

Federal Court



Cour fédérale

**Date: 20210726**

**Docket: T-594-21**

**Citation: 2021 FC 789**

**St. John's, Newfoundland and Labrador, July 26, 2021**

**PRESENT: The Honourable Madam Justice Heneghan**

**ADMIRALTY ACTION *IN REM***

**BETWEEN:**

**DAVY GLOBAL FUND MANAGEMENT  
LIMITED**

**Plaintiff**

**and**

**MICHELE BOTTIGLIERI ARMATORE S.p.A  
and  
THE SHIP *MBA GIUSEPPE*  
and  
THE OWNERS AND ALL OTHERS  
INTERESTED IN THE SHIP *MBA GIUSEPPE***

**Defendants**

**REASONS AND ORDER**

**I. INTRODUCTION**

[1] By a Statement of Claim issued on April 9, 2021, Davy Global Fund Management Ltd. (the “Plaintiff”) commenced an action against Michele Bottiglieri Armatore S.p.A. (the “Corporate Defendant”) and the Owners and All Others Interested in the Ship *MBA GIUSEPPE*, and an action *in rem* against the Ship *MBA GIUSEPPE* (the “Defendant Ship”), (collectively the “Defendants”).

[2] In its Statement of Claim, the Plaintiff alleges that it is the owner of a mortgage that was entered into between Banco di Napoli S.p.A., now named Intesa San Paolo S.p.A. (“Intesa”), and the Corporate Defendant, on or about May 27, 2010, to secure a loan to finance the purchase of the Defendant Ship which was then under construction.

[3] The Plaintiff also claims that the mortgage on the Defendant Ship is in arrears in the amount of USD 14,735,730.38, as of March 31, 2021. It seeks an Order for the appraisal and sale of the Defendant Ship to satisfy the Plaintiff’s claim, together with interest and costs.

[4] On April 9, 2021, a Warrant was issued for the arrest of the Defendant Ship. According to the affidavit of Mr. Jean Légaré, process server, the Defendant Ship was arrested at the Port of Quebec on April 9, 2021. The Statement of Claim was served upon the Defendant Ship on the same day.

[5] The Defendants filed their Statement of Defence on May 10, 2021. Generally, they deny that the mortgage is in arrears. They allege that there is no basis for this Action, and that there is no basis for the arrest of the Defendant Ship.

[6] As well, the Defendants refer to a law of general application in Italy, Italian Law Decree no. 18 (the “*Cura Italia* Decree”), which they claim grants a moratorium on the payment of debts. Originally, the moratorium was to be in effect until September 30, 2020 but was later extended until June 30, 2021.

[7] The Defendants pray that the Defendant Ship be released without bail and all proceedings be permanently stayed. In the alternative, they seek dismissal of the Plaintiff’s action, reserving their right to claim damages for wrongful arrest.

[8] By a Notice of Motion dated May 14, 2021, the Defendants seek an Order for the following relief:

(a) granting leave to the Foreign Representative to intervene in the present proceedings for the purpose of supporting and/or presenting the motion for stay of proceedings and release of the ship; and

(b) staying all proceedings in this cause for all legal purposes and for the Release of the Ship *MBA GIUSEPPE* without bail, the whole with costs.

## II. BACKGROUND

[9] The following details are taken from the pleadings filed by the parties, as well as from the affidavits filed relative to the Defendants’ Motion. Some affidavits addressed matters of fact and others offered opinion evidence about the Italian laws concerning restructuring and bankruptcy, the *Cura Italia* Decree moratorium, and the effect of a judicial sale of the Defendant Ship.

[10] The Plaintiff is a body corporate engaged in the business of asset management on behalf of public and private investors across Europe.

[11] The Corporate Defendant is a privately owned corporation and at all material times was the owner of the Defendant Ship. The Defendant Ship is the subject of a mortgage now owned by the Plaintiff.

[12] The Defendants filed four affidavits sworn by Mr. Michele Bottiglieri, the principal shareholder of the Corporate Defendant. The affidavits were sworn on May 12, 2021, May 13, 2021, May 14, 2021, and May 27, 2021.

[13] In his first affidavit, Mr. Bottiglieri provided details about the Defendant Ship, its acquisition, and the events leading up to and after the arrest of the Ship, including the proceedings undertaken in Italy pursuant to Italian Bankruptcy Law, and the Recognition Order obtained from the Superior Court of Quebec pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Mr. Bottiglieri referred to a number of exhibits that were attached to his affidavit.

[14] In this affidavit, Mr. Bottiglieri disputed that the Plaintiff engaged in discussions with the Corporate Defendant for the purpose of agreeing upon a restructuring arrangement. He deposed that the Plaintiff arrested the Ship without warning. He referred to the proceedings undertaken in Italy pursuant to Italian Bankruptcy Law, and the Recognition Order the Corporate Defendant obtained from the Superior Court of Quebec.

[15] Mr. Bottiglieri also deposed that the Corporate Defendant will suffer irreparable harm if the Ship is not released from arrest without bail.

[16] In his second affidavit, Mr. Bottiglieri updated one of the amounts listed in the Corporate Defendant's Petition for Admission to Composition with Creditors. He also attached a number of news articles regarding the acquisition of Intesa's debt by an outside party.

