Federal Court  Cour fédérale

**Date: 20140614**

**Docket: T-1331-14**

**Citation: 2014 FC 571**

**Ottawa, Ontario, June 14, 2014**

**PRESENT: The Honourable Madam Justice Strickland**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**GENERAL MPP CARRIERS LTD.**

**Plaintiff**

**and**

**SCL BERN AG,**
**SCL REEDEREI AG,**
**AND THE OWNERS AND ALL OTHERS**
**INTERESTED IN THE SHIP "SCL BERN"**

**Defendants**

## ORDER AND REASONS

[1] This is a motion of the defendants SCL Bern AG, on its own behalf and on behalf of the *in rem* defendant, the M.V. "SCL Bern" (Vessel), seeking to strike out the Statement of Claim and set aside the warrant of arrest issued against the defendant Vessel on the basis that this Court lacks jurisdiction to hear the dispute.

**Background**

[2] The Defendant SCL Bern AG (SCL Bern) is a company incorporated pursuant to the laws of Switzerland and is the registered owner of the Vessel, a 140 metre, multipurpose container vessel of Swiss flag. The Vessel was built and registered in 2005.

[3] On or about August 15, 2008, SCL Reederei AG (SCL Reederei) and MPP Carriers Ltd (MPP) entered into a Shareholders' Agreement which was executed by Mr. Hansjurg Grunder, on behalf of SCL Reederei, and Mr. Talal Hallak, on behalf of MPP. The Shareholders' Agreement states, amongst other things, that those parties directly hold 100% of the shares in SCL Bern and includes provisions concerning the right of first refusal and prohibition on disposal of the shares:

> Right of first refusal
>
> 12. Should any Party wish to dispose of their shares, it may only offer to sell its shares to the other Party. The Party which is entitled to purchase the shares shall within 30 days of the date of receipt of the offer reply in writing whether and to what extent it wishes to exercise its right of first refusal.
>
> Prohibition on disposal
>
> 13. Mr. Talal Hallak shall not be entitled to dispose of his shares in SCL Bern AG to third parties. Any transfer of title for consideration or for no consideration, be it pursuant to a sale, exchange, gift, any provisions of property law, contribution or such like shall be deemed to be a disposal.
>
> Mr. Talal El-Hallak shall, however, have as exit possibility the one time right, after 5 years of owing the shares, that is to say in June 2013, to sell his shares in SCL Bern AG to the majority shareholder (SCL Reederei AG, Bern) at a price representing 125% of his investment (5% per year), meaning here US $5,000,000.00 + 25% = US $6,250,000.00. The condition for the exercise of this right is that he must give notice of 12 months (in

> June 2012) to the buyer, before selling the shares to the majority shareholder as above.

[4] The Shareholders' Agreement also contains arbitration and applicable law clauses, the latter stipulating that the agreement shall be governed exclusively by the laws of Switzerland.

[5] MPP alleges that notice under clause 13 of the Shareholders' Agreement was given triggering the share sale provisions, however, that payment was not received. MPP initiated debt enforcement proceedings against SCL Reederei in Switzerland. On April 25, 2014 the Bern-Mittelland Regional Court, Civil Division in Switzerland granted judgment in favour of MPP in the amount of 3,391,837.50 Swiss Francs (approximately $3,750,000 USD) plus interest and costs. That judgment is currently under appeal.

[6] On May 28, 2014 MPP caused a Statement of Claim to be issued out of this Court naming SCL Reederei and SCL Bern as *in personam* defendants and the Vessel as the *in rem* defendant in this action. The Statement of Claim seeks damages in the amount of USD $3,750,000 plus interests and costs.

