

Federal Court



Cour fédérale

Date: 20141212

Docket: T-2371-14

Citation: 2014 FC 1205

Ottawa, Ontario, December 12, 2014

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

**BBC CHARTERING CARRIERS
GmbH & Co. KG**

Plaintiff

and

**JINDAL STEEL & POWER LIMITED, AND
THE OWNERS AND ALL OTHERS
INTERESTED IN THE CARGO OF PRIME
HOT ROLLED STEEL PLATES LOADED ON
THE SHIP "MV KURT PAUL"**

Defendants

ORDER AND REASONS

**(Delivered from the Bench at Ottawa, Ontario, 12 December 2014,
the Court reserving the right to correct errors in grammar,
if any, and complete citations)**

[1] The Court is faced with a motion by Jindal Steel & Power Limited to have the arrest of certain cargo covered by bill of lading number BBCH1106008VH08 by the plaintiff, set aside on the basis that this Court lacks jurisdiction *in rem*.

[2] The motion is made pursuant to Rule 221 of the *Federal Courts Rules*. Normally, a motion that pleadings should be struck as not disclosing a cause of action is heard without the benefit of affidavit evidence. However, when the failure to disclose a cause of action pertains to the jurisdiction of the Court, affidavit evidence is allowed (*MIL Davie Inc. v Hibernia Management and Development Co.* 226 NR 369 (FCA), [1998] FCJ No 614 (QL). Nevertheless, the Court is not called upon to determine the merits of the dispute but rather to determine whether it is plain and obvious that the plaintiff does not have a cause of action *in rem* within the jurisdiction of this Court (*Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, [1990] SCJ No 93 (QL)).

[3] The dispute arises under a voyage charter party in the well known Gencon form between the plaintiff as owner (in fact, time charterer) and Jindal as voyage charterer. Although the charter party calls for London arbitration, the jurisdiction of this Court is not ousted. Under the *Commercial Arbitration Act* and the Code which is a schedule thereto, a plaintiff may seek interim measures from this Court, which is the case here.

[4] The plaintiff claims demurrage at discharge and other expenses. It relies on the lien clause, clause 8 of the charter party, which provides that it has a lien on the cargo for freight, dead freight, demurrage, claims for damages, and all other amounts due under the charter party.

[5] Jindal was the shipper under bills of lading issued, which were subject to the charter party. The uncontradicted evidence is that the bills of lading had been negotiated and Jindal no longer has control over the cargo.

[6] Jindal's argument is that the lien contemplated by clause 8 of the charter party is a possessory lien and that BBC Chartering has lost possession as it discharged the cargo. The difficulty I have with that argument is that the demurrage clause, clause 7, includes demurrage at the discharge port. How can demurrage, which is time in excess of the agreed laytime, accrue unless the cargo has been discharged and, in these circumstances, unless the plaintiff has lost possession of the cargo?

[7] At this stage of the proceedings, the controlling case is that of Mr. Justice Muldoon in *Textainer Equipment Management B.V. v Baltic Shipping Company*, 84 FTR 108, [1994] FCJ No 1267 (QL). It is certainly arguable that the plaintiff has at least an equitable charge on the cargo and would be entitled to arrest same.

[8] Consequently, the motion to set aside the arrest and to dismiss the action *in rem* is dismissed.

[9] The Court is also faced with a motion on behalf of the plaintiff BBC Chartering Carriers GmbH & Co. KG to enforce an agreement to provide security for London arbitration. The dispute arises from the fact that the bank guarantee offered has a two-year time limit which is unsatisfactory to BBC. I agree. Security stands as payment for a final judgment or arbitration

award as the case may be. Security which lapses after two years is not security at all. However, I need not deal with that motion and I am adjourning it *sine die*.

[10] The fact of the matter is that the cargo under bill of lading number 8 remains under arrest and can only be released if bail is given. Under Rule 486 of the *Federal Courts Rules*, the parties are free to agree, including an agreement to release the cargo in favour of security placed in London arbitration. However, failing that, the sufficiency of any security is to be determined by the Court under Rule 486(4). As I understand it, the parties have agreed that the amount of security should be \$200,000. Unless the parties reach an agreement themselves, this Court will not release that cargo unless there is a guarantee by a Canadian chartered bank. That guarantee may have an expiration date but must, in that case, include an evergreen clause, which is to say it will be automatically renewed from time to time. If the bank decides not to renew, the guarantee must provide that \$200,000 will be deposited with the Federal Court Registry. Otherwise, the security may be in a form of bond by a surety company, again in accordance with Rule 486, or cash deposit into the Registry.

[11] Costs shall be in the cause.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion by Jindal Steel & Power Limited to set aside the arrest and dismiss the action is dismissed, costs in the cause.
2. The motion by BBC Chartering Carriers GmbH & Co. KG to enforce a security agreement is adjourned *sine die*.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2371-14

STYLE OF CAUSE: BBC CHARTERING CARRIERS GmbH & Co. KG v
JINDAL STEEL & POWER LIMITED ET AL

PLACE OF HEARING: BY WAY OF VIDEOCONFERENCE BETWEEN
OTTAWA, ONTARIO AND TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 12, 2014

ORDER AND REASONS HARRINGTON J.

DATED: DECEMBER 12, 2014

APPEARANCES:

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