Federal Court Cour fédérale

Date: 20150710

Docket: T-1116-15

Citation: 2015 FC 851

Montréal, Quebec, July 10, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

FINGAD SHIPPING LTD., CHEMSHIP B.V., and CHEMICAL SAILOR LTD.

Plaintiffs

and

NINGBO ARTS & CRAFTS IMP & EXP. CO. LTD., ZHEJIANG HANGCHANG SHIPBUILDING INDUSTRY CO. LTD. (PREVIOUSLY NAMED LINHAI HANGCHANG SHIPBUILDING INDUSTRY CO., LTD.)

Defendants

ORDER AND REASONS

[1] In the present action against two corporate defendants (Ningbo Arts & Crafts Imp & Exp. Co. Ltd. [Ningbo] and Zhejiang Hangchang Shipbuilding Industry Co. Ltd. (previously named Linhai Hangchang Shipbuilding Industry Co., Ltd.) [collectively the corporate defendants]) and

an *in rem* defendant (the ship "Chemical Aquarius" [the Ship]), Huarong Huiyin Limited [HH], the registered owner of the Ship seeks an Order:

1. Abridging the delays of presentation of the present motion;

2. Striking out the Statement of Claim, dismissing the action, and setting aside the Warrant of Arrest on the grounds that:

    a) No material facts have been pleaded in the Statement of Claim that could underlie any claim, and as such, the pleadings disclose no reasonable cause of action;

    b) The provisions of the *Federal Court Rules* relating to the commencement of actions is not the vehicle to be used when what is sought is the enforcement and recognition of an Arbitral Award;

    c) The proceedings are an abuse of process as the matter between the Plaintiffs and *in personam* Defendants have already been determined with the issuance of a series of Arbitration Awards, and thus *res judicata*;

3. Alternatively, setting aside the Warrant of Arrest issued against the *in rem* Defendant vessel, "Chemical Aquarius", on the basis that the Plaintiffs do not benefit from a statutory right *in rem* against the vessel as they do not have a corresponding right *in personam* against the owners of the said vessel, Huarong Huiyin Limited;

4. Alternatively, striking out the Statement of Claim, in whole or in part, and dismissing the action, or that part of the action relating to the recovery of legal costs, since this Honourable Court lacks jurisdiction to adjudicate in respect thereof;

5. Alternatively, setting bail for the Release of the *in rem* Defendant vessel;

6. Awarding costs to the applicant on a lump sum basis in the amount of $7,500.00;

7. Granting such other and further relief as this Court by deem just;

[2] In the absence of any objection by the plaintiffs to the hearing of this motion on an urgent basis, I have undertaken to consider it. Accordingly, I grant the relief sought in point 1 above.

[3] As explained below, I am prepared to grant the relief sought in point 3 above. As a result, it is not necessary for me to address the relief sought in points 2, 4 and 5.

I. Background

[4] The present action has its origin in a series of contracts dating from 2007 whereby the plaintiffs contracted with the corporate defendants for the building of vessels. The Ship was the result of one of these contracts. Following a dispute between the plaintiffs and the corporate defendants, the plaintiffs cancelled the contracts in 2010. Arbitral proceedings followed which resulted in arbitral awards in 2013 against the corporate defendants. Most of the amounts awarded in the arbitration have since been paid, but there remain substantial amounts owing to the plaintiffs.

[5] Until June 2012, the vessel that later became the Ship was owned by the corporate defendants. At that time, it was purportedly sold to HH. The purported sale was registered on July 6, 2012. The plaintiffs challenge the genuineness of this purported sale. They allege that HH is simply a front for the corporate defendants and that the corporate defendants remain the beneficial owners of the Ship. The dispute over the genuineness of this purported sale is at the centre of the present action and of HH's present motion. The plaintiffs have set out detailed

allegations to support their position that the purported sale of the Ship was not genuine. For the purposes of this decision, it is not necessary to discuss those detailed allegations.

[6] The plaintiffs commenced the present action against the corporate defendants and the Ship on July 3, 2015 seeking a condemnation for the defendants to pay the amounts outstanding from the arbitral awards, as well as the judicial sale of the Ship. On the same day, on the strength of an affidavit to lead warrant, and by virtue of Rule 481 of the *Federal Courts Rules* [the Rules], the plaintiffs obtained the issuance of a warrant for the arrest of the Ship.

[7] Also on the same day, the plaintiffs commenced a separate proceeding before this Court, an *ex parte* application (Court No. T-1118-15) for the recognition and enforcement of the arbitral awards pursuant to Rules 326 and following of the Rules. On July 8, 2015, Prothonotary Richard Morneau issued an Order accordingly in that application. HH argues that this application is the appropriate vehicle for enforcing the arbitral awards and that the present action is inappropriate. Because of my conclusions below, it is not necessary for me to decide on the appropriateness of using the present action to enforce the arbitral awards.