[7] The Statement of Claim, the content of which is described more fully below, claims that the Defendants breached the terms of the Shareholders' Agreement and that MPP suffered damages as a result. More specifically, that the Defendants have failed to pay MPP the amount owed for its ownership in SCL Bern in accordance with the Shareholders' Agreement. MPP claims that it has an ownership interest in the Vessel by virtue of a 40% ownership stake in SCL Bern. Alternatively, that the US$5,000,000 loan to the Defendants SCL Bern and SCL Reederei

was secured by way of a mortgage or charge on the Vessel in favour of MPP. MPP claims damages *in rem* against the Vessel pursuant to sections 22(2)(a) and (c) and 43(2), and, *in personam* against SCL Bern, pursuant to s.22(2)(a) and (c), of the *Federal Courts Act*, RSC, 1985, c F-7 (FCA) and relies on section 22(3)(a) and (d) in instituting these proceedings in Canada.

[8] Based on the Statement of Claim and an Affidavit to Lead Warrant sworn by Mr. Hallak, the Vessel was arrested on May 30, 2014.

[9] On June 5, 2014 the Defendants filed the subject motion on an urgent basis seeking to strike out the Statement of Claim and to set aside the arrest pursuant to Rules 221 and 488(1) of the *Federal Courts Rules*, SOR/98-106 (Rules).

**Positions of the Parties**

*Defendants' Position*

[10] The Defendants submit that MPP's claim is a shareholder dispute which does not fall within this Court's maritime jurisdiction. As the right of arrest is the procedure adjunct of the *in rem* action, in order to set aside the warrant of arrest a defendant must apply to strike out the statement of claim (Rule 481(1); *North Saskatchewan Riverboat Co v 573475 Alberta Ltd* (1995), 96 FTR 166 at para 8; *Paramount Enterprises International, Inc v An Xin Jiang (The)*, [2001] 2 FC 551 at p 566 (CA) [*Paramount*]; *MIL Davie Inc v Hibernia Management and*

*Development Co* (1998), 226 NR 369 at paras 7- 8 (FCA) [*MIL Davie*]; *Cameron v Ciné St Henri Inc*, [1984] 1 FC 421, [1983] FCJ No 141 (QL)(TD) at para 7).

[11] As to MPP's claim with respect to title, possession or ownership of the Vessel, its Statement of Claim acknowledges that SCL Bern is the registered owner which is confirmed by an extract from the Swiss Shipping Registry. MPP therefore cannot argue that it has title to or a registered ownership interest in the Vessel. Further, the Statement of Claim and the Shareholders' Agreement demonstrate that while MPP alleges that it is a part owner of the Vessel, what it actually owns is 40% of the shares of SCL Bern. Under Swiss law, a shareholder does not own the assets of the company in which it holds shares. Further, the proceedings in the Swiss courts do not include or involve a claim in respect to the Vessel.

[12] The Statement of Claim is merely an action to recover money allegedly owed under the Shareholders' Agreement and it is not a claim in respect to the title, possession, ownership, mortgage, hypothecation or charge on the Vessel. The Shareholders' Agreement is a corporate agreement inseparable from SCL Bern's Articles of Association and Swiss company law and is not an agreement pertaining to navigation and shipping and does not mention the Vessel (*Quebec and Ontario Transportation Co v Incan St Laurent (The)*, [1980] 2 SCR 242 [*The Incan St. Laurent*]; *Trawlercat Marine Inc v Folden*, [2002] FCJ No 1601 at para 13 (QL)(TD) [*Trawlercat*]; *JPMorgan Chase Bank v Mystras Maritime Corporation*, 2010 FC 1053 at paras 2-4 [*JPMorgan*]; *Atlantic Yacht & Ship Inc v Sovereign Yachts (Canada) Inc et al*, 2003 FC 965 [*Atlantic Yacht & Ship*]).

[13] As to the claim in respect of a mortgage, hypothecation or charge on the Vessel made pursuant to s. 22(2)(c) of the FCA, the Swiss Ship Registry indicates that the only mortgagee or lien holder is the Swiss Confederation. A request made under Rule 206 for production of any document evidencing a mortgage or charge on the Vessel did not result in production of any such documents. While there was reference to an email, on its face, this did not purport to grant any form of mortgage, charge or other security on the Vessel.

