and conversion does not appear to be necessary or relevant to the determination of his in rem claim in the Federal Court action.
- [70] Granting the stay would probably result in at least six months further delay in Sargeant's prosecution of this action. Sargeant commenced this action over six years ago. For more than half of that time, this action was stayed as a result of the CCAA proceedings. Further delay in the adjudication of his fraud claim will result in some prejudice to Sargeant. The plaintiff is entitled to have his claims in fraud and conversion tried regardless of the result of the Federal Court action.
- [71] As counsel for Sargeant submits, Worldspan has adduced no affidavit evidence on this application of the prejudice it would suffer if the stay is refused. If the stay is not granted, Worldspan may incur the expense of simultaneous litigation in two courts. However

Sargeant has the right to pursue his fraud and conversion claims in the Supreme Court of British Columbia. Those claims are distinct from, and do not overlap with the in rem proceedings in the Federal Court action. In these circumstances, there is no prejudice or injustice to Worldspan if it is required to deliver its list of documents and to undertake other pre-trial steps in this action before the final resolution of the in rem claims in the Federal Court action.

[72] On weighing all of these factors, I find the balance of convenience favours dismissal of the stay application. Accordingly, Worldspan's application for a stay of this action pending resolution of the liability issues as between Sargeant and Worldspan in the Federal Court action is dismissed.

[73] It follows that Sargeant is entitled to the order he seeks requiring Worldspan to produce its list of documents within 30 days of the date of these reasons for judgment.

[74] The costs of these applications will be costs in the cause.

"PEARLMAN J."

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