

Federal Court



Cour fédérale

Date: 20140704

Docket: T-1226-10

Citation: 2014 FC 655

Ottawa, Ontario, July 4, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

OFFSHORE INTERIORS INC.

Plaintiff

and

**WORLDSPAN MARINE INC.,
CRESCENT CUSTOM YACHTS INC.,
THE OWNERS AND ALL OTHERS
INTERESTED IN THE VESSEL
"QE014226C010" AND
THE VESSEL "QE014226C010"**

Defendants

and

**WOLRIGE MAHON LIMITED
IN ITS CAPACITY AS APPOINTED
VESSEL CONSTRUCTION OFFICER
OF THE DEFENDANT VESSEL
"QE014226C010", HARRY SARGEANT III,
MOHAMMAD ANWAR FARID AL-SALEH,
AND 642385 B.C. LTD.**

Intervenors

ORDER AND REASONS

[1] This is an application under Rule 51 of the *Federal Courts Rules*, SOR/98-106 by the Intervenor Harry Sargeant III (Sargeant) to appeal the order of Prothonotary Roger Lafrenière, made June 23, 2014, with respect to the Motion of the Plaintiff Offshore Interiors Inc (Offshore) dated June 18, 2014. In that order, Prothonotary Lafrenière approved the sale of the Vessel QE014226C010 (the Vessel) to a numbered company for USD \$5 million.

[2] Sargeant, supported by the Intervenor Comerica Bank (Comerica), seeks to prevent the sale and sought an expedited hearing of this appeal on the ground of urgency. The plaintiff Offshore, supported by the Intervenor 642385 B.C. LTD (the Landlord) and Mohammad Anwar Farid Al-Saleh (Al-Saleh), wish to have the sale proceed.

[3] By order dated June 30, 2014, I stayed the execution of the sale order pending disposition of this appeal and abridged the times for serving and filing of this motion and supporting material. The matter was heard the same day.

I. **BACKGROUND:**

[4] There is no dispute about the background facts set out by Prothonotary Lafrenière in his Reasons for Order dated June 30, 2014:

[4] The underlying proceeding has a long history. In summary, Sargeant and Worldspan Marine Inc. (Worldspan) entered into a Vessel Construction Agreement (VCA) dated February 29, 2008 whereby Worldspan agreed to design, construct, outfit, launch, complete, sell and deliver the Vessel, a 142 foot custom built

luxury yacht, to Sargeant. Construction of the Vessel began in March 2008. A Builder's Mortgage in favour of Sargeant as against the Vessel was filed in the Vancouver Ship Registry on May 14, 2008. By August 2009 payments made by or on behalf of Sargeant to Worldspan totalled USD\$11,064,525.38.

[5] On August 14, 2009, Sargeant entered into a Construction Loan Agreement (CLA) with Comerica and others for USD\$9,400,000.00 to finance the completion of the construction of the Vessel. Sargeant's interests in the VCA, the Vessel, and the Builder's Mortgage were assigned to Comerica by way of an Assignment of Security Agreement and Mortgage of same date. From August 2009 to March 2010, Comerica paid to Worldspan, on Sargeant's behalf, the sum of USD\$9,387,398.67. By April 2010 the total amount paid to Worldspan by or on behalf of Sargeant in connection with the construction of the Vessel was USD\$20,651,924.05.

[6] A dispute arose between Sargeant and Worldspan concerning project costs and construction of the Vessel ceased in April or May 2010. Offshore commenced the underlying action on July 20, 2010 against Worldspan, Crescent Custom Yachts Inc., the Owners and all others interested in the Vessel, and the Vessel itself for unpaid invoices for services and materials rendered in connection with construction of the Vessel. The Vessel was arrested on July 28, 2010 and has remained under arrest ever since in leased premises on a property owned by the Landlord at 27222 Lougheed Highway, Maple Ridge, British Columbia.

[7] On May 27, 2011, Worldspan and related entities filed a Petition in the British Columbia Supreme Court seeking relief under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36 (CCAA Proceedings).

[8] On May 31, 2011, default judgment was granted by this Court on behalf of Offshore against the Defendants, including the Vessel or her bail, in the amount of \$273,754.58, plus costs.

[9] On July 22, 2011, Justice Pearlman of the British Columbia Supreme Court issued a claims process order in the CCAA Proceedings (CCAA Claims Process Order). This required all creditors to deliver proofs of claim on or before the claims bar date, September 9, 2011, failing which the creditor would be forever barred from making or enforcing any claim. It also provided that any creditor that filed a proof of claim in the CCAA Proceedings asserting an in rem claim against the Vessel could pursue that claim, outside the CCAA Proceedings, in this Court.