[14] No material facts have been plead nor evidence produced to support a claim made pursuant to s. 22(2)(c) of the FCA.

[15] Further, the term "charge on" in s. 22(2)(c) of the FCA is limited to charges in the nature of a mortgage (*Modern Maritime Law* p.29; Jackson D.C., *Enforcement of Maritime Claims*, 4th edition (London: LLP, 2005) at paras 2.128 and 2.129; Tetley, William, Maritime *Liens and Claims*, 2nd ed. (Montreal: Les Editions Yvon Blais, 1998) at pp. 478-479; The "S*t. Merriel*", [1963] 1 Lloyd's Rep 63 at pp. 67 & 68; *Logistec Corporation v The Ship Sneland*, [1979] 1 FC 497 at para 4; *The Acrux*, [1965] 1 Lloyd's Rep at p. 572).

[16] In sum, the Defendants submit that the evidence clearly establishes that MPP cannot make out a cause of action under either of the two grounds of admiralty jurisdiction which it cites in support of its allegations. In the absence of subject-matter jurisdiction as defined by s. 22 of the FCA, there can be no *in rem* jurisdiction pursuant to s .43(2). The Statement of Claim must therefore be struck out, the action dismissed and the Warrant of Arrest quashed.

*MPP's Position*

[17] MPP submits, based on the Affidavit of Mr. Talal Hallak filed in response to the motion to strike, that there was an agreement between Mr. Hallak and Mr.Grunder, described as the principal behind SCL Reederei and Enzian Ship Management AG, that US$5,000,000 would be advanced to assist in the financing or capitalization of the Vessel such that MPP would have a 40% interest in the Vessel. This was implemented by SCL Reederei having 60% and MPP having 40% of SCL Bern, a one ship company that owns the Vessel. Mr. Hallak's intention and believe was that MPP was to own 40% of the Vessel. Whether that 40% was of SCL Bern or the Vessel itself was not important as the result was intended to be the same, which was a 40% ownership interest in the Vessel once the right to sell was triggered. The Vessel was arrested on the basis that MPP claims that it is a part owner of the Vessel, it has triggered its right to sell and has not been repaid its part interest in the Vessel.

[18] MPP submits that to succeed in striking out an *in rem* claim the Defendants must establish that it is plain, obvious and beyond doubt that the *in rem* claim is so clearly futile that it has not the slightest chance of success (*Atlantic Yacht & Ship*, above at para 23; *Dragage Verreault Inc v Atchafalaya*, 2009 FC 273 at paras 19, 21 [*Dragage Verreault*]; *Western Stevedoring Co v Anadolu Guney (The)*, [1988] FCJ No 649 (QL)(TD) [*The Anadolu Guney*]. The Supreme Court has held that a claim will only be struck out if it is plain and obvious, assuming all facts pleaded to be true, that the pleading discloses no reasonable cause of action (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 11, 21-22 [*Imperial Tobacco*]; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*]; *VISX Inc v Nidek Co*, [1998] FCJ No 871

(QL)(CA); *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at paras 16, 21). Further, the novelty of a pleaded cause of action should not serve as a reason for the claim's dismissal, as the Court should focus on whether there is a reasonable prospect that the claim will succeed if the facts pleaded can assume to be true. Based on this, MPP submits that the action should not be struck out simply because questions regarding vessel ownership interests, acquired by purchase of corporate shares in a one ship company, have not been fully settled in Canada.

[19] Further, where there are triable issues relating to the proper ownership of a vessel the Court should not strike out an *in rem* claim (*Dragage Verreault*, above).

