Section de première instance de
la Cour fédérale du Canada

Federal Court of Canada
Trial Division

Date: 19971217

File: T-956-97

98 174 047

Action *in rem* against the cargo of about 500 metric tons prilled TNT explosives and 500 metric tons flaked TNT UN0209 1.1D., now loaded on the vessel "AN XIN JIANG", her aforesaid cargo and her owners and all others interested in her and *in personam* against Beston Chemical Corporation, Inc., China North Chemical Industries Corporation, China Xinshidai Company, China Ocean Shipping (Group) Co. (COSCO) and Guangzhou Ocean Shipping Company (COSCO Guangzhou).

BETWEEN:

PARAMOUNT ENTERPRISES INTERNATIONAL, INC.,

Plaintiff,

- AND -

THE CARGO OF ABOUT 500 METRIC TONS PRILLED TNT EXPLOSIVES AND 500 METRIC TONS FLAKED TNT UN0209 1.1D NOW LOADED ON THE SHIP "AN XIN JIANG", ITS OWNERS AND ALL OTHERS INTERESTED THEREIN;
and
THE VESSEL "AN XIN JIANG", HER AFORESAID CARGO AND HER OWNERS AND ALL OTHERS INTERESTED IN HER;
and
BESTON CHEMICAL CORPORATION, INC.;
and
CHINA NORTH CHEMICAL INDUSTRIES CORPORATION;
and
CHINA XINSHIDAI COMPANY;
and
CHINA OCEAN SHIPPING (GROUP) CO. (COSCO);
and
GUANGZHOU OCEAN SHIPPING COMPANY (COSCO GUANGZHOU);

Defendants.

REASONS FOR JUDGMENT

TREMBLAY-LAMER J.:

[1] This is an appeal from the decision of the prothonotary, Mr. Morneau, who concluded that the *in rem* portion of the action by the plaintiff, Paramount Enterprises International Inc., could not be brought against either the ship "An Xin Jiang" or the cargo, on the ground that it disclosed no reasonable cause of action, having regard to the manner in which paragraph 22(2)(*i*) and subsection 43(2) of the *Federal Court Act*[1] (the "Act") must be interpreted.

FACTS

[2] In March 1987, the plaintiff and the three defendant companies - Beston Chemical Corporation ("Beston"), China North Chemical Industries Corporation ("Nocinco") and China Xinshidai Company ("Xinshidai") - entered into the Conlinebooking charter-party pursuant to which the plaintiff agreed to transport the defendants' cargo of dynamite from Tianjin-Xingang, China, to Grande-Anse, Quebec.

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[1] R.S.C. 1985, c. F-7.

[3] When the agreement had been signed, the plaintiff made the necessary arrangements for its ship, the "Len Speer", to travel to Xingang to transport the cargo. On March 25, 1997, Nocinco informed the plaintiff that the cargo would be transported on board the "An Xin Jiang", a ship belonging to China Ocean Shipping (Group) Co. ("Cosco"). This would have caused a loss of $175,000 (Can.) to the plaintiff.

[4] The plaintiff brought an action *in personam* against Beston, Nocinco and Xinshidai for non-performance of contract, and against Cosco for the tort of interference in the Conlinebooking charter-party. It also attempted to exercise its rights resulting from the breach of contract *in rem* against the cargo of dynamite, and its rights resulting from the interference by Cosco against the "An Xin Jiang".

[5] Cosco opposed the *in rem* portion of the plaintiff's action. It filed a motion under paragraph 419(1)(*a*) of the *Federal Court Rules*[2] (the "Rules") seeking to have that portion struck out on the ground that it disclosed no reasonable cause of action, within the meaning of paragraph 22(2)(*i*) and subsection 32(2) of the Act, when read together.

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[2] C.R.C. 1978, c. 663.