[10] By Order dated August 29, 2011, I established a claims process for all creditors with in rem claims against the Vessel (Federal Court Claims Process Order). That Order provided that notice be given to all creditors of the requirement to file an affidavit containing particulars in support of the claim against the Vessel, specifying the nature of the claim to enable the Court to determine if such a claim constituted an in rem claim and, if so, its priority. It also required all such affidavits to be filed 21 days after the in rem creditor received the required notice and provided that all questions relating to the right of any in rem claimant be determined by the Federal Court upon application.

[11] On February 9, 2012, Offshore filed a motion seeking an order declaring that the Builder's Mortgage does not create a lien or charge in the Vessel other than to secure its delivery. I granted the relief sought by Offshore by Order dated March 5, 2013; however, the Order was reversed on appeal by Madam Justice Cecily Strickland on December 19, 2013. Offshore appealed and the matter is presently under deliberation by the Federal Court of Appeal.

[12] The above facts provide background information that is important for a contextual understanding of the timing and interplay of the motions that were recently brought before this Court.

[13] The first salvo was by the Landlord. It moved for an order that the arrest warrant for the Vessel be set aside or, alternatively, that the arrest warrant be varied to permit the Landlord to remove the Vessel from the Premises and to store the Vessel in the Landlord's exterior yard or such alternative location as may be directed by the Court.

[14] Sargeant in turn brought a motion to relocate the Vessel to Richmond Shipyard and for a priority charge for the movement of the Vessel and future rent. Sargeant submits that steps to prepare the Vessel for the relocation must be taken immediately as the window of opportunity is very short due to unfavourable tides later in the summer.

[15] The two motions for immediate relief from the Court prompted Offshore to bring the present motion for approval of the sale of the Vessel to the Purchaser.

[16] It should be noted that this is not the first time that Offshore has sought the Court's assistance to sell the Vessel. On September 28, 2011, Offshore sought leave to market the Vessel for sale. Mr.

Justice Sean Harrington issued an Order on May 7, 2013 approving the process for marketing and advertising the sale of the Vessel with a gross asking price of USD\$18,900,000.00. Notwithstanding extensive marketing efforts and an extension of the marketing order, no satisfactory offer was received. The Vessel has since languished at the Landlord's premises, accumulating rent charges and depreciating in value.

[5] In the decision referenced at para 11 of Prothonotary Lafrenière's reasons, Justice Strickland noted that the VCA put the Owner, Sargeant, at risk as regards his advances as the Builder, Worldspan, retained title to the Vessel until delivery: *Offshore Interiors Inc. v Worldspan Marine Inc.*, 2013 FC 1266 at para 47 [*Offshore 2013 FC*].

[6] Section 12.1 of the VCA reads as follows:

Builder will retain title to the Vessel until delivery to the Owner. Builder grants to Owner a continuing first priority security interest in the Vessel, including all work, materials, machinery, and equipment relating 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.** In support of Owner's security interest in the Vessel Builder agrees to register a Ship's Mortgage in favour of Owner or Owner's construction lender (the form of the mortgage document is to be agreed upon between the parties acting reasonably) if Owner requests that this be done for any purpose. [Emphasis added]

[7] Worldspan's *in personam* rights under section 12.1 of the VCA have yet to be adjudicated. It remains open to Worldspan to participate in the Claims Process and challenge the *in rem* claims, as owners of the Vessel.

[8] The builder's mortgage entered into by Worldspan and Sargeant was intended to ensure that the Vessel itself would stand as a first priority security for Sargeant's pre-delivery instalments subordinate, however, to Worldspan's right to receive payments pursuant to the VCA. Sargeant stopped payment of the monthly instalments in December 2009 but did not terminate the contract until April 2010. The outstanding payments owed to Worldspan, according to Offshore, amount to \$4.9 million, plus interest. The VCA made no provision for third party claimants such as Offshore and the Landlord (*Offshore 2013 FC*, above, at para 52).

[9] Justice Strickland recognized, at para 64 of her reasons that in the event of the total loss or breach of the VCA, the parties to it intended that the Vessel would be sold to repay the advances made to fund its construction. However, she noted:

[...]As the Vessel has been arrested and is subject to claims by third parties, these provisions have no application in the present circumstances. [...]