[17] In his third affidavit, Mr. Bottiglieri referred to a letter written by another party to the Restructuring Agreement in which that party said it would comply with the Order of the Court of Naples. A copy of that letter is attached as an exhibit to this affidavit.

[18] In his fourth affidavit, Mr. Bottiglieri purported to refute certain factual allegations set out in the affidavit of Mr. Berrigan and to provide information about current Court proceedings in Italy.

[19] Specifically, Mr. Bottiglieri deposed that on May 19, 2021, the Corporate Defendant was served with a Writ of Summons, issued on behalf of the Plaintiff and FiNav, to appear before the Tribunal of Naples.

[20] Mr. Bottiglieri deposed that the Plaintiff is asking the Italian Court to declare that the Plaintiff or FiNav is entitled to claim under the mortgage and for a declaration as to the amount due as of April 14, 2021.

[21] Mr. Bottiglieri further deposed that he had instructed his lawyers to argue that, due to the *Cura Italia* Decree, no amount was due as of April 14, 2021.

[22] The Defendants also filed two affidavits sworn by Mr. Bruno Inzitari on May 13, 2021 and May 21, 2021, an Italian lawyer practicing in commercial law, insolvency and restructuring. These affidavits provide opinion evidence and will be addressed later.

[23] The Plaintiff filed the affidavits of Mr. Tom Berrigan, sworn on May 21, 2021; Mr. Giorgio Berlingieri, sworn on May 21, 2021; Mr. Luca Magrini, sworn on May 21, 2021; and Mr. Flavio Rocchio, sworn on May 28, 2021. Insofar as Mr. Berlingieri and Mr. Magrini also provide opinion evidence, these affidavits will also be addressed later.

[24] Mr. Berrigan is the Chief Executive Officer of the Plaintiff. Mr. Berrigan deposed to the circumstances giving rise to the Corporate Defendant's debt and the Plaintiff's decision to sue upon the Ship's mortgage.

[25] Mr. Berlingieri is a maritime law practitioner based in Genoa with extensive experience in Maritime law, including status as the President of the Italian Maritime Law Association and a former First Vice President of the Comité Maritime International. In his affidavit, he addressed the sale of a vessel by a holder of a hypothec under Italian law, and commented on the advantages and disadvantages of selling a vessel through insolvency proceedings.

[26] Mr. Magrini is an Italian lawyer who specializes in restructuring and insolvency matters, with significant expertise in shipping restructuring. His law firm represents the Plaintiff in its capacity as the management company of the fund that owns claims against the Corporate Defendant.

[27] The affidavit of Mr. Flavio Rocchio was tendered by the Plaintiff in response to the fourth affidavit of Mr. Bottiglieri. Mr. Rocchio also offered brief opinion evidence about the effect of the commencement of the proceedings in Italy by Davy on May 19, 2021.

[28] Mr. Rocchio is a lawyer and a teacher at the Università Cattolica del Sacro Cuore. He represents the Plaintiff in the proceedings commenced in the Court of Naples on May 19, 2021.

[29] Mr. Rocchio deposed that the proceedings were taken in respect of certain personal guarantees from Mr. Bottiglieri and his spouse given to secure the obligations of the Corporate Defendant upon the mortgage. He further deposed that under Article 1957 of the Italian Civil Code, the guarantees were subject to a six-month time limitation upon termination of the Restructuring Agreement. As such, the proceeding was begun in order to protect the rights of the Plaintiff relative to the guarantees.

[30] Mr. Rocchio also deposed that the proceedings before the Court of Naples are *in personam*, whereas the proceedings in Canada are *in rem* proceedings.

[31] The Defendant Ship was built in 2010 and is registered in the Port of Napoli in Italy.

[32] On or about May 27, 2010, Intesa granted a loan to the corporate Defendant of a maximum amount of USD 22,500,000, for the purchase of the Defendant Ship.

[33] Pursuant to the Loan Agreement, the Defendant Ship was subject to a marine mortgage in favour of Intesa in the amount of USD 45,000,000. The mortgage was registered with the International Shipping Registry of the Coast Guard of Naples on or about June 25, 2010.

[34] Following the 2008 financial crisis, the Corporate Defendant took steps to restructure its debt. On November 13, 2018, it entered into a “Restructuring Agreement” with its lenders. According to this agreement, certain terms of loans previously granted to the company were amended, including some terms of the Loan Agreement.

[35] On or about July 11, 2019, the Plaintiff purchased Intesa’s interest in the mortgage.

[36] On March 17, 2020, the Italian government published the *Cura Italia* Decree, which suspended repayment obligations for certain eligible companies in light of the COVID-19 pandemic.

[37] The Corporate Defendant asserted that it could enjoy the payment moratorium pursuant to the *Cura Italia* Decree. Accordingly, on March 19, 2020, it served its creditors with a payment moratorium request until December 31, 2020, notwithstanding that the *Cura Italia* Decree only provided for a moratorium until September 30, 2020.



[38] The Corporate Defendant admits that it made payments on the mortgage up to March 16, 2020.

