

Federal Court



Cour fédérale

Date: 20131219

Docket: T-484-11

Citation: 2013 FC 1264

ACTION IN REM AGAINST THE SHIP “MCP ALTONA” AND IN PERSONAM

BETWEEN:

CAMECO CORPORATION

Plaintiff

and

**THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP “MCP ALTONA”,
THE SHIP “MCP ALTONA”,
MS ‘MCP ALTONA’ GMBH & CO KG,
HARTMANN SCHIFFAHRTS GMBH & CO,
HARTMANN SHIPPING ASIA PTE LTD.,
FRASER SURREY DOCKS LP AND
PACIFIC RIM STEVEDORING LTD.**

Defendants

REASONS FOR ASSESSMENT OF COSTS IN RESPECT TO THE SHERIFF’S COSTS

Johanne Parent, Assessment Officer

[1] At the end of the Reasons for Assessment of the Sheriff’s Costs issued October 3, 2012, I responded to the request of counsels for the Caveator HSH Nordbank AG [Nordbank] and Cameco Corporation [Cameco] that the matter of costs with respect to the assessment be addressed. In the final paragraph of the Reasons, I stated that said costs could be dealt with, if they still so wished, once the Certificate of Costs had been issued, and parties had had an opportunity to file

representations. On June 18, 2013, the Bill of Costs of the Caveator, HSH Nordbank AG was filed and directions were issued indicating the timeframe for the parties to serve and file their representations.

[2] Through a review of all the steps taken towards the assessment of the Sheriff's Bill of Costs, counsel for Nordbank contends in his Written Representations that the approach taken by Cameco resulted in a long and costly process. He further argues that Tariff B of the *Federal Courts Rules* "deal with typical actions and applications, and not a matter such as assessments of the costs of the Marshall..." Referring to the decision in *Cosorzio de Prociutto di Parma v Maple Leaf Meats Inc.* 2002 FCA 417, it is submitted that "the appropriate costs award in a matter such as this is not achieved by applying items in the tariff, but rather looking at the actual legal costs of the parties". It is further suggested that a lump sum award of \$15,000.00 for fees, plus disbursements and taxes would be appropriate.

[3] In response, counsel for Cameco submits that no costs should be awarded, or in the alternative, they should be greatly reduced and in accordance with the Tariff. In support of this contention, it is first argued that paragraph 3 of the Court Order of August 4, 2011 already considered that the costs of the Sheriff would have to be assessed and, that it was taken "into consideration when determining the fee to be paid to the Sheriff as part of his commission". Secondly, it is argued that there is no direct order of the Court awarding costs to either party with regard to the costs of the assessment of the Sheriff's costs. Lastly, it is contended that pursuant to Rule 408(3), it would be appropriate for the assessment officer to refuse to allow the costs of the assessment to either party considering that the costs sought by the Sheriff in his Bill of Costs were

substantially inflated, thereby making the assessment necessary and that Cameco was in effect the successful party in the process. With regards to having the assessment officer granting a lump sum award of costs, it is contended that only a Judge of the Court has the required authority and that no such award of costs had been awarded by the Court.

[4] In rebuttal, counsel for Nordbank contends that:

The Order of August 4, 2011 was handed down before the Sheriff had begun his work, it clearly establishes that the Sheriff shall be paid 1.75% of the gross total sale price as his fee for selling the “MCP Altona” (the “Vessel”) and associated work. The dispute between Cameco and the Sheriff/Bank was over the Sheriff’s disbursements, not fees. Of course, in August 2011, no one could conceive that the assessment of the Sheriff’s disbursements could lead to such a protracted and costly legal battle. The Order of August 4, 2011 at paragraph 3 provided that the legal costs of the Sheriff would be a separate cost recoverable as “Sheriff’s costs”. That Order provides authority for the Sheriff, as an officer of the Court, to recover his actual legal costs.” (Nordbank’s underlines)

Regarding Cameco’s second argument that there is no Order for the Sheriff to have its costs of the assessment, Nordbank contends that the Order of August 4, 2011 provides for the recovery of the Sheriff’s legal costs as in the “normal course, costs follow the event” (*Johnson & Johnson Inc. v Boston Scientific Ltd.* 2008 FC 817). It is argued that since Cameco initially opposed all of the disbursements paid to Hartman and only made concessions throughout a lengthy assessment process, Cameco would have had had a reasonable argument if they had offered to settle the contested disbursements and that the amount allowed would have been less than their offer. On the argument with regard to Rule 408(3), counsel submits that “the right to refuse costs of a successful party should be restricted to matters of improper or outrageous conduct”. It is further contended that despite the number of claimants to the proceeds of the sale, only Cameco “voluntarily chose to contest the assessment, therefore, taking up substantial court time and creating substantial legal

costs for both themselves and for the Sheriff and the Bank”. The costs claimed by the Sheriff were reduced in the assessment process but there was never a settlement offer as to the disbursements, thus preventing Cameco to trigger costs consequences. It is further contended that it is “erroneous to conclude that the costs claimed by the Sheriff were inflated” as the Sheriff’s disbursements were made in good faith and paid by the Bank on behalf of the Sheriff. Lastly, on the quantum, counsel for Nordbank submits that “based upon the Order of August 4, 2011, an assessment pursuant to the Tariff is not necessary”.