[10] And further, at para 99, Justice Strickland observed:

...the Builder's Mortgage was intended to secure Sargeant's first priority rights in the Vessel as against third parties in circumstances, such as these, where the terms of the VCA do not govern the disposition of the Vessel as between Worldspan and Sargeant **as it has been arrested by third parties and will be sold by the Court.** [Emphasis added].

[11] In conclusion, at para 100, Justice Strickland found that the Builder's Mortgage secured the unearned advances which were in the nature of a loan or a potential debt and an obligation to repay in the event of non-delivery. In the alternative, she found, Sargeant and Comerica's claim under subsection 22(2)(n) of the *Federal Courts Act*, RSC, c F-7 had merit and was to be

addressed at the priorities hearing (para 111). Justice Strickland's decision was the subject of an appeal by Offshore to the Federal Court of Appeal. The appeal was heard on June 9, 2014 and reserved.

[12] Offshore, concerned about the depreciating value and declining marketability of the Vessel, seeks a court-ordered sale in order to clear title and to create a fund for distribution of proceeds once priorities are determined. There is now an individual who has expressed a serious interest in purchasing the Vessel through a numbered company and has put down a deposit of \$200,000.00.

[13] The Landlord is anxious to have the Vessel removed from its premises in order that they may be rented to another manufacturer, while maintaining its interest in unpaid rental and other charges. To facilitate removal, the Landlord is prepared to forego its common law right of distraint over chattels on its premises related to but not forming part of the arrested Vessel. Should the sale not proceed, the Landlord seeks an order to allow the Vessel to be stored in an exterior location on its property. That, the parties are agreed, would hasten the further deterioration of the Vessel. However, it cannot remain where it is and removal by barge from the present location is dependent on water levels in the Fraser River which rapidly decline following a peak in early July. The Vessel must therefore be moved before the end of July 2014.

[14] The Landlord's rental arrears continue to accrue and are now approximately \$1 million. The Landlord is entitled, pursuant to an Order of the Court, to a priority charge representing 20% of its rent from August 2012. The 20% is roughly the space occupied by the footprint of the

Vessel within the premises. A further 37% of the premises, according to the Landlord, is used for storage of materials intended for inclusion in the Vessel. As these are not attached to or on the Vessel, the Landlord claims a common law right of distraint over them.

[15] Mr Al-Saleh has obtained judgment in Florida against Sargeant and a corporate entity he controls for fraud related to the shipment of oil in the Middle-East. He alleges that the proceeds of the fraud were used to construct the Vessel. Sargeant's interest in the Vessel has been assigned to Al-Saleh by the Florida Court. Al-Saleh is taking steps to have the Florida fraud judgment registered in British Columbia and seeks to submit a claim against any fund resulting from the sale of the Vessel. He asserts both a constructive trust with respect to the proceeds of the frauds and a subrogated *in rem* claim against the Vessel in his capacity as a judgment creditor of Sargeant. In a decision on February 28, 2013 by the Case Management Prothonotary, affirmed on November 29, 2013 by Justice Strickland, Al-Saleh was granted leave to intervene in this action and the potential validity of his *in rem* claim was recognized, without deciding the merits of the issue. This decision is also the subject of an appeal to the Federal Court of Appeal heard on June 9, 2014 and reserved.

[16] While the defendant Worldspan took no part in this appeal and is insolvent, it remains an interested party because of outstanding claims for materials and construction advances that Sargeant stopped paying while work continued on the Vessel.

II. **DECISION UNDER APPEAL:**

[17] Prothonotary Lafrenière issued oral reasons on June 23, 2014, written reasons on June 26, 2014 and an order on June 30, 2014.

[18] Factors that the Prothonotary considered relevant in determining that the time was ripe to sell the Vessel were:

- (a) First, the Vessel has been under arrest for four years;
- (b) Second, the Vessel was the subject of a Marketing Order issued by Mr. Justice Harrington dated October 7, 2011, as extended by Mr. Justice Hughes on June 4, 2012, which resulted in no reasonable offer;
- (c) Third, the movement of the Vessel from the Landlord's premises would involve risk of damage and the Vessel is not insured for the benefit of the creditors;
- (d) Fourth, the Vessel is incomplete and has a limited market;
- (e) Fifth, the Vessel has significantly declined in value since its arrest and will depreciate further by further delay;
- (f) Sixth, additional costs, including relocation costs and future rent, will have to be incurred in the event the vessel remains under arrest; and
- (g) Seventh, the Landlord has agreed to release its claim to distraint of the items listed in the schedules to the offer to purchase so that the sale may complete without the necessity of further hearings and potential priority disputes to address the Landlord's rights, which is of value to all parties concerned.