[39] The Plaintiff and the Corporate Defendant began negotiations in April 2020 with the goal of reaching a consensual restructuring to allow the Corporate Defendant to pay its creditors. The Corporate Defendant presented a number of proposals, which the Plaintiff rejected on the basis that they appeared to prioritize payment of the Defendant's equity holders at the expense of its creditors.

[40] On or about October 23, 2020, due to the Defendant's continuing default, the Plaintiff gave notice of termination of the "Restructuring Agreement". As a result, the Defendant's entire outstanding debt to the Plaintiff became due and payable.

[41] After commencement of the within action on April 9, 2021 and service of the Statement of Claim and warrant of arrest upon the Defendant Ship, the Corporate Defendant commenced proceedings before the Court of Naples, Seventh Section ("Court of Naples"), seeking Admission to Composition with Creditors, pursuant to Article 161, sixth paragraph, of the Italian Bankruptcy Law.

[42] On April 28, 2021, the Court of Naples issued an Order admitting the corporate Defendant to the Composition with Creditors. The Order, *inter alia*, provides as follows:

- a) grants the Corporate Defendant a period of 120 days to submit its proposal for composition with creditors or an application for approval of debt restructuring agreements;

- b) appoints a Judicial Commissioner to supervise the corporate Defendant's activities;
- c) prohibits the Corporate Defendant from carrying out "acts of extraordinary administration" until the expiry of the term, "unless authorized by the Court and only if their urgency and usefulness are made object of evidence and justified"; and
- d) prohibits the Corporate Defendant from paying anterior credits.

[43] On or about May 7, 2021, the Corporate Defendant applied to the Superior Court of Quebec sitting in Montreal, under section 46 of the CCAA, for recognition of the Italian Restructuring Proceedings as a "foreign main proceeding". The Plaintiff contested the application.

[44] On the same day, that is May 7, 2021, the Superior Court of Quebec, sitting as a CCAA court, issued an Order, recognizing the proceedings commenced on April 13, 2021 in the Court of Naples, as a "foreign main proceeding", pursuant to the provisions of the CCAA (the "Recognition Order").

[45] The Recognition Order of May 7, 2021 includes the following provisions:

[9] STAYS, RESTRAINS OR PROHIBITS until otherwise ordered by this Court:

- a) any and all proceedings taken or that could be taken against the Italian Debtor under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;
- b) further proceedings in any action, suit or proceeding against the Italian Debtor;

c) the commencement of any action, suit or proceeding against the Italian Debtor;

[10] DECLARES that this Order shall not apply to the proceedings pending before the Federal Court with respect to the Vessel, unless and to the extent that the Federal Court may determine in the exercise of its own jurisdiction and discretion;

[11] AUTHORIZES the Foreign Representative to pursue, continue, appear, defend or intervene in any action, suit or other proceeding to enforce rights in respect of the Italian Debtor's property in Canada, including, in particular, to apply to the Federal Court to obtain the release of the Vessel or such other remedy which the Federal Court may determine in the exercise of its own jurisdiction and discretion;

[12] DECLARES that the order recognizing the Italian Proceedings and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada;

[13] SEEKS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, including the Federal Court, to give effect to the order recognizing the Italian Proceedings and to assist the Italian Debtor and the Foreign Representative and their respective counsel and agents in carrying out the terms said order ...

### III. THE OPINION EVIDENCE

[46] As mentioned above, the parties also filed opinion evidence.

[47] The Defendants filed opinion evidence, that is through the affidavits of Mr. Bruno Inzitari, an Italian lawyer practicing in commercial law, insolvency and corporate restructuring.

[48] According to his affidavits, Mr. Inzitari is a member of the Italian Ministerial Commission on the reform of bankruptcy law. He is also a full professor of Institutions of Private Law at the University of Milano-Biocca of Milan.

[49] In his first affidavit, sworn on May 13, 2021, Mr. Inzitari expressed the opinion that the Corporate Defendant can rely on the *Cura Italia* Decree moratorium, so as to postpone payments on its loans.

[50] Mr. Inzitari also commented on the purpose of the Restructuring Proceedings and opined that the Plaintiff must respect the consequences of the application of Italian law upon the Corporate Defendant. In short, he opined that the stay granted by the Court of Naples applies to the Plaintiff's prosecution of its action in Canada.

[51] Mr. Inzitari noted that the Plaintiff's registered office is in Ireland, and pursuant to an E.U. Regulation, the Plaintiff is subject to the Order of the Court of Naples. He also offered the opinion that it would be illegal for the Corporate Defendant to post security to obtain the release of the Defendant Ship, in light of the Order made by the Court of Naples.

[52] That Order prohibits the payment of "anterior debts", and requires the Corporate Defendant obtain permission from the Court of Naples before it carries out any "acts of extraordinary administration". In Mr. Inzitari's view, it would be extremely unlikely for the Court of Naples to grant such permission, in light of the clear wording of the Order.

[53] For its part, the Plaintiff tendered opinion evidence through the affidavits of Mr. Berrigan, Mr. Berlingieri, Mr. Magrini, and Mr. Rocchio.