[8] In April 2015, the plaintiffs made similar efforts to enforce the arbitral awards and arrest the Ship in France. After the seizure of the Ship in France, HH sought (much as it has in the present motion) to have the seizure lifted on the basis that the owner of the Ship is not one of the debtors of the arbitral awards. This resulted in a decision dated May 7, 2015 of the Tribunal de Commerce de Terre et de Mer du Havre [the French Tribunal] lifting the seizure of the Ship.

[9] HH now seeks to have the arrest warrant for the Ship lifted here in Canada. Because the arrest warrant is an adjunct to the action *in rem* (see Rule 481 of the Rules), HH must be successful in having the action, or at least the *in rem* portion of it, struck out in order to have the arrest warrant lifted.

[10] Central to HH's argument is subsection 43(3) of the *Federal Courts Act*, RSC 1985, c F-7 which provides that this Court's jurisdiction with respect to claims arising out of contracts relating to the construction, repair or equipping of a ship may not be exercised *in rem* unless, at the time of the commencement of the action, the ship that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose. The issue between the parties on this motion concerns whether HH is actually the beneficial owner of the Ship.

II. Analysis

[11] The parties are agreed that the threshold for striking out a pleading is high. A party seeking to strike out a pleading must establish that it is "plain and obvious" that the pleading has no merit on one of the grounds listed in Rule 221 of the Rules. The fact that the claim is a novel or difficult one is not a sufficient ground to strike the claim. The burden on the defendant is very high and the Court should exercise its discretion to strike only in the clearest of cases: *Coastal Float Camps Ltd v Jardine Lloyd Thompson Canada Inc*, 2014 FC 906 at para 11 [*Coastal Float Camps*]. The fact that the Plaintiff might face an uphill battle in proving its claim should not deprive it of the opportunity to do so: *Coastal Float Camps* at para 19. The court's approach

should be generous and err on the side of permitting novel or arguable claims to proceed to trial: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 19-21.

[12] The parties are also agreed that, for the purpose of a motion to strike, the facts alleged in the Statement of Claim are to be taken as true. However, this principle does not extend to legal conclusions asserted from those facts. These are not entitled to be automatically taken as true.

[13] HH has asserted several grounds for concluding that the present action should be struck out. One of these grounds is based on the principle of issue estoppel: that the French Tribunal has already addressed the issue of the arrest of the Ship in enforcement of the arbitration awards and the genuineness of the Ship's sale to HH, and therefore the plaintiffs should not be allowed to reassert the same argument.

[14] The key authority on the subject of issue estoppel is *Danyluk v Ainsworth Technologies*, [2001] 2 SCR 460 (SCC) [*Danyluk*]. Justice Binnie, speaking for the Court, stated at para 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.

[15] Analysis of issue estoppel involves two steps. The first step is to determine whether the moving party has established three preconditions for the operation of issue estoppel. The second step is to determine whether, as a matter of discretion in light of a series of factors, issue estoppel <u>ought</u> to be applied: *Danyluk* at para 33.

A. *Preconditions for issue estoppel*

[16] With regard to the first step, the three preconditions for issue estoppel are set out in *Danyluk* at para 25:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that 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.

[17] The only one of these preconditions that is in dispute is the first. HH argues that the same issues were before the French Tribunal as are present here: the parties dispute (i) the seizure of the Ship in order to secure the corporate defendants' debt resulting from the arbitral awards, and (ii) whether the Ship was genuinely transferred to HH such that it is actually owned by an entity other than the corporate defendants who are the debtors, and the seizure should therefore be lifted. In oral argument, HH's counsel provided a detailed, side-by-side comparison of the issues raised in the Statement of Claim in the present action, and the issues addressed by the French Tribunal. On this basis, HH argues that the same question as is before the Court in the present action was decided by the French Tribunal.

[18] The plaintiffs have several arguments against HH's position. Firstly, they argue that the proceeding in France simply sought interim relief to obtain security on the debt, and was not a decision on the merits. From my reading of the decision of the French Tribunal, it does not appear that the issues identified in the previous paragraph were not considered in full. Whether

or not the proceeding in France was interim, the issues appear to have been considered and the decision was final.