[19] As a result, Prothonotary Lafrenière concluded as follows:

[19] Considering all of the circumstances, I consider it proper and in the interests of justice that the Vessel be sold. The parties all agree that the Vessel will have to be monetized at some point in time. In fact, counsel for Sargeant and Comerica conceded at the hearing that the Vessel must first be sold by court order before it can be completed.

[20] While a vessel is under the protection of a warrant of arrest, the Court's role is to protect the interests of all the creditors, not some of them. In my view, it would be unreasonable to continue to hold the Vessel under arrest, at large expense (for relocation and future rent) and for an indefinite period of time. The result would be a reduced recovery for the claimants, whether they have a secured interest or otherwise.

[21] On the basis of the affidavit evidence filed on behalf of Offshore, which has not been cross-examined or contradicted by Sargeant and Comerica, and the appraisal prepared by Aegis Marine Surveyors Ltd. at the Landlord's request on May 17, 2013, I conclude the Vessel has significantly depreciated in value since its arrest and is reaching the point of obsolescence. The offer to purchase by 1005257 B.C. Ltd. represents, in my view, fair value for the Vessel and its equipment.

[20] In the order giving effect to these reasons, Prothonotary Lafrenière directed that the Vessel and various parts and equipment be sold on or before July 9, 2014 subject to Sargeant or Comerica posting security in accordance with Rule 485 of the *Federal Courts Rules* by 12:00 p.m. PST on Monday, June 30, 2014 in the Canadian Dollar equivalent of USD \$5 million. Under the terms of the order, the sales proceeds or security in the event it was posted was to stand in place of the Vessel and the Vessel was to be removed from the Landlord's premises as soon as reasonably practical. Absent such removal by August 30, 2014, the Landlord was authorized to store the Vessel in its exterior yard.

[21] At the hearing before this Court which began an hour before the deadline of 12:00 p.m. PST on Monday, June 30, 2014, counsel for Sargeant and Comerica advised that their clients did not intend to pay the USD \$5 million security into court. Counsel for Sargeant indicated that his client was prepared to offer security of \$200,000 for the Landlord's storage costs but expected that any costs associated with the removal of the Vessel would stand as a priority charge against

any subsequent sale. This offer was not acceptable to the Landlord who maintained the position taken before Prothonotary Lafrenière.

III. **ISSUES:**

[22] The sole issue is whether the Prothonotary erred in the exercise of his discretion and failed to apply the appropriate principles of law on the motion before him.

IV. **ANALYSIS:**

[23] It is well established that discretionary orders of Prothonotaries ought not to be disturbed on appeal to a judge unless they raise questions vital to the final issue of the case, or they are clearly wrong in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Merck & Co. v Apotex Inc.*, 2003 FCA 488 at para 19; *Eli Lilly Canada Inc. v Novopharm Limited*, 2008 FCA 287 at para 52.

[24] Where the decision of the Prothonotary falls within the scope of either of the two categories outlined above, a reviewing Judge may exercise his or her discretion *de novo*: *Louis Bull Band v Canada*, 2003 FCT 732 at para 13; *Seanix Technology Inc. v Synnex Canada Ltd.*, 2005 FC 243 at para. 11. Absent such a finding, the decision of a Prothonotary in the context of case management, such as here, attracts considerable deference and should only be interfered with in the clearest case of misuse of judicial discretion: *Sawridge Band v Canada*, 2001 FCA 338, [2002] 2 FC 346 at 354 (FCA).

[25] Comerica argues that the Prothonotary's order was a discretionary order that was vital to the final issue of this case, namely the right of Sargeant to submit a credit bid to purchase the Vessel if Offshore's appeal to the Federal Court of Appeal is dismissed. Sargeant's argument, supported by Comerica in the alternative, is that the decision was clearly wrong in that the learned Prothonotary erred in failing to recognize and apply the correct legal principles. In that respect, their argument, in essence, is that the Prothonotary failed to apply "the presumption that where the proceeds of sale are insufficient to satisfy the secured debt that the Court would not approve the sale unless the mortgagee consents."

[26] Offshore, the Landlord and Al-Saleh dispute that the Prothonotary's decision is vital to the outcome of the case as, they submit, Sargeant and Comerica are solely advancing claims pursuant to the Claims Process Order. The value of the Vessel has been established at USD \$ 5 million. The fund created on the sale would simply replace the *res*. Sargeant and Comerica's goal to acquire the Vessel outside of the VCA cannot be "vital" to the outcome of issues under the VCA.