[54] Mr. Berlingieri expressed the opinion that the jurisdiction clause contained in the Loan Agreement does not apply to the arrest of the Defendant Ship in Canada, as the holder of the hypothec must appear before the Court in which the Ship is located. He also opined that release of the Defendant Ship from arrest would be extremely harmful, as it exposes the Plaintiff to the risk of not obtaining satisfaction of its claim.

[55] Mr. Magrini expressed the opinion that the Corporate Defendant does not qualify for the payment moratorium provided by the *Cura Italia* Decree because it cannot meet the two requirements for such relief.

[56] According to Mr. Magrini, the *Cura Italia* Decree requires that a debtor seeking the benefit of the payment moratorium must meet two conditions: first, that it be a small or medium-sized enterprise, based in Italy, without debt exposures that are classified as “non-performing”, and second, that the debtor must submit a written moratorium request to its lenders and self-certify that it has suffered a temporary liquidity problem as a direct consequence of the COVID-19 pandemic.

[57] Mr. Magrini tendered the opinion that the Corporate Defendant did not meet the definition of “non-performing exposure” contained in the relevant European Union Regulation and further, that the Corporate Defendant failed to produce the required self-certification.

[58] Further, Mr. Magrini is of the opinion that the forum selection clauses in favour of Italy, contained within the Claims Transfer Agreement and the Restructuring Agreement, do not apply to these proceedings.

[59] The Claims Transfer Agreement involves the Plaintiff and Intesa, but not the Corporate Defendant. In any event, the Plaintiff has not initiated “this case” on the basis of the Restructuring Agreement, which has in any event been terminated, in the opinion of Mr. Magrini.

[60] Finally, Mr. Magrini deposed there are no other maritime liens with priority to the Plaintiff’s claim.

#### IV. THE PARTIES’ SUBMISSIONS

##### A. *The Defendants’ Submissions*

[61] The Defendants seek the following relief upon their Motion:

The Motion is for an Order:

(a) granting leave to the Foreign Representative to intervene in the present proceedings for the purpose of supporting and/or presenting the motion for stay of proceedings and release of the ship;

(b) staying all proceedings in this cause for all legal purposes and for the Release of the Ship MBA GIUSEPPE without bail, the whole with costs.

[62] The Defendants move for the grant of Intervener status for Mr. Bottiglieri, pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), so that he may continue in his role as the “Representative” of the Corporate Defendant, for the purposes of the proceedings before the Court of Naples.

[63] The Defendants argue that pursuant to the jurisdiction clause in the Restructuring Agreement, all disputes arising in respect of the mortgage are to be adjudicated in the Court of Naples.

[64] Next, the Defendants submit that the mortgage debt is not in arrears; it simply cannot be paid at this time due to the operation of the provisions of the “*Cura Italia Decree*” which was enacted by the Government of Italy on March 17, 2020, in response to the COVID-19 pandemic. In the opinion of Mr. Inzitari, the effect of this law is to prohibit the payment of debts during a specified time.

[65] Finally, the Defendants plead that the effect of the Order granted by the Court of Naples, on April 28, 2021, is to prohibit the Corporate Defendant from acts of extraordinary administration and from making payments to anterior creditors. They also plead that this Order forbids creditors from starting or continuing enforcement and precautionary actions against the Defendants’ assets.

[66] Further, they submit that the recognition of that Order by the Superior Court of Quebec, on May 7, 2021, means that the stay of proceedings operates also in Canada and that this Court should recognize that stay, in the interests of comity.

B. *The Plaintiff's Submissions*

[67] The Plaintiff opposes the Motion for Intervener status, on the grounds that such status is unnecessary. It further objects to the release of the Defendant Ship from arrest without the posting of bail, on the grounds that such relief is available only in exceptional circumstances that do not exist here.

[68] The Plaintiff argues that the Defendants cannot raise a jurisdiction argument after they filed a Statement of Defence on behalf of all Defendants, including the Owners of the Defendant Ship. It submits that the Defendants, by doing so, have attorned to the jurisdiction of this Court.

[69] The Plaintiff submits, relying on the affidavit of Mr. Magrini, that the Corporate Defendant does not qualify for protection under the *Cura Italia* Decree. It argues that this is an issue that must be determined by a court of law; the moratorium does not apply automatically.

[70] Further, the Plaintiff submits that the Corporate Defendant invoked insolvency proceedings before the Court of Naples in order to avoid posting security for the release of the Defendant Ship, after the Ship had been arrested in the Port of Quebec.



[71] The Plaintiff also submits that the Corporate Defendant has not shown that it is actually insolvent or faces any financial crisis. It notes that the Corporate Defendant has submitted contradictory evidence, that it is paying its trade obligations as they become due and its ships continue to operate, collecting freight and hires.

[72] As for the Recognition Order issued by the Superior Court of Quebec, the Plaintiff argues that the Quebec Superior Court has no discretion in the matter of recognizing the Order issued by the Court of Naples, in light of the provision of the CCAA.

[73] Thirdly, the Plaintiff argues that this Court is not obliged to accede to the request for assistance, set out in the Recognition Order. It submits that the Defendants' Motion for a stay is governed by section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and that provision grants a discretion to the Court.