[20] MPP also submits that it is not necessary for the claim to fall strictly under s. 22(2)(a) or another of the enumerated subsections to support an *in rem* action. It need only have "a claim for relief or a remedy sought under Canadian Maritime law or relating to any matter coming within the class of subject of navigation and shipping" pursuant to s. 21(1). Thus, even if MPP's claim does not fall within s. 22(2)(a) or (c), it falls within s.22(1) or a claim pursuant to Canadian Maritime law. Ownership and financing of vessels is integrally connected to maritime commerce and carrying out the activity of shipping (*ITO – International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at para 20 [*ITO*]). The modern approach to Canadian Maritime law should include disputes with regard to the financing of vessels and the corporate entities which may be employed for the limited purpose of financing vessels. So long as MPP's claim falls within s. 22, then it can proceed *in rem* against the ship that is the subject of the action pursuant to s. 43(2) (*Marlex Petroleum Inc v The Har Rai*, [1984] 2 FC 345 (FCA); *Kuhr v The*

*Friedrich Busse*, [1982] FCJ No 54 (QL) [*The Friedrich Busse*]; *Balodis v The Prince George*, [1984] FCJ No 266).

[21] Further, s. 22(2)(a) uses the words "with respect to" and should be interpreted broadly (*Antares Shipping Corporation v The Ship "Capricorn" et al*, [1980] 1 SCR 553 paras 9-10 [*The Capricorn*]) to include disputes relating to one ship holding companies (*Paull v Munday (1979)*, 36 LGRA 303 at 306; *R v Nowegijick*, [1983] 1 SCR 29 at para 7). This is an untested and unsettled point of Canadian law and should be heard and determined on its merits.

[22] While the claim or controversy may be coloured by the fact that there is an intervening company that holds ownership of the Vessel, SCL Bern, this does not make it any less a claim or question arising out of a claim to the ownership of the Vessel in these circumstances.

[23] The Vessel is the subject of the action and is therefore subject to the Court's *in rem* jurisdiction pursuant to s. 43(2) of the FCA. The identifiability test applies, being whether the ship is the ship designated in the contract or dispute which is alleged to have been breached (*Phoenix Bulk Carriers Ltd v Kremikovtzi Trade*, 2007 SCC 13, [2007] 1 SCR 588, rev'g 2006 FCA 1 at paras 38-39 [*Kremikovtzi Trade*]).

[24] The words "subject of the action" should be interpreted broadly. To be the subject of the action, the ship to be arrested does not have to be the cause of the action (*Kremikovtzi Trade*, above, at para 40). Therefore, the Court may exercise its jurisdiction *in rem* if the property against which a claimant seeks to exercise its *in rem* rights is the subject of the action. Here,

MPP has arrested the ship that is the very heart of the contract alleged to have been breached and is the subject of the action.

[25] MPP also submits that the cases relied on by the Defendants are, in the circumstances of this case, distinguishable. These include *The Incan St. Laurent*, *Atlantic Yacht & Ship*, *Trawlercat* and *JPMorgan*, all above.

[26] Further, that the Court must look at the dispute in terms of the real issue between the parties, which is a dispute over partial ownership of a vessel and the right to be paid out its ownership interest pursuant to the agreement. The substance or underpinnings of the claim and the relief sought must be considered in evidencing maritime jurisdiction cases and the arguments of the parties should be viewed in whole (*Shibamoto & Co v Western Fish Producers, Inc*, [1989] FCJ No 900 (QL)(TD) [*Shibamoto*]; *Alcan Primary Metal, a division of Rio Tinto Alcan Inc v Groupe Maritime Verreault Inc*, [2011] FCJ No 1622 (QL)(CA) [*Alcan*]).

[27] Similarly, it should be recognized that the financing of the Vessel, the involvement of the company whose sole purpose was to own it and the Shareholders Agreement are inseparable. Further, the Court is also one of equity which looks to intent rather than form (*Textainer Equipment Management BV v Baltic Shipping Co*, [1994] FCJ No 1267 at para 13). Thus, while SCL Bern owns the Vessel, the intent of the arrangements was for MPP to have a 40% interest in it.