[27] I note that in *Nordea Bank Norge ASA v "Kinguk" et al.*, 2006 FC 1290 [*Kinguk*], Justice Gauthier accepted the position of the parties that sale of a vessel pursuant to a default judgment to realize a mortgage security was an issue vital to the final determination of the case and the rights of the parties. Given that, she elected to exercise the Court's discretion *de novo*. In the circumstances of this matter, I am prepared to do the same.

[28] Sargeant, supported by Comerica, contends that the sale cannot proceed against his wishes, as holder of the secured mortgage against the Vessel. In support of this proposition they rely primarily on *Westar Mining Ltd (Re)*, [1992] BCJ No 3128 [*Westar*] and *Mahood v 429553 BC Ltd* [1998] BCJ No 246, 48 BCLR (3d) 362 (CA) [*Mahood*].

[29] *Westar* concerned an application by a prospective purchaser for an order for the sale of an operating coal mine under the *Bankruptcy Act*. The sale was opposed by the Bank of Montreal, a secured creditor. MacDonald J., at para 16, stated that he reluctantly agreed with the Bank that there was no authority which entitled the court to order a sale to which the secured creditor objects for less than the amount at which the Bank's security had been valued. That case turns, however, on the application of s 129 of the *Bankruptcy Act* and is of little assistance in this context.

[30] In *Mahood*, a chambers judge had approved the sale of certain properties owned by corporations under control of a court appointed receiver-manager. The context was a long-standing family dispute that had necessitated the involvement of the courts on many occasions. In upholding the sale, the B.C. Court of Appeal agreed with the principles expressed in *Westar*, above. It noted, at para 5, that "in a simple foreclosure proceeding, a mortgagor should not normally obtain an order for sale of the property charges unless the sale proceeds would be sufficient to satisfy the full amount of the mortgage". However, the case was exceptional because of the long history of litigation and because the validity of some of the mortgages in question was in dispute. In those circumstances, "it lay within the court's discretion to approve a sale on terms it would otherwise not likely have" (para 7).

[31] Counsel for Sargeant and Comerica were unable to direct my attention to any case directly on point involving the sale of a vessel. I note that in *Canada (Minister of Supply and Services) v Horizons Unbound Rehabilitation and Training Society*, [1996] FCJ No 1496, Prothonotary Hargrave directed the sale of a ship that was deteriorating in value prior to trial where the defendants held a second mortgage that would thereby be extinguished and had an arguable case for trial.

[32] Even assuming that Sargeant and Comerica are correct that there is a presumption against the forced sale of an asset subject to a mortgage where the mortgagee does not consent, that does not operate in my view to prevent the sale of a vessel under the *Federal Courts Rules* where it is warranted under the circumstances. Vessels are not immovable assets such as factories and coal mines. And they are subject to rapid depreciation in value unless properly maintained. For that reason, this Court has recognized that it may be necessary to sell a vessel even before rights have been determined in order to protect the value for the owner and creditors.

[33] Rule 490 of the *Federal Courts Rules* provides the basis for the judicial sale of vessels. It reads as follows:

SALE OF ARRESTED
PROPERTY

Disposition of arrested
property;

490. (1) On motion, the Court
may order, in respect of
property under arrest, that

(a) the property be
appraised and sold, or sold
without appraisal, by

VENTE DES BIENS SAISIS

Sort des biens saisis

490. (1) La Cour peut, sur
requête, ordonner que les biens
saisis, selon le cas :

(a) the property be
appraised and sold, or sold
without appraisal, by public

public auction or private contract;

auction or private contract;

(a) the property be appraised and sold, or sold without appraisal, by public auction or private contract;

(a) the property be appraised and sold, or sold without appraisal, by public auction or private contract;

(b) the property be advertised for sale in accordance with such directions as may be set out in the order, which may include a direction that

b) soient mis en vente par des avis publics conformes aux directives données dans l'ordonnance, laquelle peut prescrire notamment

(i) offers to purchase be under seal and addressed to the sheriff,

(i) que les offres d'achat doivent être scellées et adressées au shérif,

(ii) offers to purchase all be opened at the same time in open court, that the parties be notified of that time and that the sale be made pursuant to an order of the Court made at that time or after the parties have had an opportunity to be heard,

(ii) que les offres d'achat doivent être toutes décachetées au même moment à une audience publique, que les parties doivent être avisées de ce moment et que la vente doit être faite en vertu d'une ordonnance de la Cour rendue à cette occasion ou après que les parties ont eu l'occasion de se faire entendre,