STATUTORY PROVISIONS

[6] Subsection 22(1) of the Act gives the Federal Court jurisdiction in admiralty matters. Subsection 22(2) defines the scope of this jurisdiction more precisely, but not exhaustively. The parties agree that this case deals with paragraph 22(2)(*i*):

22.(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following:	(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), la Section de première instance a compétence dans les cas suivants :
...	...
(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;	i) une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie.

[7] Subsections 43(2) and (3) of the Act provide for the exercise of that jurisdiction *in rem*:

43(2) Subject to subsection (3), the jurisdiction conferred on the Court by section 22 may be exercised in rem against the ship, aircraft or other property that is the subject of the action, or against any proceeds of sale thereof that have been paid into court. [My emphasis]	43(2) Sous réserve du paragraphe (3), la Cour peut, aux termes de l'article 22, avoir compétence en matière réelle dans toute action portant sur un navire, un aéronef ou d'autres biens, ou sur le produit de leur vente consigné au tribunal. [Je souligne]

43(3) Notwithstanding subsection (2), the jurisdiction conferred on the Court by section 22 shall not be exercised in rem with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property 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.	43(3) Malgré le paragraphe (2), la Cour ne peut exercer la compétence en matière réelle prévue à l'article 22, dans le cas des demandes visées aux alinéas 22(2)e), f), g), h), i), k), m), n), p) ou r), que si, au moment où l'action est intentée le véritable propriétaire du navire, de l'aéronef ou des autres biens en cause est le même qu'au moment du fait générateur.

DECISION OF THE PROTHONOTARY

[8] Mr. Morneau allowed Cosco's motion and struck out the *in rem* portion of the plaintiff's action.

[9] In his reasons, he first addressed the question of the action *in rem* against the ship. In his opinion, it was plain and obvious that this action had no chance of success, since the "An Xin Jiang" was not the ship to which the plaintiff's action related. The action had been brought against the Conlinebooking charter-party for the carriage of the cargo of dynamite on board the "Len Speer".

[10] The prothonotary also rejected the plaintiff's argument that it could rely, in tort, on the agreement between Cosco and the other defendant companies respecting the chartering of the "An Xin Jiang" to which it was not a party. On

this point, the prothonotary distinguished the instant case from the decisions in *The "Antonis P. Lemos"*[3] and *Margem Chartering Co. v. Cosena S.R.L. ("Bosca")*,[4] which recognized the right to found an action *in rem* against a ship in tort. The circumstances in this case are different from the facts in those two cases, where one party to an agreement for carriage by ship had brought an action against a ship and its owners who were not parties to the agreement.

[11] The prothonotary also found that the action *in rem* against the cargo disclosed no reasonable cause of action. Once again, he said that the basis of the plaintiff's action was the Conlinebooking charter-party and that under that agreement there was no sufficient connection between the plaintiff and the cargo to entitle the plaintiff to bring an action *in rem*, since the plaintiff had never had possession of the cargo.

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[3] [1985] 1 Lloyd's 283.

[4] (March 5, 1997), T-2418-96 (F.C. prothonotary).

ANALYSIS

Paragraph 419(1)(*a*)

[12] First, it is important to remember that Cosco's motion is based on Rule 419(1)(*a*), which provides:

419.(1) The Court may at any stage of an action order any pleading or anything in any pleading to be struck out, with or without leave to amend, on the ground that	419.(1) La Cour pourra, à tout stade d'une action ordonner la radiation de tout ou partie d'une plaidoirie avec ou sans permission d'amendement, au motif
a) it discloses no reasonable cause of action or defence, as the case may be,	a) qu'elle ne révèle aucune cause raisonnable d'action ou de défense, selon le cas,

[13] In *Attorney General of Canada v. Inuit Tapirisat*,[5] Mr. Justice Estey, speaking for the Supreme Court of Canada, set out the circumstances in which a statement of claim may be struck out:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt".[6] [My emphasis]

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[5] [1980] 2 S.C.R. 735. See also *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at 449; *Prior v. Canada* (1990), 101 N.R. 401, at 404 (F.C.A.); *Joint Stock Society "Oceangeotechnology" v. 1201 (The)*, [1994] 2 F.C. 265, at 269-270 (T.D.).