[74] The Plaintiff refers to the decisions of the Supreme Court of Canada in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 and *Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951, as well as to the more recent decision of this Court in *RMI Marine Ltd. v. Scotia Tide (Ship)*, 2019 FC 114, as setting out the applicable test for a stay of proceedings in an *in rem* action in Canada.

V. DISCUSSION AND DISPOSITION

A. *Request for Intervener Status*

[75] The first matter for consideration is the Defendants' request for the grant of Intervener status to Mr. Bottiglieri. Intervener status in this Court is governed by Rule 109 which provides as follows:

**Leave to intervene**

**109 (1)** The Court may, on motion, grant leave to any person to intervene in a proceeding.

**Contents of notice of motion**

**(2)** Notice of a motion under subsection (1) shall

**(a)** set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

**(b)** describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

**Directions**

**(3)** In granting a motion under subsection (1), the Court shall give directions regarding.

**Autorisation d'intervenir**

**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

**Avis de requête**

**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

**a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

**b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

**Directives de la Cour**

**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :

- |  |   |
|--|---|
| <b>(a)</b> the service of documents; and   | <b>a)</b> la signification de documents;  |
| <b>(b)</b> the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener. | <b>b)</b> le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre. |

[76] The test upon a Motion for intervener status was considered by the Federal Court of Appeal in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90, as follows:

- 1) Is the proposed intervener directly affected by the outcome?
- 2) Does there exist a justiciable issue and a veritable public interest?
- 3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
- 5) Are the interests of justice better served by the intervention of the proposed third party?
- 6) Can the Court hear and decide the cause on its merits without the proposed intervener?

[77] Mr. Bottiglieri is the principal shareholder of the Corporate Defendant. He is the “designated representative” for the purpose of the reorganization proceedings undertaken in Italy under the Bankruptcy Law of Italy. He is recognized as the “foreign representative” by the Recognition Order granted by the Quebec Superior Court on May 7, 2021.

[78] Mr. Bottiglieri's status as the designated representative, for the purposes of any insolvency proceedings in Italy, as recognized in Canada by the Recognition Order, may require him to provide certain information to the Italian Courts involved in those proceedings.

[79] However, there is no evidence submitted to show that Mr. Bottiglieri is "directly affected" by the conduct of the within action, which is an action to recover a mortgage debt that is in arrears.

[80] In my opinion, while there is a justiciable issue, that is the status of the mortgage debt and its amount, the within action does not raise any "public interest".

[81] As for the third element in *Rothmans, supra*, there is no lack of a reasonable means to submit the question of the interests of the Corporate Defendant to the Court. The Corporate Defendant has filed a defence, in its capacity as the owner of the Defendant Ship. The proposed Intervener is the principal shareholder of that entity.

[82] Mr. Bottiglieri's status as a shareholder of the Corporate Defendant satisfies the fourth element of the test in *Rothman, supra*. His position, as the proposed Intervener, is adequately represented and defended by the Corporate Defendant.

[83] As for the fifth element, I am satisfied that the interests of justice do not require the participation of the proposed Intervener. The interests of justice will be adequately served by the participation of the Corporate Defendant.

[84] Finally, the Court can decide the merits of the within Motion without the grant of party status to the proposed Intervener.

[85] I acknowledge the recent decision in *Gordillo v. Canada (Attorney General)*, 2020 FCA 198, where the Federal Court of Appeal reframed the sixth element of the *Rothmans, supra*, test, at paragraph 10, as follows:

The question is not whether the presence of the intervener is necessary to the proceeding, rather, the question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

[86] In my opinion, the proposed Intervener will not bring “other” different perspectives to the matters raised in the Defendants’ Motion.

[87] Accordingly, the Motion for Intervener status is denied.

B. *Jurisdiction Argument*

[88] The Defendants argue that according to the contractual arrangements with the Plaintiff, all disputes under the Restructuring Agreement are to be determined under Italian law before the Court of Naples in Italy.

[89] This argument is based upon the principle of *lex forum*.

[90] The Plaintiff, as noted above, submits that once the Defendants filed a Statement of Defence on behalf of all Defendants, including the Defendant Ship, they can no longer rely on

the jurisdiction clause in the Restructuring Agreement. It argues that the Defendants have attorned to the jurisdiction of this Court.

[91] In reply, the Defendants say that in their Statement of Defence, they objected to the jurisdiction of this Court. They claim that notwithstanding the entry of a Defence, they can still challenge jurisdiction, relying on the decision of *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*, [2012] 1 S.C.R. 359. Further, they argue that in their Statement of Defence they reserved the right to challenge jurisdiction.

[92] The preamble of the Statement of Defence reads as follows:

As Statement of Defence to Plaintiff's Statement of Claim dated April 9, 2021, and under reserve of its right to seek a Stay of Proceedings in favour of the Italian Insolvency Court in Naples, Italy, Defendant states that ...

[93] I am not persuaded that the Defendants clearly set out a reservation about jurisdiction in their Statement of Defence. The Statement of Defence clearly engages the merits of the Plaintiff's claim, that is an action upon a balance owing in respect of the mortgage upon the Defendant Ship.