[19] The plaintiffs also note that they cite new evidence that was not considered by the French Tribunal. However, based on the goal of finality in litigation and the obligation for litigants to "put their best foot forward" and to take only "one bite at the cherry" (*Danyluk* at para 18), I am not satisfied that new evidence of the kind cited by the plaintiffs is sufficient to avoid estoppel. To conclude otherwise would permit parties to gut issue estoppel of any substantial meaning by simply raising new evidence in a subsequent proceeding.

[20] The plaintiffs note that the decision of the French Tribunal cites the 1952 Convention on the Arrest of Sea-going Ships which is not applicable in Canada. In my view, this is a difference without a distinction. The key point in both France and in Canada is that there must be a link between the owner of the ship in question and the debt. This issue is addressed in both countries.

[21] The plaintiffs note that the French Tribunal was concerned about loose translation of documents from Chinese into English, and only a few documents then further translated into French. Though it is true that English is an official language in Canada (which is not the case in France), and therefore documents in English do not present a difficulty here, this distinction does not address the problem of the loosely translated Chinese documents. In my view, the French Tribunal's concern on that score applies equally here.

[22] Moreover, the French Tribunal went on to observe that the evidence submitted did not directly prove that HH was not the true owner of the Ship. In making this observation, the French Tribunal acknowledged that the plaintiffs' evidence concerning the genuineness of the transfer of ownership was, at best, suggestive; it was not sufficiently compelling to overcome the evidence of the transfer of ownership to HH in 2012.

[23] Finally, the applicants argue that the treatment of facts is different in the present motion in that they must be taken as true. From my reading of the decision of the French Tribunal, I see no indication that it failed to take any of the facts alleged in the Canadian action (which were also raised in the French proceeding) as true. As mentioned in the previous paragraph, the French Tribunal's concern was that the evidence relied on by the plaintiffs was indirect and insufficient.

[24] In conclusion, I am satisfied that the central issue before the French Tribunal (the fictitiousness of HH as an entity) is the same as the central issue in the present motion, and that the first precondition for issue estoppel is satisfied. As indicated above, the other two preconditions are not disputed.

B. *Exercise of discretion*

[25] With regard to the list of factors that should be considered in the exercise of discretion as to whether issue estoppel ought to be applied, the parties focus on the last of the factors identified in *Danyluk*: the potential injustice (see para 80).

[26] The plaintiffs argue that the potential injustice they face if issue estoppel is applied in the present case is that its case will not be heard on its merits, either in Canada or in France. However, as indicated above, I see no indication in the decision of the French Tribunal that the issues the plaintiffs seek to have considered in the present action were not considered in full in the French proceeding. In fact, the decision of the French Tribunal gives every indication that these issues were heard and considered. I am not satisfied that applying issue estoppel in the present case would result in an injustice of the kind contemplated in *Danyluk*.

[27] Accordingly, I am not inclined to exercise my discretion to refuse to apply estoppel in this case.

C. *Conclusion on issue estoppel*

[28] Even applying the high threshold for striking out of pleadings, it is my view that it would be an abuse of the process of the Court (see Rule 221(1)(f) of the Rules) to permit the allegation at paragraph 76 of the Statement of Claim (that the ownership of the Ship remained at all material times with Ningbo, and that HH is a front or sham standing in lieu of Ningbo) to stand. In my view, that allegation should be struck.

[29] It follows from this that paragraph 1(c) of the Statement of Claim should also be struck, and that the style of cause of the present action should be modified (i) to remove reference to the action being "in rem"; and (ii) to remove the defendants "The ship 'Chemical Aquarius'" and "The owners and all others interested in the ship 'Chemical Aquarius'".

ORDER

THIS COURT ORDERS that:

1. The delays for presentation of the present motion are abridged.

2. Paragraphs 1(c) and 76 are struck from the Statement of Claim.

3. The style of cause is modified (i) to remove reference to the action being “in rem”; and (ii) to remove the defendants “The ship ‘Chemical Aquarius’” and “The owners and all others interested in the ship ‘Chemical Aquarius’”.

4. The ship “Chemical Aquarius” is released.

5. Costs of the present motion are awarded in favour of Huarong Huiyin Limited in the amount of $7,500.

“George R. Locke”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1116-15
STYLE OF CAUSE:	FINGAD SHIPPING LTD., CHEMSHIP B.V., AND CHEMICAL SAILOR LTD. v NINGBO ARTS & CRAFTS IMP & EXP. CO. LTD., ZHEJIANG HANGCHANG SHIPBUILDING INDUSTRY CO. LTD. (PREVIOUSLY NAMED LINHAI HANGCHANG SHIPBUILDING INDUSTRY CO., LTD.)
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JULY 9, 2015
ORDER AND REASONS:	LOCKE J.
DATED:	JULY 10, 2015

APPEARANCES:

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