

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada
Date: 19971119

Docket: T-2241-97

97 345 059

**ACTION IN REM IN PERSONAM
AGAINST THE VESSEL "M.V. FILOMENA LEMBO"
AND ALL THOSE PERSONS INTERESTED IN HER**

DEC 11 1997

BETWEEN:

VIKTOR OVERSEAS LTD.

Plaintiff

- and -

**DEIULEMAR COMPAGNIA DI NAVIGAZIONE S.p.A., MISANO DI
NAVIGAZIONE S.p.A. AND THE VESSEL "M.V. FILOMENA LEMBO" AND
ALL THOSE PERSONS INTERESTED IN HER**

Defendants

REASONS FOR ORDER

NADON J.

[1] On November 6, 1997, I heard in Ottawa the defendant shipowners' application for an order quashing and setting aside the warrant of arrest of their vessel *FILOMENA LEMBO* and its release from arrest. At the end of the hearing, I advised counsel that the application would be denied. The order and reasons for that order were signed on that day.

[2] After I had informed counsel that the application would be denied, counsel for the shipowners made a verbal application with respect to the amount of bail which her clients

would have to provide to obtain the release of their vessel. Counsel for the plaintiff informed me that his client was prepared to accept the sum of U.S.\$1,000,000.00.

[3] The plaintiff submits that this sum is a reasonable sum in the circumstances. The starting point for this amount of bail is the amount of the action, U.S.\$495,025.00, which represents the cost of repairing the shipowners' vessel in June and July 1996. Counsel for the plaintiff then referred me to clause 5.3 of the contract of repairs dated June 28, 1996 which provides for a rate of interest of 6% per month on any amount due under the contract. Counsel for the plaintiff informed me that as the contract price became due in January 1997 only, the plaintiff is claiming interest at 6% per month from January 1997. Clause 5.3 of the contract provides as follows:

5.3 In the event that Contract Price payable to the Contractor under this Agreement shall not be paid within the due date, the Owner shall pay interest on amount of the Contract Price due hereunder which is not paid on the due date for each day during the period of such default at the rate of 6% (six percent) per month. In the event of such default in payment the Contractor shall have the right and power to institute legal proceedings to recover all amounts due to them under this Agreement including without limitation the right and power to bring an action in rem against the Vessel.

[4] Counsel for the plaintiff assumed that this case would take at least two years to go to trial and for judgment to be rendered. He therefore factored in a rate of interest of 6% per month for two years which entitles the plaintiff to over U.S.\$730,000.00 in interest. To these amounts should be added an amount to cover the plaintiff's costs.

[5] The plaintiff thus submits that a bail of U.S.\$1,000,000.00 is not, in the circumstances, unreasonable.

[6] The shipowners are not in agreement with the view taken by the plaintiff. They submit that a rate of interest of 6% per month is illegal and outrageous. Counsel for the shipowners argued that section 347.(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, prohibits agreements to receive interest at a criminal rate. The section defines "criminal rate" as follows:

"criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

[7] As the contract of repairs was entered into in Croatia and that the governing law thereof is English Law (article 14.1), I am of the view that the *Criminal Code* is of no relevance. The plaintiff could not be prosecuted in Canada under section 347 since the alleged crime occurred in Croatia. If a rate of interest of 6% per month is a crime in that country, the plaintiff could be prosecuted there. Thus, the shipowners' argument based on the *Criminal Code* fails.

[8] During the hearing¹, I raised with both counsel the question as to whether section 4 of the *Interest Act*, R.S. 1985, c. I-15, was relevant. That section provides:

4. Except as to mortgages on real property, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent.

[9] After due consideration, I am of the view that this section is of no relevance to a contract governed by a foreign law. The rate of interest is, in my view, to be determined by the law of the contract. In W. Tetley, *International Conflict of Laws, Common, Civil and Maritime*, Montréal, Yvon Blais, 1994, the learned author opines that in contractual matters the right to interest and the rate of interest are determined by the law of the contract. At pages 756 and 757, he states:

At common law, the *right to interest* has traditionally been regarded as subject to the proper law of the contract, whether the claim is for the recovery of the contractual debt or for damages for breach of the contract.

[...]

The *rate of interest*, as opposed to the right to claim it, has been held to be governed by the proper law of the contract as regards the contract debt itself.
[...]

¹ The hearing was continued by way of a conference call on Friday, November 7, 1997.

[10] Counsel for the plaintiff referred me to *Halsbury's Laws of England*, 4th Ed., Vol. 32, p. 57, paragraph 111 where the following statement can be found:

Subject to the statutory power of the court to set aside or vary a transaction where the interest charged by a moneylender is excessive, there is no restriction on the terms which may be agreed between a borrower and a lender for the payment of interest, and the ordinary principles of the law of contract govern any such agreement. The same rule applies to interest upon other debts.

[11] Further, at p. 80, paragraph 161, we find the following statement:

The provisions in the Money-lenders Act 1900 relating to the reopening of transactions which are harsh and unconscionable or where the interest charged is excessive have been repealed by the Consumer Credit Act 1974. However, the former provisions still apply to agreements made before 16th May 1977 which are not personal credit agreements.

[12] On the basis of the foregoing, counsel for the plaintiff argued that a rate of interest of 6% per month was not, under the law of the contract, illegal.

[13] After considering the arguments made by both counsel, I am unable to conclude that the plaintiff cannot succeed on its claim for interest as per clause 5.3 of the contract.

Consequently, I am unable to acquiesce to the shipowners' request that I only allow, for the purpose of fixing the amount of bail, interest at the prime rate.

[14] The bail shall therefore be fixed at the sum of U.S.\$1,000,000.00 or its equivalent in Canadian dollars.

[15] The costs of this application shall be in the cause.

Ottawa, Ontario
November 19, 1997

"MARC NADON"

Judge

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-2241-97

STYLE OF CAUSE: VIKTOR OVERSEAS LTD.
v. DEIULEMAR COMPAGNIA DI NAVIGAZIONE ET AL.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 7, 1997

REASONS FOR ORDER OF MR. JUSTICE NADON

DATED: NOVEMBER 19, 1997

APPEARANCES:

RUI FERNANDES REPRESENTING THE PLAINTIFF
and
GORDON HEARN

DEBORAH HUTCHINGS REPRESENTING THE DEFENDANTS

SOLICITORS OF RECORD:

FERNANDES HEARN FOR THE PLAINTIFF
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