[94] According to the decision in *Van Damme v. Gelber* (2013), 363 D.L.R. (4th) 250 (Ont. C.A.), a party attorns to the jurisdiction when it appears in Court and engages upon the merits of the claim in that jurisdiction, instead of simply challenging the jurisdiction of that Court.

[95] In this case, that is what the Defendants did. The jurisdiction argument must fail, in my opinion.

[96] The body of the Defence does not clearly challenge the jurisdiction of this Court. The Defendants do not specifically plead a jurisdiction clause. The Preamble to the Defence is the closest they come to challenging jurisdiction.

[97] The Plaintiff's claim against the Defendant Ship is based upon a mortgage, a claim that falls within the jurisdiction of the Court pursuant to paragraph 22(2)(c) of the *Federal Courts Act, supra*. The Defendant Ship was found within the territorial jurisdiction of the Court, that is at the Port of Quebec, Quebec City.

C. *COVID-19/Cura Italia Decree Argument*

[98] The subject of the action against the Defendant Ship is a ship's mortgage that is in arrears. Relying upon Article 56 of the *Cura Italia Decree*, which suspends the payment of debts during the COVID-19 pandemic, the Defendants plead that the mortgage is not in arrears.

[99] The Defendants plead that by operation of the *Cura Italia Decree*, they are legally barred from making payments on the mortgage. Consequently, there is no default and no basis for the Plaintiff's action.

[100] On the basis of the expert opinion provided by Mr. Magrini, the corporate Defendant does not qualify for protection under that law. I agree with the submissions of the Plaintiff that

the interpretation and application of the *Cura Italia* Decree to the Defendants is a question of law which remains to be determined.

[101] The Plaintiff, relying on the expert opinion provided by Mr. Magrini, argues that the Corporate Defendant does not qualify for protection under that law.

[102] In Canada, foreign law is a matter of fact to be determined upon evidence. In this regard, I refer to the recent decision of the Federal Court of Appeal in *Hapag-Lloyd AG v. Iamgold Corporation*, 2021 FCA 110, at paragraph 49: “There is no dispute between the parties that foreign law must be proven as fact”.

[103] In this Motion, the parties filed expert evidence by way of affidavits. The deponents of those affidavits gave their opinions as to the meaning and effect of the *Cura Italia* Decree. None of the deponents were cross-examined.

[104] In these circumstances, I find that there is insufficient evidence to permit a finding as to the interpretation and application of the *Cura Italia* Decree to the issue before me, that is a Motion for a stay of *in rem* proceedings in Canada and the release of the Defendant Ship from arrest without the provision of security.

[105] I decline to make a finding in respect of the *Cura Italia* Decree.



D. *Recognition Order Argument*

[106] The remaining issue is the relevance of the insolvency proceedings initiated before the Court of Naples.

[107] The proceedings before the Court of Naples eventually led to the issuance of the Recognition Order by the Superior Court of Quebec. The Defendants plead that broad questions of policy about the facilitation of international commerce and trade, in the context of a restructuring process, weigh in favour of this Court providing assistance to that process, by granting a stay of the within action, even if it is not strictly required to do so.

[108] The Defendants, relying on the Order issued by the Court of Naples, as recognized by the Superior Court of Quebec, argue that the effect of these Orders is to stay any proceedings against them.

[109] For its part, the Plaintiff submits that notwithstanding the Order issued by the Court of Naples, the evidence is far from clear that the Corporate Defendant is indeed insolvent and that the inference can be drawn that the proceedings in Naples were instituted solely for the purpose of allowing the Corporate Defendant to avoid posting security for the release of the Defendant Ship from arrest in Canada.

[110] In my opinion, it is not necessary for me to wade into these broad arguments. In *Holt*, *supra*, the Supreme Court of Canada affirmed the right of the Federal Court to act according to

its *in rem* jurisdiction, in a case involving a bankruptcy in a foreign jurisdiction, with international implications. In *Holt, supra*, the Belgian trustee in bankruptcy sought a stay of proceedings undertaken in the Federal Court where a ship was arrested *in rem* proceedings and was ultimately sold.

[111] I note that the Recognition Order specifically excludes this Court and this action from its purview, although that Order seeks the assistance of this Court in giving effect to it, including assistance to the Defendants and their respective counsel and agents in carrying out its terms. While, generally, the principle of comity encourages a court to recognize and enforce the Orders of another court, the recognition is not automatic.

[112] I refer to the decision in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, citing Justice Estey's concurring reasons in *Spencer v. R.*, [1985] 2 S.C.R. 278 at 283, in which he adopted the following passage from *Hilton v. Guyot*, 159 US 113 (1985) at 163:

“Comity” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

[113] In my opinion, this Court is not bound to follow the Orders issued by the Court of Naples and the Quebec Superior Court, sitting as a CCAA court, in deciding the Defendants' Motion.

[114] There is no provision in the CCAA or the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”), mandating this Court to stay its proceedings in favour of the insolvency proceedings undertaken in Naples.