[5] This matter is one of many actions concerning the Ship “*MCP Altona*” [the Ship] commenced in the Federal Court. The motion for the judicial sale of the Ship was filed by Nordbank in this Court file. The Sale Order that ensued was issued by the Court on August 4, 2011.

Paragraphs 3 and 12 of the Sale Order provided that:

3. Mr. Nick Bailey of Howe Robinson & Company Ltd. (“Howe”) shall be appointed as an acting Sheriff of this Court (hereinafter the Sheriff). The Sheriff’s commission on sale shall be 1.75 percent of the gross total sale price, which shall include payment for any brokering services provided by Howe or other agency in respect of the sale. Included in the aforesaid commission shall be the services of the Sheriff in contacting any prospective or potential purchasers, in arranging physical inspection of the Vessel, in liaising with the shipowners or managers for the ship-board attendances by potential purchasers, the negotiation of the purchase price, dealing with the deposit and the balance of the purchase price, instructing lawyers and assessing costs. The Sheriff may, in the event a situation arises in which he reasonably feels in need of independent legal advice, retain legal counsel, the cost of which shall be included as a Sheriff’s cost, payable from the sale proceeds. In the event that the Sheriff has any uncertainty as to what items are covered by the commission, he has liberty to apply to the Court on short notice for directions in that regard.

...

12. All reasonable expenses of advertisement of the sale, agency fees, insurances and all other costs, disbursements, commissions and other expenses such as costs of the officers and crew, insurance, costs of berthage, security, reproduction of plans, photographs, courier services, survey reports, etc., necessary or inherent to giving effect to this order and the commission of sale and for the preservation, safekeeping or maintenance of the Vessel incurred by the Sheriff and/or funded by or on behalf of the Bank from August 3, 2011 to the date of sale shall be treated as Sheriff's costs payable immediately after taxation by an assessment officer in priority to all other claims from the proceeds of the sale. Notwithstanding *Federal Courts Rules* 490(5) and 490(6), the Sheriff's account shall be submitted directly to the assessment officer who shall promptly examine it and who shall issue a certificate, authorizing all or such portion of the account as he or she deems appropriate, whereupon the amount set out in the certificate shall be paid out to the Sheriff or as the Sheriff shall direct, out of the proceeds of sale in priority to all other claims.

[6] A copy of the Sheriff's Bill of Costs, showing copies of the invoices for the disbursements incurred by and on behalf of the Sheriff by Nordbank as well as expenses related to the sale of the Ship paid by the Sheriff's company or on behalf of his company, is found in the Affidavit of Nicholas Bailey, shipbroker with Howe Robinson & Co. Ltd and acting Sheriff, sworn December 9, 2011 and filed with the Court on December 13, 2011. In accordance with paragraph 12 of the Sale Order, all expenses submitted in the above mentioned Sheriff's Bill of Costs incurred for the preservation, safekeeping or maintenance of the Vessel have been assessed, to be paid out from the sale proceeds and, as such, Certificates of Assessment of the Sheriff's Costs were issued on December 22, 2011, February 23, 2012 and October 3, 2012. As mentioned in paragraph 1 above, the only issue left outstanding is the costs of the assessment of the Sheriff's Bill of Costs. As previously mentioned, counsel for Nordbank submitted a Bill of Costs on June 18, 2013 for the assessment of their costs with regard to the assessment of the Sheriff's costs, reflecting the steps that were taken throughout the assessment process.

[7] My reading of paragraphs 3 and 12 of the August 4, 2011 Order leads me to understand the following: (1) The Sheriff's commission on the sale of the Altona included instruction to lawyers and the assessment of costs; (2) The Sheriff could, in the event a situation arose in which he reasonably felt in need of independent legal advice, retain legal counsel; (3) The cost of the independent legal advice was to be included as a Sheriff's cost, payable from the sale proceeds; (4) The Sheriff, facing any uncertainty as to what items were covered by the commission, was at liberty to apply to the Court on short notice for directions in that regard; (5) All reasonable expenses, disbursements necessary or inherent to giving effect to the Order of the Court and the Commission of Sale and for the preservation, safekeeping or maintenance of the Vessel incurred by the Sheriff and/or funded by or on behalf of the Bank from August 3, 2011 to the date of sale was to be treated as Sheriff's costs payable immediately after taxation by an assessment officer in priority to all other claims from the proceeds of the sale. It is also my understanding from my reading of the parties' representations that, further to paragraph 3 of the Sale Order, the Sheriff's commission with regards to the sale of the Vessel has been paid.