[28] MPP submits that it cannot be said that a dispute which centres around the investment into a ship, albeit through a "one-ship company", is not a matter falling within the wide jurisdiction of navigation and shipping. Therefore, the Defendants' motion should be dismissed.

**Legislation**

[29] The relevant provisions of the FCA are as follows:

| | |
|---|---|
| **Navigation and shipping** | **Navigation et marine marchande** |
| 22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned. | 22. (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence. |
| **Maritime jurisdiction** | **Compétence maritime** |
| (2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:<br><br>(a) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or | (2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :<br><br>a) une demande portant sur les titres de propriété ou la possession, en tout ou en partie, d'un navire ou sur le produit, en tout ou en partie, de la vente d'un navire; |

any part interest therein;

[…]

(c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;

[…]

**Jurisdiction applicable**

(3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies

(*a*) in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be;

[…]

(d) in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not.

**Jurisdiction in personam**

43. (1) Subject to subsection (4), the jurisdiction conferred on the Federal Court by section 22 may in all cases be exercised in personam.

**Jurisdiction in rem**

(2) Subject to subsection (3),

[…]

c) une demande relative à un prêt à la grosse ou à une hypothèque, un privilège ou une sûreté maritimes grevant tout ou partie d'un navire ou sa cargaison;

[…]

**Étendue de la compétence**

(3) Il est entendu que la compétence conférée à la Cour fédérale par le présent article s'étend :

*a*) à tous les navires, canadiens ou non, quel que soit le lieu de résidence ou le domicile des propriétaires;

[…]

d) à toutes les hypothèques ou tous les privilèges donnés en garantie sur un navire — enregistrés ou non et reconnus en droit ou en equity — , qu'ils relèvent du droit canadien ou du droit étranger.

**Compétence en matière personnelle**

43. (1) Sous réserve du paragraphe (4), la Cour fédérale peut, aux termes de l'article 22, avoir compétence en matière personnelle dans tous les cas.

**Compétence en matière**

| | |
|---|---|
| the jurisdiction conferred on the Federal 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 from its sale that have been paid into court. | **réelle**<br><br>(2) Sous réserve du paragraphe (3), elle 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. |
| […] | […] |

[30] The relevant portions of Rule 221 are:

| | |
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| **Motion to strike** | **Requête en radiation** |
| 221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it | 221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas : |
| (a) discloses no reasonable cause of action or defence, as the case may be, | a) qu'il ne révèle aucune cause d'action ou de défense valable; |
| […] | […] |
| (c) is scandalous, frivolous or vexatious, | c) qu'il est scandaleux, frivole ou vexatoire; |
| […] | […] |
| (f) is otherwise an abuse of the process of the Court, | f) qu'il constitue autrement un abus de procédure. |
| and may order the action be dismissed or judgment entered accordingly. | Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence. |
| **Evidence** | **Preuve** |
| (2) No evidence shall be heard on a motion for an order under | (2) Aucune preuve n'est admissible dans le cadre d'une |

| | |
|---|---|
| paragraph (1)(a). | requête invoquant le motif visé à l'alinéa (1)a). |

**Analysis**

[31] This motion was brought on an urgent basis and was heard on June 10, 2014. On June 12, 2014, counsel for the Defendants wrote to the Court advising that circumstances were such that a decision was now required as soon as possible. Security for the release of the Vessel has not been posted. This order with reasons, accordingly, has been rendered on an urgent basis. While the reasons are not as fulsome as may be desired, the outcome, however, remains the same.

[32] I have concluded that the heart of this matter, even when viewed in whole, is a shareholder's dispute and falls outside the jurisdiction of this court.