[115] The Plaintiff argues that the CCAA, following amendments in 2005, does not require the Federal Court to respond to a recognition order issued by a provincial Superior Court. The Plaintiff submits that provincial Superior Courts lack discretion to refuse recognition of an Order issued by a foreign Court but that such discretion has not been removed from the Federal Court.

[116] The Defendants cast their arguments in terms of pleading that the Plaintiff cannot meet the test for exemption from the initial stay Order granted by the Court of Naples, and refer to the recent decision of this Court where Justice Southcott granted a stay in a situation involving the CCAA; see the decision in *RMI Marine Limited v. Scotia Tide (Ship)*, 2019 FC 114.

[117] In my opinion, these arguments, while interesting, are not dispositive of this Motion.

[118] The Recognition Order specifically and clearly says that “this Order shall not apply to the proceedings pending before the Federal Court with respect to the Vessel ...”.

[119] In my opinion, in the face of the clear language in the Recognition Order and the direction from the Supreme Court of Canada in *Holt, supra*, about the right of the Federal Court to control its process, the Recognition Order is irrelevant to the issue raised in the Defendants’ Motion.

[120] The undisputed fact is that the Plaintiff commenced an action *in rem* against the Defendant Ship, in respect of a ship's mortgage that is allegedly in arrears.

[121] An action in respect of a ship's mortgage is clearly within the *in rem* jurisdiction of this Court; see paragraph 22(2)(b) and subsections 43(2) and (3) of the *Federal Courts Act, supra*.

[122] The Plaintiff arrested the Defendant Ship and is entitled to proceed with its action. The merits and quantum of its claim are not at issue in the Motion. Should a Court later determine that the Defendant Ship should not have been arrested, the Plaintiff will answer to any judgment in that regard.

E. *Stay Motion and the Test*

[123] At the moment, however, the issue is whether the Defendants should succeed upon their Motion for a stay of the action and the release of the Defendant Ship from arrest without posting bail.

[124] Upon consideration of the evidence submitted and the submissions of the parties, as well as the relevant jurisprudence, and the discretion afforded by paragraph 50(1)(b) of the *Federal Courts Act, supra*, I am not satisfied that a stay should be granted and that part of the Motion is dismissed.

[125] Neither am I satisfied that the general rule about posting security for the release of a ship from arrest should be ignored. The Motion for the release of the Defendant Ship from arrest without bail is also dismissed.

[126] The Defendants' Motion for a stay is governed by section 50 of the *Federal Courts Act*, *supra*. In my opinion, the Orders made in Italy and Montreal have little relevance.

[127] Subsection 50(1) provides as follows :

**Stay of proceedings  
authorized**

**50 (1)** The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

**(a)** on the ground that the claim is being proceeded with in another court or jurisdiction; or

**(b)** where for any other reason it is in the interest of justice that the proceedings be stayed.

**Suspension d'instance  
authorized**

**50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

**a)** au motif que la demande est en instance devant un autre tribunal;

**b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[128] In the present, case, there is no evidence that the claim relative to the mortgage upon the Defendant Ship is "being proceeded with in another court or jurisdiction", and paragraph 50 (!) (a) does not apply.

[129] The Defendants' Motion for a stay falls to be determined under paragraph 50(1)(b) of the *Federal Courts Act, supra*, which provides as follows:

<b>Stay of proceedings authorized</b>	<b>Suspension d'instance</b>
<b>50 (1)</b> The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	<b>50 (1)</b> La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
...	...
<b>(b)</b> where for any other reason it is in the interest of justice that the proceedings be stayed.	<b>b)</b> lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[130] Pursuant to paragraph 50(1)(b), the Court enjoys a discretion. That discretion is to be exercised judicially, with regard to the relevant facts and the applicable jurisprudence.

[131] The test upon this Motion is the two-part test set out in *Mon-Oil Ltd. v. R.* (1989), 26 C.P.R. (3d) 379 at 380 (Fed. T.D.). That test requires the Court to consider two questions, that is will the continuation of the action cause prejudice to the Defendants, and will the stay cause an injustice to the Plaintiff.

[132] In *Holt, supra*, the Supreme Court of Canada recognized the discretion of the Federal Court to decline a stay of proceedings in the face of orders of the Canadian bankruptcy court recognizing a Belgian bankruptcy order.

[133] At paragraph 91 of the decision in *Holt, supra*, the Supreme Court provided a test for determining whether the Federal Court should exercise its discretion under section 50 of the *Federal Courts Act, supra*:

The “natural forum” is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigation in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[134] The subject of the within action is a ship’s mortgage upon the Defendant Ship. It is an action *in rem* and the Ship itself is a Defendant. I refer to the observations of Justice Harington in *Quin-Sea Fisheries Ltd. v. “Broadbill I” (The)*, 2013 FC 575, as follow:

[9] [The defendants] argue that there is no need to arrest the ship because their claim is already secured by a mortgage. I can dismiss this point out of hand. A mortgage creditor is entitled to arrest the ship for alleged breach of the mortgage agreement. The defendants cannot dictate to the plaintiff how it should run its case.

...

[15] Nevertheless, I cannot resist raising the possibility that the action *in rem* is not a mere matter of procedure, but rather is a matter of substance which goes to the very essence of admiralty law. ...

