Date: 20071130

Docket: T-1796-07

Citation: 2007 FC 1257

Ottawa, Ontario, November 30, 2007

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM* AGAINST A VESSEL BEARING HULL NO. QFY10703E709 AND HER SISTER-SHIP, A VESSEL BEARING HULL NO. QFY96003E507 and *IN PERSONAM* AGAINST SPLASH HOLDINGS LTD.

BETWEEN:

F.C. YACHTS LTD.

Plaintiff

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL BEARING HULL NO. QFY10703E709 AND HER SISTER-SHIP, A VESSEL BEARING HULL NO. QFY96003E507 and SPLASH HOLDINGS LTD.

Defendants

REASONS FOR ORDER AND ORDER

[1] On the face of it, this is a most peculiar action. A shipowner has arrested its own ship in order to secure a claim against the mortgage holder, which it characterizes as the "beneficial owner". The mortgage holder submits that this cannot be done, that it is not the beneficial owner, and so has moved to have the arrest set aside. I have come to the conclusion that the mortgage holder is right.

[2] The plaintiff, F.C. Yachts Ltd., is building two yachts for the account of the corporate defendant Splash Holdings Ltd. Splash has allegedly failed to make progress payments due on the second. This gives rise to an action *in personam* against it which is within the jurisdiction of this Court as, to use the words of s. 22(2)(*n*) of the *Federal Courts Act*, it is a claim "arising out of a contract relating to the construction, repair or equipping of a ship."

[3] The first yacht, bearing hull number QFY96003E507, commonly described at "the 100", as it is 100 feet in length, is at an advanced stage of construction and at the present time is far more valuable than the second, "the 107". F.C. Yachts has taken an action *in rem* against both yachts. It has arrested the 100 as a sister-ship to the 107, the ship which is the subject of the action. The contractual documents (one distinct set for each yacht) describe F.C. Yachts as the owner. It is shown as such in the public records maintained by the Registrar of Shipping. However, upon completion of the contract and against payment, it is obliged to deliver the yacht and transfer title to Splash. Splash in turn was given certain security rights against the yachts in the event of a default during construction by F.C. Yachts as builder. It holds separate builder's mortgages against each.

[4] If Splash were the recorded owner of the yachts (a ship under construction is publicly "recorded" rather than "registered"), F.C. Yachts would have had an action *in rem* against the 107 and could have arrested the 100 as a sister-ship. However, it must live with the contracts it has made and, in my opinion, cannot proceed *in rem* against either. Although ownership has its advantages, on the facts of this case, F.C. Yacht would have been better off holding a builder's mortgage, or even holding no security at all.

[5] The plaintiff rests its claim on s. 43 of the *Federal Courts Act* which deals with the Court's admiralty jurisdiction *in personam* and *in rem*. It is the Court's *in rem* jurisdiction which is in dispute here. Section 43(2) provides that jurisdiction may be exercised *in rem* against the ship that is the subject of the action. Notwithstanding that general wording, it is well established that a statutory right *in rem*, unaccompanied by a maritime lien, does not lie unless the personal liability of the owner of the ship is engaged (*Westcan Stevedoring Ltd. v. Armar (The)*, [1973] F.C.J. No. 152, [1973] F.C. 1232, *Mount Royal/Walsh Inc. v. Jensen Star (The)(C.A.)*, [1990] 1 F.C. 199, 99 N.R. 42 (F.C.A.), *Maritima De Ecologia, S.A. de C.V. v. Maersk Defender (The)*, [2007] F.C.J. No. 709, 366 N.R. 162). The question becomes: Who is the owner?

[6] Sections 43(3) and 43(8) go on to provide:

43. (3) Despite subsection (2), the jurisdiction conferred on the Federal 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), elle 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.

(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.	(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.

The modified question becomes: Who is the beneficial owner?

[7] Since a claim under a shipbuilding contract does not carry with it a maritime lien, it is a requirement of s. 43(3) that in order to proceed *in rem* there must have been no change in beneficial ownership between the time the cause of action arose and the time the action was instituted. In this case, there has been no change in either the legal or beneficial ownership, at any time.

[8] In order to ascertain whether Splash is the beneficial owner, recourse must be had to the shipbuilding contracts. Splash relies on rules 221 and 488 of the *Federal Courts Rules*. To the extent the motion is advanced on the ground that the Statement of Claim discloses no reasonable cause of action *in rem*, no evidence is to be heard. Evidence is permitted, however, if moved on the ground that the action is, for example, vexatious or is an abuse of process. Certainly no bad faith has been alleged. However, rule 488 provides that when a ship, which is not the subject of the action, has been arrested, the owner or any other person interested therein (i.e. the mortgage holder) may bring in a motion for her release. Motions are usually accompanied by affidavits, and so I consider the affidavits filed by both parties to be relevant.