[33] The test with respect to striking out pleadings under Rule 221 is whether it is plain and obvious that the claim discloses no reasonable cause of action (*Hunt*, above). The "plain and obvious" test also applies when a lack of jurisdiction is the basis for the motion to strike (*Hodgson v Ermineskin Indian Band No 942* (2000), 180 FTR 285, aff'd [2000], 267 NR 143 (FCA), leave to appeal refused [2001] SCCA No 67 (QL); *Kremikovtzi Trade*, above; *Kona Concept Inc v Guimond Boats Ltd*, 2005 FC 214 at paras 12-13). The onus of proof on the party seeking to strike pleadings is a heavy one (*Apotex Inc v Syntex Pharmaceuticals International Ltd* (2005), 44 CPR (4th) 23 at para 31).

[34] Where an objection is taken to jurisdiction, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction. The

existence of the necessary jurisdictional facts will normally be found in the pleadings and the affidavits filed in support of or in response to the motion to strike (*MIL Davie*, above at paras 8-9; *Trawlercat*, above at paras 3, 17).

[35] In this case, the relevant pleadings as contained in the Statement of Claim can be summarized as follows:

- MPP alleges that it loaned SCL Bern and SCL Reederei US$5,000,000 "in exchange for a 40% ownership stake in the Vessel. To facilitate the loan, the Plaintiff and the Defendant entered into a Shareholders' Agreement (the Agreement) signed on August 15, 2008" (para 6);
- Under the Shareholders' Agreement the combined shares of MPP and SCL Reederei "amounted to 100% ownership interest in "one-ship" company SCL Bern AG" (para 7);
- "The Agreement granted the Plaintiff an option to sell its interest in the Vessel" (para 9);
- The Plaintiff claims that the Defendants breached the terms of the Shareholders' Agreement and that it suffered damages as a result. More particularly, "The Defendants have failed to pay the Plaintiff the amount owed for the Plaintiff's ownership in SCL Bern AG in accordance with the Agreement between the Defendants and the Plaintiff" (para 12(a));
- "The Plaintiff claims that it has an ownership interest in the Vessel by virtue of a 40% ownership stake in the Defendant SCL Bern AG. In the alternative, the Plaintiff claims that the US$5,000,000 loan to the Defendants SCL Bern AG and SCL Reederei was secured by way of a mortgage or charge on the Vessel in favour of the Plaintiff" (para 13);
- The Plaintiff claims damages *in rem* pursuant to s. 22(2)(a) and (c) and s. 43(2) of the FCA and *in personam* pursuant to s. 22(2)(a) and (c) of the FCA "as it is the owner of the Vessel" (paras 14-15).

[36] The Shareholders' Agreement is attached as an exhibit to the Affidavit of Daniele Favalli, a partner with the law firm of Vischer AG, Swiss counsel for SCL Reederei filed by the Defendants in support of this motion. It is also an exhibit to the Affidavit of Talal Hallak, filed by MPP in response to the motion to strike.

[37] The Shareholders' Agreement is made between SCL Reederei and MPP. It states that those parties directly hold 100% of the shares of SCL Bern. As to the purpose of the agreement:

> The spirit and purpose of this Shareholders' Agreement
>
> 2. The purpose of this Shareholders' Agreement is to supplement the rights and obligations of the Parties pursuant to company law and the Articles of Association, in order to ensure in the long term that all parties participate equally in the success or lack of success of SCL Bern AG on the basis of their shareholdings. Should this agreement not contain any provision, the Articles of Association shall apply.

[38] The Board of Directors of SCL Bern was required to reach a unanimous decision in relation to the sale and purchase of shareholdings and the consent of Mr. Hallak (clause 8). And, as noted above, the Shareholders' Agreement contained clauses pertaining to the right of first refusal and the prohibition on share disposal (clauses 12 and 13), a clause relating to the transfer of shares (clause 14) and arbitration and applicable law clauses (clauses 19 and 20).

[39] The Shareholders' Agreement contains no reference of any kind to the Vessel.