(iii) the sale not necessarily be to the highest or any other bidder, or

(iii) qu'il n'est pas obligatoire de vendre les biens au plus haut enchérisseur ou autre enchérisseur,

(iv) after the opening of the offers and after hearing from the parties, if it is doubtful that a fair price has been offered, the

(iv) que, après l'ouverture des offres d'achat et audition des parties, s'il y a un doute sur la justesse du prix offert, le montant de

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| amount of the highest offer be communicated to the other persons who made offers or to some other class of persons or that other steps be taken to obtain a higher offer; | l'offre la plus élevée doit être communiqué aux autres personnes qui ont fait des offres ou à une autre classe de personnes, ou d'autres dispositions doivent être prises pour qu'on obtienne une offre plus élevée; |
| (c) the property be sold without advertisement; | c) soient vendus sans préavis de vente; |
| (d) an agent be employed to sell the property, subject to such conditions as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent as may be stipulated in the order; | d) soient vendus, sous réserve des conditions précisées dans l'ordonnance ou de l'approbation subséquente de la Cour, par l'entremise d'un agent ou courtier rémunéré au taux fixé dans l'ordonnance; |
| (e) any steps be taken for the safety and preservation of the property; | e) fassent l'objet de mesures assurant leur sécurité et leur conservation; |
| (f) where the property is deteriorating in value, it be sold forthwith; | f) s'ils perdent de leur valeur, soient vendus immédiatement; |
| (g) where the property is on board a ship, it be removed or discharged; | g) s'ils sont à bord d'un navire, en soient enlevés ou déchargés; |
| (h) where the property is perishable, it be disposed of on such terms as the Court may order; or | h) s'ils sont de nature périssable, soient aliénés de la manière qu'elle ordonne; |
| (i) the property be inspected in accordance with rule 249. | i) soient examinés aux termes de la règle 249. |

[34] The only formal requirement for the exercise of the power of sale under Rule 490 is the existence of an arrested vessel. It provides that the “property”, i.e. the vessel, may be sold without appraisal by public auction, private contract or by broker and authorizes the Court to direct the manner of conducting the sale. This very broad discretion permits a judgment creditor, such as Offshore, to negotiate an agreement with a third-party for the purchase of the vessel and seek the approval of the Court. An appraisal and advertisement is discretionary but not essential.

[35] While a private contract may not be the preferred manner of proceeding with a sale in most instances, it may be necessary in exceptional circumstances. The Court has refused to approve a private sale where it considers that it would not achieve the best possible price for the vessel: *International Marine Banking Co. v Dora [No. 2] (The)* [1977] 1 FC 603 (FCTD) [*The Dora*]; *Sea-Tec Fabricators Ltd v Offshore Fishing Co.*, [1985] FCJ No 236 (FCTD) [*Sea-Tec*]. Both of these matters concerned proposed pre-judgment sales without prior public notice.

[36] I note that in *The Dora*, at para 9, Thurlow A.C.J. expressly rejected the argument that the vessel would suffer undue physical deterioration by standing idle long enough for normal court procedures leading to her appraisal and sale to be carried out. Moreover, there was clear evidence that a sister ship and another comparable vessel had been recently sold for amounts substantially higher than the proposed offer and the opinion of three brokers that the vessel could obtain a much higher price. In *Sea-Tec* there was no evidence before the Court as to the fair market value of the ship. The Court could not presume, in the absence of such evidence, that the purchase price that was proposed by the mortgagee represented a fair price for the vessel.

[37] The Court has granted orders approving private sales where the evidence is that the vessel is losing value, timing is essential to obtaining the best possible price and there is convincing evidence that prior efforts to sell the vessel have not lead to higher offers: *Bank of Scotland v "Nel"* (1997), 140 F.T.R. 271 (FCTD) [*Nel*]; *Franklin Lumber Ltd v "Essington II"*, 2005 FC 95 [*Essington II*]; and *Kinguk*, above. In the case of the *Nel*, timing was essential as the vessel was carrying a corrosive cargo and might, within months, have become unsellable. With respect to the *Essington II* and the *Kinguk*, there was convincing evidence, as here, that the vessels had been marketed for sale for several years and would not likely receive a higher offer.

[38] As stated by Justice Gauthier in *Kinguk* at para 2, the jurisprudence establishes that each case ought to be decided on its own facts and on the basis of the evidence before the Court.