[9] An arrest of maritime property, such as ship or cargo, interrupts commerce. The modalities thereof should be dealt with on an urgent basis. Part 13 of the *Federal Courts Rules*, beginning at rule 475, contemplates other motions as well, which could lead to the fixing of bail, or to the release of arrested property at any time, with or without bail. This is not to say that all matters dealing with the arrest of a *res*, including the setting aside of the warrant, can be dealt with at the outset of proceedings. There may be instances where the facts are unclear, or a legal proposition is so inextricably tied in with those facts that a decision cannot be made on a summary basis. See, for instance, the decision of the Ontario Court of Appeal in *Law Society of Upper Canada v. Ernst & Young* (2003), 65 O.R. (f3d) 577, 222 D.L.R. (4th) 577. However this is not one of those cases.

[10] Ownership of a ship during construction is, as between the builder and the purchaser, a matter of freedom of contract. As the parties have clearly expressed their intention, it is not necessary to refer to either the (U.K.) *Sale of Goods Act, 1893* as being part of Canadian maritime law (*ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641), or the *British Columbia Sale of Goods Act* as the contracts are to be interpreted "under the laws of the province of British Columbia and the laws of Canada applicable therein."

[11] Two cases which make the point are *Sir James Laing & Sons Limited v. Barclay, Curle & Co., Limited*, [1908] A.C. 35, a decision of the House of Lords on appeal from the Court of Session, Scotland, and *Re Blyth Shipbuilding and Dry Docks Company Limited, Forster v. Blyth Shipbuilding and Dry Docks Company Limited*, [1926] 1 Ch. 494 (C.A.). In the *Sir James Laing*, the contract did not specifically deal with title. However, there were provisions that the ship would not be delivered and finally accepted until conditions of the contract had been fulfilled and after sea

going trials. Then, against a bank guarantee for the final payment instalment, the "usual certificates" would be handed over. It as held that it was the intention of the parties that property not pass until delivery. As Lord Loreburn LC said at page 43:

> I think the contract was for a completed ship, and the risk lay upon the builders until delivery, and there was no intention to make delivery or depart with the property until the vessel was completed.

[12] In *Re Blyth*, like *Sir James Laing*, the purchase price was paid by instalments. However, the contract specifically provided that from payment by the purchasers of the first instalment, the ship and all materials appropriated for her would, subject to the builders lien, become and remain the absolute property of the purchasers. It was held that the property in the uncompleted ship had passed to the purchasers. See Halsbury's Laws of England, 4th ed., vol. (43(1)), page 113, para. 159.

[13] The 107 contract which includes a yacht construction agreement, and a security agreement perfected by a builders' mortgage, calls for instalment payments during the course of construction and for delivery after sea trials. At delivery the builder is required to deliver, among other things, a bill of sale. The contract specifically provides that the builder hold title during construction; title and risk only to pass upon delivery. In turn, F.C. Yachts as owner granted Splash the aforesaid builder's mortgage. In my opinion, Splash Holdings' interest in the 107 is exactly what the contract says it is. It is the mortgagee. It is not a beneficial owner within the meaning of s. 43(3) of the *Federal Courts Act*. No trust has been created.

[14] It is open to argument that *Sir James Laing* and *Re Blyth* are distinguishable because they did not plumb distinctions between legal and beneficial ownership. Indeed, unless facts are alleged

to the contrary, one would assume the registered owner has both legal and beneficial title. Although it appears that there was some advantage from a Goods and Services Tax point of view for the foreign purchaser only to take title after delivery outside Canada, it does not follow that F.C. Yachts was holding title for the benefit of the purchaser. It was holding title for its own benefit. Although it was under a contractual obligation to deliver a bill of sale once Splash satisfied all its own obligations, Splash had no real interest in the ship any more than the interest of a purchaser, without possession, of an existing ship under a contract of sale which provides that tile is only to pass upon delivery.

[15] The case most on point is the Federal Court of Appeal's decision in the *Jensen Star* above. The plaintiff had a series of claims under section 22(2)(*n*) of the Act arising out of contracts relating to the repair or equipping of a ship, and so did not benefit from a maritime lien. Between the time some of the causes of action arose and the time the action was instituted, the shipowner, Jensen Shipping Limited, obtained fresh financing and sold the ship to a newly formed company, Jensen Holdings Limited. There was some, but not a complete, community of shareholding. Jensen Holdings in turn bareboat chartered the ship back to Jensen Shipping. Although the shipowner had an action *in personam* against Jensen Shipping Limited with respect to the pre-sale invoices, its action *in rem* was lost. Although Jensen Shipping was both the legal and beneficial owner of the *Jensen Star* prior to the sale, it did not continue as beneficial owner because it was the bareboat or demise charterer.

[16] Mr. Justice Marceau speaking for the Court of Appeal said at pages 209 and 210:

> The problem, however, is that I simply do not see how a court could suppose that Parliament may have meant to include a demise charterer in the expression "beneficial owner" as it appears in subsection 43(3). Whatever be the meaning of the qualifying term "beneficial", the word owner can only normally be used in reference to title in the *res* itself, a title characterized essentially by the right to dispose of the *res*. The French corresponding word "propriétaire" is equally clear in that regard. These words are clearly inapt to describe the possession of a demise charterer. In my view, the expression "beneficial owner" was chosen to serve as an instruction, in a system of registration of ownership rights, to look beyond the register in searching for the relevant person. But such search cannot go so far as to encompass a demise charterer who has no equitable or proprietary interest which could burden the title of the registered owner. As I see it, the expression "beneficial owner" serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative or an agent. The French corresponding expression "véritable propriétaire" (as found in the 1985 revision, R.S.C., 1985, c. F-7) leaves no doubt to that effect.