[6] *Ibid.* at 740.

[14] Although the expression used to describe the principle may vary somewhat from one decision to another - in this instance, Mr. Morneau preferred the expression "plain and obvious"[7] - the Court can still not allow a motion of this kind unless the case is so devoid of merit that it is impossible for it to succeed. As Mr. Justice Marceau stated in *Prior v. Canada*,[8] the courts will strike out a statement of claim when a case raises a question of law that cannot be disposed of solely on the basis of the facts set out in the pleadings, without the necessity of submitting additional evidence:

> The principle expressed by the words used by Estey J. refers to the effect the legal submissions set forth, if recognized as valid, will have on the fate of the action. When the success of an action is wholly dependant on a proposition of law that can easily be seen and precisely defined on the sole reading of the statement of claim, without any possibility of it being qualified by further pleadings, and there is no issue that could be better explored at trial, a 419(1)(*a*) motion will permit the defendant to dispute the validity of such legal proposition and thereby show immediately that the action will necessarily fail since, even if the material facts alleged were all true, there is no way the Court may, in law, grant the reliefs sought ... .[9]

[15] In the instant case, taking the facts in the statement of claim as proved, we must then ask whether the plaintiff may bring action *in rem* against the ship "An Xin Jiang" and against the cargo, or it is plain and obvious that such an action has no chance of success.

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[7] This expression was also used by Dubé J. in *Ludco Entreprises Ltd. et al. v. Minister of National Revenue* (1994), 72 F.T.R. 175, and by Teitelbaum J. in *The 1201*, *supra* note 5.

[8] *Supra* note 5.

[9] *Ibid.*

Action *in rem* against the ship

[16] The plaintiff contends that it is not plain and obvious that its action *in rem* against the Cosco ship has no chance of success. It states that under subsection 43(2) it may exercise its rights *in rem* against the "An Xin Jiang", since this is the ship that is the subject of the action. It submits that its action in tort against Cosco is based on the agreement for the carriage of goods entered into by Cosco and the three other defendant companies. It contends that it may rely on that agreement, to which it is not a party, since paragraph 22(2)(*i*) may be cited in support of a claim in tort, as was the case in *Bosca* and *Antonis P. Lemos*.

[17] I am not persuaded by the plaintiff's arguments. Subsection 43(2) provides that a party may bring action *in rem* against a ship provided that the ship is the subject matter of the action. The courts have held that a ship is the subject matter of an action where there is a sufficient connection between the ship and the action:

> As I have stated, the defendants cite the above two cases to show that there must be a "sufficient connection" to the defendant Ship in order to commence proceedings with an *in rem* action.

> ... I too agree that an *in rem* proceeding will only lie if there is a "connection" to the defendant vessel.[10]

[18] In the instant case, the plaintiff complains that Cosco unlawfully interfered in the Conlinebooking charter-party entered into by Paramount, Besco, Nocinco and Xinshidai, which provided for the carriage of the cargo on board the "Len Speer". The plaintiff's action is founded on that agreement. There is no connection between that agreement and the "An Xin Jiang". The "An Xin Jiang" is the subject of a second agreement entered into by Cosco with the three other defendant companies. The plaintiff's cause of action is independent of that second agreement, and accordingly it is plain and obvious that the Court cannot exercise its jurisdiction *in rem*.

[19] With respect to the plaintiff's argument that it may rely on the agreement between the co-defendants and Cosco in tort, I agree with the distinction made by the prothonotary between this case and the decisions in *Antonis P. Lemos* and *Bosca*. In those two decisions, the plaintiff alleged that it was a party to a sub-charter of the ship seized, which was responsible for the tort committed. This created the connection between the ship and the plaintiff that was needed in order

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[10] *The 1201*, *supra* note 5 at 276. See also *Westview Sable Fish Co. et al. v. Ship Neekis et al.* (1986), 6 F.T.R. 235 (F.C.T.D.); *Corostel Trading v. Ship "Catalina"* (1986), 6 F.T.R. 233 (F.C.T.D.).

for there to be an action *in rem*. Since this element is absent in the instant case, those decisions do not apply.