[39] Here the uncontradicted evidence is that the value of the Vessel has already substantially diminished since it was arrested. At least 25% of the work required to complete the build remains to be done. The Vessel is stored as a hull without its top structures attached and without most of the systems necessary for its operation installed. The electronics, possibly state of the art in 2008, are now compared to a Commodore 64, an obsolete computer. The Vessel is susceptible to damage due to metallic dust particles being produced by another business in the manufacturing plant.

[40] The fact that the listing agreement authorized by the Court in 2011 has expired is no reason, in my view, not to proceed with this sale. The Court has the authority to approve a sale forthwith and without marketing where the property is deteriorating in value. But that is not the situation in this instance.

[41] Offshore submitted extensive affidavit evidence regarding the market value of the Vessel and the strenuous efforts made over the past four years to sell it. This included the evidence of two yacht builders, a Chartered Accountant who serves as a consultant for the manufacture and sale of “super yachts” and a broker with the “world’s largest super yacht brokerage firm”. Several of the affiants had occasion to visit the shipyard and to view the Vessel in place. Efforts were made to clean it up to make it more presentable to prospective buyers or their agents. Correspondence from a number of other persons engaged in the manufacture and sale of super yachts and who are familiar with the Vessel was attached as exhibits to the affidavit evidence. These reflected a shared consensus about the value of the Vessel and the merits of the offer to purchase.

[42] It is clear on the evidence that the Vessel was aggressively marketed, without success, for several years. The market for “super yachts” is very specialized. A vessel of this nature has a very limited market. Any potential purchaser faces considerable risk due to the complexity and cost of completion. The failure to generate interest in the “Crescent 144”, as the Vessel is described, is well known within the industry and has deterred other prospective purchasers. The evidence is that further advertisement or other marketing efforts would not produce a prospective buyer at a price greater than that on offer.

[43] A May 17, 2013 appraisal of the Vessel obtained by the Landlord from a certified Marine Surveyor was that the value of the Vessel fell within a range between scrap value and a maximum of USD \$6.6 million. The further cost to complete the Vessel was identified as a minimum of \$13.3 million. The Landlord was then prepared to offer \$5 million for the ship. The

uncontradicted weight of the evidence is that in June 2014 USD \$5 million was a fair offer for the Vessel given the length of time since production of the boat had halted, the condition under which it had been stored and the obsolescence of its systems.

[44] None of this evidence was challenged by Sargeant or Comerica on the motion. They have not presented any recent evidence of a higher value or made an offer to purchase the Vessel over the course of the past four years. There is no evidence that USD \$5,000,000.00 is not the maximum one could reasonably expect from the sale of the Vessel. I agree with the parties supporting the sale that the evidence on the issue of value is overwhelming and uncontroverted.

[45] Sargeant, supported by Comerica, seeks to have the Vessel relocated to a vacant shipyard, which he controls through a corporate entity, for completion and delivery by a recently established shipbuilding company. The capacity of that newly formed company to complete the build is disputed by the opposing parties. The workforce that had been assembled to build the Vessel is no longer available and it would be difficult to find skilled tradesmen knowledgeable about the structure and components to finish the job. Offshore, the Landlord and Al-Saleh assert that the value of the Vessel will continue to depreciate and any fund created by its ultimate sale will be substantially diminished. In my view, their assessment of the situation is correct.

[46] I note that under the terms of sale approved by Justice Harrington in October 2011, the gross asking price of the Vessel was already substantially lower than the total value of the advances provided by Sargeant. Moreover, the sale was subject to a court approved commission for the broker on a sliding scale beginning at 10%. Had an offer been made during the life of that

listing agreement, it was likely to result in a significant loss to Sargeant. The Order provided that no Commission would be payable to the Broker where Sargeant or any corporate entity associated with him was the ultimate buyer. That option has been available to Sargeant, it would appear, from the outset. It is irrelevant, in my view, that the present buyer has likely made a private arrangement with the broker concerned to pay a commission that does not factor into the net amount on offer.

[47] Sargeant and Comerica have conceded that the Vessel must be sold at some point. Sargeant's intent, according to his written representations, is to engage a shipbuilder to complete and deliver the Vessel if his priority position is confirmed [emphasis added]. In the meantime he seeks an order for removal of the Vessel to the Richmond shipyard which he controls. The cost of removal of the Vessel to that shipyard is said to be in the vicinity of \$300,000.00 for which Sargeant says he would claim a priority charge.