[17] Certainly, a party who has a contractual right to purchase a ship in the future, assuming all conditions are met, cannot be considered an owner. While sitting as a trial judge Mr. Justice Marceau had earlier held that the purchaser of a ship under a contract which provided that title would pass upon delivery was not the owner thereof (*Magnolia Ocean Shipping Corporation v. Soledad Maria (The)*, T-744-81, 30 April 1981).

[18] The distinction between a statutory right *in rem*, which requires beneficial ownership at two points of time, and a maritime lien, which does not, is a matter of history. For the most part maritime liens precede the (UK) *Admiralty Acts* of 1840 and 1861. Claims thereafter usually only benefited from a statutory right *in rem*, which more recently has been extended to sister-ships. In the *Jensen Star*, Mr. Justice Marceau referred to *Coastal Equipment Agencies Ltd. v. Comer (The)*, [1970] Ex. C.R. 13, where Mr. Justice Noël set out much of that history. See also *Anglo-Soviet*

Shipping Company v. Beldis (The) (1936), 53 Ll. L. Rep. 255 (C.A.) which was framed as an action *in* rem against a sister-ship.

[19] I agree with F.C. Yachts' proposition that registration, or in this case "recording", is not conclusive and that the Court should enquire into all the circumstances affecting the right of property in the yachts. However the case of *Robillard v. St. Roch (The)*, (1921) 21 Ex. C.R. 132, illustrates the type of circumstance in which one may be the beneficial owner of a ship that is registered in the name of another. In that case, the sale of the ship was set aside as the purchaser knew the vendor, the registered owner, was committing a fraud on the real owner. The trial judge found that the registered owners were only nominees or trustees or "prête-noms" holding title for the benefit of the real owner. Favourable references were made to that case in *Antares Shipping Corp. v. Capricorn (The)*, [1980] 1 S.C.R. 553, 111 D.L.R. (3d) 289. F.C. Yachts is in no sense fronting for Splash.

[20] Although there are slight differences in language, the contract with respect to the sister-ship, the 100, is to the same effect. F.C. Yachts is the legal and beneficial owner of both ships and so cannot arrest either. Consequently, it is not necessary for me to consider Splash's other argument which is that in order to arrest a sister-ship, the beneficial owner thereof must be the registered owner of the ship which is the subject of the action. It relies on the decision of Mr. Justice Rothstein, as he then was, in *Hollandcshe Aannaming Maatschappij v. Ryan Leet (The)*, [1997] F.C.J. No. 1098, [1997] 135 F.T.R. 67. Prothonotary Hargrave distinguished the *Ryan Leet* in *Norcan Electrical Systems Ltd. (c.o.b. Feeding Systems Canada) v. Feeding Systems A/S*, [2003] 4 F.C. 938, [2003] F.C.J. No. 904 and in *Royal Bank of Scotland plc v. Golden Trinity (The)*, [2004]

F.C.J. No. 992, 254 F.T.R.1, on the grounds that there is a significant difference between the English and French versions of section 43(8), and that only the English version was apparently put before Mr. Justice Rothstein.

[21] As vexing as subsection 43(8) of the *Federal Courts Act* is, more particularly in the placement of "beneficially" as opposed to "veritable", I need not interpret it in order to reach a conclusion. It is a problem best left for another day.

[22] For these reasons, the *in rem* portions of the statement of Claim are struck, the warrant of arrest set aside, and the 100 released from arrest subject to giving prior notice to those who have filed caveats, the whole with costs. Such other remedies as F.C. Yachts may have are not before me and are not affected by this decision.

ORDER

UPON MOTION by Splash Holdings Ltd.;

THIS COURT ORDERS that:

1. The style of cause is hereby amended to read:

BETWEEN:

F.C. YACHTS LTD.

Plaintiff

and

SPLASH HOLDINGS LTD.

Defendant

2. Paragraph 7 of the Further Amended Statement of Claim is struck, without leave to amend.
3. The action *in rem* is dismissed in its entirety as against both ships.
4. The warrant for the arrest of the ship bearing hull number QFY96003E507 is set aside, and the ship is freed from arrest subject to giving notice to those who have filed caveat releases pursuant to rule 493(2).
5. Costs of the motion in its favour fixed in the amount of $2,500, payable in any event of the cause.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1796-07
STYLE OF CAUSE:	F.C. YACHTS LTD. v. THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL BEARING HULL NO. QFY10703E709 et al.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	November 19, 2007
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DATED:	November 30, 2007

APPEARANCES:

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Mr. Michael J. Bird Mr. James D. Fraser	FOR THE DEFENDANT Splash Holdings Ltd.

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