Action *in rem* against the cargo

[20] The plaintiff contends that it is not plain and obvious that its action *in rem* against the cargo is so devoid of merit that it has no chance of success. In its opinion, subsection 43(2) is clear: it permits an action *in rem* against "other property" that is the subject of the action. In the instant case, the cargo of dynamite is "property" as defined in section 2 of the Act, whether on board the "Len Speer" or not, and it is also the subject of the action, that is, of the Conlinebooking charter-party.

[21] The defendants agree that the expression "property" in subsection 43(2) includes cargo, but go on to say that it includes only the cargo on board the ship that is the subject of the action. Although Parliament did not expressly state that requirement in the wording of subsection 43(2), the defendants contend that this was in fact its intention, in that the expression "cargo" used in subsection 22(2) always relates to the ship that transported it. In the instant case, the cargo is on board a ship, but not the ship referred to in the Conlinebooking charter-party.

[22] The defendants further contend that the admiralty jurisdiction may not be invoked *in rem* against a cargo unless that cargo is charged with a maritime lien. The only exception to that principle is a possessory lien on the cargo. In the instant case, since the cargo was never loaded on board the "Len Speer", the possessory lien never arose and accordingly the plaintiff may not bring action *in rem* against the cargo.

[23] I agree with the interpretation of subsection 43(2) proposed by the plaintiff, in that it is consistent with the method adopted by the Supreme Court of Canada for statutory interpretation. We are told in the recent decisions that the rule that must be applied is the "plain meaning" rule.[11] In *R. v. McIntosh*,[12] Chief Justice Lamer said that effect must be given to the plain meaning of the words where the language of the statutory provision is clear and unequivocal. The plain meaning of the words may be disregarded and a broad-ranging interpretive analysis applied where the language of the statute is ambiguous, that is, where it lends itself to more than one interpretation:

> In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms.

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[11] *R. v. McIntosh*, [1995] 1 S.C.R. 686, Lamer C.J.; *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550, Iacobucci J.

[12] *Ibid.*

> Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise ... .[13]

[24] In the instant case, subsection 43(2) is not ambiguous. The word "property" is clearly defined in section 2 of the Act. It refers to "property of any kind, whether real or personal or corporeal or incorporeal, and, without restricting the generality of the foregoing, includes a right of any kind, a share or a chose in action". Subsection 43(2) therefore allows an action *in rem* against a cargo, which is personal property. The language does not require either that the cargo be on board or not on board a ship, or that there be a maritime or possessory lien in order to found an action *in rem* against the cargo. If Parliament had intended to impose such a requirement, it would have expressly so indicated in the Act. This was what the Parliament of England did in the *Supreme Court Act, 1981*. Subsections 21(3) and (4) of the *Supreme Court Act* set out the circumstances in which the High Court may exercise the jurisdiction conferred on it by paragraph 20(2)(*h*) (the counterpart of our paragraph 22(2)(*i*)) *in rem*. Subsection 21(4) provides that actions *in rem* may be brought against ships only, but subsection 21(3) adds that they may also be brought against other property provided that such property is subject to a lien or other charge:

> 21.(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action *in rem* may be brought in the High Court against that ship, aircraft or property. [My emphasis]

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[13] *Ibid.* at 697.

[25] Here in Canada, Parliament did not deem it necessary to provide such a requirement in our Act.