[48] Sargeant says that upon completion of the Vessel, he intends to apply for sale of the Vessel using the Federal Court sale process. He would seek approval of a "credit bid" whereby the debt owing on the mortgage would be used to purchase the Vessel without the payment of any additional cash. The sale of the vessel under authority of a Federal Court order, subject to the determination of priority charges, would render the vessel free and clear of any other encumbrances.

[49] The contingent nature of Sargeant's intent is dependent upon three factors, the Landlord argues:

(a) that Sargeant is successful before the Federal Court of Appeal and his mortgage interest is upheld (subject to the possibility of leave being granted for appeal to the Supreme Court;

(b) that Worldspan's position on the import of s 12.1 of the VCA fails; and

(c) that there is no equitable re-ordering that would allow the *in rem* trade creditors to assert priority over the mortgage.

[50] I would add to this, Mr Al-Saleh's assertion of a constructive trust in any claim that Sargeant may have on the Vessel remains an open issue.

[51] It is not at all clear, in my view, that Sargeant and Comerica will succeed in establishing their priority claim as secured creditors. There remains a claim by the owner, Worldspan, to advances never paid by Sargeant for the construction of the Vessel as the work continued, and the claims of Offshore, the Landlord and Al-Saleh to contend with. The merits of those competing claims are not for me to determine. That will be resolved at the priorities hearing down the road. As Sargeant and Comerica vigorously argued during the hearing, I must concern myself with the situation as it stands to-day.

[52] That situation, as I see it, is that a valid offer has been made to purchase the Vessel for the amount of USD \$5 million net of any commission that may be payable to the broker. The Vessel has been under arrest for 4 years and the resolution of the competing claims will not be soon accomplished. The length of an arrest is a factor to be taken into account where the asset is decreasing in value. The only evidence before me is that this is not an improvident sale

[53] The Vessel will further decline in value as the parties await resolution of their claims. If the present offer is lost the creditors will all be prejudiced. There is no evidence before the Court that Sargeant has the means to pay any priority charge on the Vessel without a sale to a third party and considerable evidence that any interest he may have in the Vessel may be subject to Al-Saleh's USD \$36 million fraud judgment against him and his corporation.

[54] Comerica's interest is no greater than Sargeant's under the terms of the VCA and Builder's Mortgage. The record indicates that they have already received at least partial reimbursement of their loans from Sargeant. In its submissions to the several courts that have dealt with this matter, including the Federal Court of Appeal on the appeal of Justice Strickland's decision, Comerica has explicitly recognized that the Vessel had been arrested at the instance of a third party and will be sold by the Federal Court. The fact that they now think the amount to be generated by that sale is inadequate is insufficient to prevent the sale in light of the uncontradicted evidence before the Court.

[55] In the result, I am satisfied, exercising my discretion *de novo*, that it is fair and just and in the interest of all concerned that the sale of the Vessel be approved. The terms and conditions of this sale shall be in accordance with the Order of Prothonotary Lafrenière dated June 30, 2014. The Order of same date imposing a stay on the sale of the Vessel shall be vacated. Costs are awarded the parties supporting the sale against Sargeant and Comerica.

ORDER

IT IS THE ORDER OF THIS COURT that:

1. The appeal of Prothonotary Lafrenière's decision of June 23, 2014 is dismissed;
2. The Vessel shall be sold or relocated in accordance with the terms and conditions set out in Prothonotary Lafrenière's Order of June 30, 2014;
3. The Order of this Court dated June 30, 2014 staying the sale of the Vessel is hereby vacated, and
4. The Plaintiff Offshore Interiors Inc and the Intervenors 642385 B.C. Ltd and Mohammad Anwar Farid Al-Saleh are awarded costs in the amount of \$1,500 each payable by the Intervenors Harry Sargeant III and Comerica Bank.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1226-10

STYLE OF CAUSE: OFFSHORE INTERIORS INC., v WORLDSPAN MARINE INC., CRESCENT CUSTOM YACHTS INC., THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL "QE014226C010", AND THE VESSEL "QE014226C010" v WOLRIGE MAHON LIMITED IN ITS CAPACITY AS APPOINTED VESSEL CONSTRUCTION OFFICER OF THE DEFENDANT VESSEL "QE014226C010", HARRY SARGEANT III, MOHAMMAD ANWAR FARID AL-SALEH, AND 642385 B.C. LTD.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 30, 2014

ORDER AND REASONS: MOSLEY J.

DATED: JULY 4, 2014

APPEARANCES:

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Kieran Sidall Kaitlin Smiley John C. MacInnis John MacLean Dionysios Rossi	FOR THE INTERVENORS

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