[135] As acknowledged by the Supreme Court of Canada in *Holt, supra*, there is no jurisdictional barrier to the continuation of the present action. It is a “true” maritime claim and the Plaintiff is entitled to pursue its claim in the forum of its choice.

[136] As noted above, the test in *Mon-Oil, supra*, requires the Court to consider two questions.

[137] In my opinion, the first question must be answered in the negative. Continuation of this action will not cause prejudice to the Defendants. Upon a trial, with evidence, the Defendants can answer the Plaintiff's allegations. If the evidence shows those allegations to be unfounded, judgment will issue accordingly.

[138] On the other hand, the second question requires an affirmative answer.

[139] Granting a stay will cause grave prejudice to the Plaintiff.

[140] The Plaintiff commenced an action *in rem* against the Defendant Ship. The Plaintiff is entitled to pursue its action to trial and judgment. The defences mounted to date turn upon questions of mixed fact and law.

[141] The Plaintiff was entitled to arrest the Defendant Ship, as security for its claim. Prejudice would result if the stay were granted and the Defendant Ship released without security.

[142] In these circumstances, the interests of justice weigh in favour of denying the Motion for a stay.



F. *Request for Release of the Defendant Ship without Security*

[143] The Defendants also seek the release of the Defendant Ship from arrest without providing security. They argue that the terms of the Order of the Court of Naples prohibit them from paying creditors and that posting security would infringe that Order.

[144] I disagree with this proposition.

[145] First, according to the evidence set out in the May 12, 2021 affidavit of Mr. Bottiglieri, the corporate Defendant has been paying its unsecured creditors.

[146] Second, in my opinion, posting security is not equivalent to paying a debt. In that regard, I refer to the decision in *Child & Grower Piano Co. v. Gambrel*, [1933] 2 W.W.R. 273 (Sask. C.A.), in which Justice Martin stated, at pages 281-82:

In *Stroud's Judicial Dictionary*, vol. 3, p. 1815, it is stated that a security is "anything that makes the money more assured in its payment or more readily recoverable." Security for a debt, in the ordinary meaning of the term, carries with it the idea of something or somebody to which, or to whom, the creditor can resort in order to aid him in realizing or recovering the debt, in case the debtor fails to pay; the word implies something in addition to the mere obligation of the debtor. When a person buys goods from a merchant, his promise to pay, whether express or implied, is not security, nor does the promise to pay become security merely because it is reduced to writing.

[147] In any event, the release of ship from arrest without providing security is highly unusual.

I refer to the comments of Justice MacKay in *Argosy Seafoods Ltd. v. Atlantic Bounty (The)* (1991), 45 F.T.R. 114 (Fed. T.D.), at page 120:

... The general purpose of an action *in rem* in maritime matters is to provide security for claims of a creditor who has a claim ultimately attaching to a ship or its cargo. The claim, if action is initiated by the creditor, may at his option lead to arrest of the vessel to provide security. Once arrested the general practice is to accept security to take the place of the vessel, the *rem*, in an amount equal to the appraised value of the vessel or, if the claims of the plaintiff be less than that, adequate to meet those claims in the event that those may be successfully established at trial. Absent the consent of the arresting party, the circumstances in which that general practice would be varied must be quite extraordinary, otherwise the underlying purpose of an action *in rem* may be defeated. ...

## VI. CONCLUSION

[148] In the result, the Defendants' Motion is dismissed in its totality.

[149] The Plaintiff does not seek costs relative to the Motion requesting Intervener status for the Foreign Representative. However, it seeks costs on the balance of the Motion.

[150] If the parties cannot agree, brief submissions can be made, not exceeding four pages, such submissions to be served and filed by the Plaintiff within 10 days of the date of the Order. Reply submissions on behalf of the Defendants will be served and filed within 10 days of receipt of the Plaintiff's submissions.

**ORDER in T-594-21**

**THIS COURT'S ORDER is that**

1. the Motion is dismissed in its entirety;
2. the Plaintiff does not seek costs relative to the Motion requesting Intervener status for the Foreign Representative, but otherwise seeks costs and is granted costs for the balance of the Motion;
3. if the parties cannot agree, brief submissions can be made, not exceeding four pages, such submissions to be served and filed by the Plaintiff within 10 days of the date of the Order. Reply submissions on behalf of the Defendants will be served and filed within 10 days of receipt of the Plaintiff's submissions.

“E. Heneghan”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-594-21

**STYLE OF CAUSE:** DAVY GLOBAL FUND MANAGEMENT LIMITED v  
MICHELE BOTTIGLIERI ARMATORE S.p.A., THE  
SHIP *MBA GIUSEPPE*, THE OWNERS AND ALL  
OTHERS INTERESTED IN THE SHIP *MBA  
GIUSEPPE*

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE FROM  
MONTREAL, QUEBEC CITY, QUEBEC AND ST.  
JOHN'S, NEWFOUNDLAND AND LABRADOR

**DATE OF HEARING:** MAY 28, 2021

**REASONS AND ORDER:** HENEGHAN J.

**DATED:** JULY 26, 2021

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