[26] The defendants contend that literal interpretation produces an unfair result since it would permit the seizure *in rem* of a cargo on board a ship belonging to an innocent third party. This ground is not a reason to depart from the plain meaning of the words in subsection 43(2). In *McIntosh*, Lamer C.J. stated that the harsh or absurd result produced by literal interpretation does not justify embarking on a broad-ranging interpretive analysis where the language of the statutory provision is not ambiguous:

> I would adopt the following proposition: where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be ... . The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.
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> ...
>
> Thus, only where a statutory provision is ambiguous, and therefore reasonably open to two interpretations, will the absurd results flowing from one of the available interpretations justify rejecting it in favour of the other. Absurdity is a factor to consider in the interpretation of ambiguous statutory provisions ... .[14]

[27] It must be presumed that where the meaning of a provision is clear and unequivocal it reflects the intention of the legislature, as the Chief Justice pointed out:

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[14] *Ibid.* at 704-705.

> Parliament, after all, has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly.[15]

[28] Thus, under subsection 43(2), it is sufficient that the cargo be the subject of the action in order for the plaintiff to exercise its rights *in rem*, as it has done in the instant case. The plaintiff's action arose out of the defendants' failure to fulfil their contractual obligations under the Conlinebooking charter-party. The cargo of dynamite was the actual subject of that charter-party. In addition, the plaintiff had started to perform its contractual obligations. According to its statement of claim, it had already "positioned" the "Len Speer" to travel to Tianjin-Xingang to take on the cargo of dynamite. According to the decision in *The 1201*, it is sufficient to have commenced to perform the contractual obligations for the connection required for an action *in rem* to arise:

> A contract to tow the Ship was entered into by the plaintiff and the defendant Global. Had nothing further been done and the defendant Global then cancelled the contract, I am satisfied that the plaintiff would not have been able to proceed with an *in rem* action as no steps would have been taken to fulfil the obligations under the contract and one would be unable to say that there existed a connection to the Ship. In the case before me, the facts are that a contract was entered into to have a named tug tow a named ship from Halifax to India. Furthermore, according to the statement of claim, the parties had allegedly agreed that the named tug would be immediately dispatched to Halifax (it was in the Mediterranean). The tug was so dispatched. After 12 ½ days, while the tug was on its way to Halifax and [the] plaintiff continuously informing defendants as to the position of the tug, the defendants cancelled the agreement.
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> ...

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[15] *Ibid.* at 706.

> ... To restrict a claim under paragraph 22(2)(*k*) of the Act to actual towing is much too restrictive. I am satisfied that one need not actually start the "towing", a line actually attached to the vessel, in order to have "any claim for towage". It is sufficient, as in this case, to have commenced to fulfil the terms of a contract of towage in order to have "any claim for towage" pursuant to paragraph 22(2)(*k*).[16]

[29] For these reasons, I believe that it is not plain and obvious that the action *in rem* against the cargo should be struck out.

[30] In view of this conclusion, the decision of the prothonotary cancelling the bank letter of guarantee supplied by Cosco is set aside.

CONCLUSION

[31] Accordingly, I allow the appeal in part. The decision of the prothonotary to strike out the *in rem* portion of the plaintiff's action against the ship "An Xin Jiang" is upheld, whereas his decision to strike out the action *in rem* against the cargo is set aside on the ground that it discloses a reasonable cause of action. The

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[16] *The 1201*, *supra* note 5 at 277-278.

decision is also set aside as it relates to cancelling the bank letter of guarantee.

The order will go with costs.

Danièle Tremblay-Lamer
JUDGE

OTTAWA, ONTARIO
December 17, 1997

Certified true translation

C. Delon, LL.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	T-956-97
STYLE OF CAUSE:	PARAMOUNT ENTERPRISES INTERNATIONAL INC. -AND- BESTON CHEMICAL CORPORATION INC.
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	November 5, 1997

REASONS FOR JUDGMENT OF TREMBLAY-LAMER J.

DATED: DECEMBER 18, 1997

APPEARANCES:

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Guy Vaillancourt	FOR THE DEFENDANT (COSCO)

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THE FEDERAL COURT
OF CANADA

LA COUR FÉDÉRALE
DU CANADA

JUN 23 1998

Court No.: T-956-97

No. de la cause:

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Reasons for Order

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DATE

D. Tremblay-Lamer

J.F.C.C. J.C.F.C.

Form T-4F

Formule T-4F

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