[8] The expenses incurred by the Sheriff and/or funded by or on behalf of Nordbank are dealt with in paragraph 12 of the Sale Order. This paragraph, further to dealing with the necessary expenses to give effect to the Sale Order and Commission of Sale, saw to the expenses incurred for the preservation, safekeeping and maintenance of the Ship as incurred by the Sheriff and/or funded by or on behalf of Nordbank from August 3, 2011 to the date of the sale, and for these expenses to be treated as Sheriff's costs payable after taxation by an assessment officer. This timeframe excludes costs of the assessment of the Sheriff's Bill as the assessment occurred after the date of

sale. While paragraph 12 of the Sale Order dealt with the above mentioned expenditures, it is my understanding that, as per paragraph 3 of the Sale Order, the services for the Sheriff to have his Bill of Costs assessed were covered within the Sheriff's commission on the sale of the Ship, to be paid out of her gross total sale price.

[9] The Bill of Costs at hand is filed by the Caveator HSH Nordbank AG to cover for their services and disbursements through the assessment of the Sheriff's costs. With regards to Nordbank's argument dealing with paragraph 3 of the Sale Order, that provides for the Sheriff to seek "legal advice, retain legal counsel, the cost of which shall be included as a Sheriff's cost, payable from the sale proceeds", I appreciate that it could have conferred the necessary authority for the assessment officer to proceed with the assessment of the legal costs incurred by the Sheriff and be part of the Sheriff's disbursements, payable from the sale proceeds. However, I cannot find in the parties' arguments or in the Court file, documents or arguments to the effect that the Sheriff in need of legal advice, retained Nordbank's counsel. From my work on this file, it is also my understanding that Nordbank was actively involved with the Sheriff in the expenses incurred for the preservation, safekeeping and maintenance of the Ship. However, I do not consider this argument sufficient proof that Nordbank's counsel was acting in this matter solely on the Sheriff's behalf as Nordbank also had a significant interest in the matter before the Court.

[10] With regard to the argument that this assessment of costs proceeds pursuant to Tariff B of the *Federal Courts Rules*, I have taken into consideration the representations from counsel for both Nordbank and Cameco and, further to my review of the Court record and, as contended by the parties, I did not find any Order from the Court, pursuant to Rule 400 of the *Federal Courts Rules*,

awarding costs of the assessment of the Sheriff's Bill of Costs to either party. Pursuant to said Rule, only the Court retains jurisdiction to award costs under Tariff B and the assessment officer holds no authority, absent a Court Order, to assess costs on a matter for which the Court has not already awarded costs to a specific party, I find therefore, that I have no jurisdiction to assess costs under Tariff B.

[11] Having determined that I do not have jurisdiction to conduct an assessment pursuant to Rule 400 and Tariff B, it is my opinion that I lack the necessary jurisdiction to entertain the parties' requests under Rule 408(3) of the *Federal Courts Rules*.

[12] Finally, as per my findings above, I consider my authority to assess the Bill of Costs with respect to the Sheriff's costs limited by the Sale Order of August 4, 2011 and I find nothing in the Court file awarding costs of the assessment of the Sheriff's Bill to either Cameco or Nordbank. Considering all of the above, I find that, in the absence of a Court Order specifically awarding costs to Nordbank, the Bill of Costs submitted by the Caveator HSH Nordbank AG will not be assessed.

"Johanne Parent"
Assessment Officer

Toronto, Ontario
December 19, 2013

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-484-11

STYLE OF CAUSE: CAMECO CORPORATION v. THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MCP ALTONA", THE SHIP "MCP ALTONA", MS "MCP ALTONA" GMBH & CO KG, HARTMANN SCHIFFAHRTS GMBH & CO, HARTMANN SHIPPING ASIA PTE LTD., FRASER SURREY DOCKS LP AND PACIFIC RIM STEVEDORING LTD.

ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT OF COSTS IN RESPECT TO THE SHERIFF'S COSTS:

JOHANNE PARENT

DATED:

December 18, 2013

SOLICITORS OF RECORD:

Bull Housser & Tupper LLP
Vancouver, BC

FOR THE PLAINTIFF
(Tam International Inc.)

Isaacs & Co.
Toronto, ON

FOR THE PLAINTIFF and THIRD PARTY
(Cameco Corporation and Cameco Europe)

Fasken Martineau DuMoulin LLP
Vancouver, BC

FOR THE DEFENDANT and THIRD PARTY
(Fraser Surrey Docks LP and Pacific Rim
Stevedoring Ltd.)

Borden Ladner Gervais LLP
Vancouver, BC

FOR THE DEFENDANTS
(MS "MCP Altona" GmbH & Co Kg,
The Ship "MCP Altona",
Hartmann Schiffahrts GmbH & Co., Kg and
Hartmann Shipping Asia Pte Ltd.)

Alexander Holburn Beaudin & Lang LLP
Vancouver, BC

FOR HSH NORDBANK AG

Bernard & Partners
Vancouver, BC

FOR ITAC SERVICES (AUST) PTY. LTD.

Giaschi & Margolis
Vancouver, BC

FOR SAXON ENERGY SERVICES INC.