[40] The Affidavit of Mr. Favalli deposes that under Swiss law, owning of shares of a company does not give an ownership interest in the assets of that company. He states that the fact that MPP owns 40% of the shares of SCL Bern does not mean that it owns 40% of the assets of SCL Bern and it would be entitled to dispose or otherwise take actions with respect of any assets of that company.

[41] As noted above, it is not disputed that SCL Bern is the registered owner of the Vessel. An extract from the Swiss Ship Register is attached as an exhibit to the Affidavit of Finbarr Murphy

filed in support of the Defendants' motion. This also demonstrates that MPP does not have a mortgage or other charge against the Vessel recorded on that register.

[42] The Shareholders' Agreement confirms that MPP acquired an interest in the shares of SCL Bern in consideration of its US$5,000,000 investment.

[43] In his Affidavit, Mr. Hallak deposes that it was agreed between himself and Mr. Grunder and that MPP would advance US$5,000,000 to be used to finance the Vessel in exchange for which MPP would be entitled to a 40% ownership interest in the Vessel. In support of this, attached as an exhibit to the Affidavit, is an email from Mr. Grunder to Mr. Hallak, dated October 10, 2007. This states that for good order, he would like to confirm the agreements made on September 25, 2007:

> "1. investment into bern you will buy 40% of the shares of scl bern fpr us-$ 5 mio…"

[44] Mr. Hallak also attached as an exhibit to his affidavit an email from him to Enzian Ship Management AG dated March 1, 2008 stating that he had asked a financial advisor and planner "…to organize on my behalf the setting of General MPP Carriers – being the 40% buyer of the SCL Bern as well as organize the transfer – shares purchase agreement…" and asks if his advisor can contact the recipient in that regard.

[45] Mr. Hallak deposes that these emails demonstrate the intent that MPP was to be the purchaser of 40% of the Vessel. Further, that in his view, ownership of the company and

ownership of the Vessel in the circumstances of a one-ship company, is the same thing. The intent was that MPP was to own 40% of the Vessel.

[46] It is against these pleadings and facts that jurisdiction must be considered. MPP in the Statement of Claim has relied on sections 22(2)(a) and (c) and section 43 of the FCA as the jurisdictional basis of its claims. In its submissions MPP takes the view that even if its claim does not fall precisely within those subsections there will be jurisdiction so long as the claim falls within section 22(1), being a claim for relief or a remedy sought under Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping. I agree with that view. The enumerated claims in s. 22(2) are simply illustrative of and do not limit the jurisdiction described in s. 22(1).

[47] Section 22 addresses the threshold jurisdictional requirement. Once that hurdle has been met then, pursuant to section 43(1), the jurisdiction conferred on the Court by section 22 can in all cases be exercised *in personam*. Pursuant to section 43(2), that jurisdiction can be exercised *in rem* against the ship or other property that is the subject of the action with certain exceptions stated in section 43(3). In *Kremikovtzi Trade*, above, at para 44, Justice Nadon stated that once it has been determined that the action relates to an agreement that falls within the purview of section 22, the enquiry then turns to what constitutes the subject of that particular action.

[48] In *ITO*, above the Supreme Court stated that jurisdiction in the Federal Court depends on there being three things: (1) a statutory grant of jurisdiction by Parliament; (2) an existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of

jurisdiction; and (3) law underlying the case falling within the scope of the term "a law of Canada" used in s.101 of the *Constitution Act, 1867*. In the context of jurisdiction for maritime claims, the second element must fall within Canadian maritime law as defined by the FCA and as interpreted by the Supreme Court and the third element is satisfied by the *Canada Shipping Act* or the FCA (see also *Isen v Simms*, 2005 FCA 161 at para 62, rev'd on other grounds, 2006 SCC 41). In the context of the constitutional limits that may apply to Canadian maritime law, the Supreme Court in *ITO* stated that a court in determining whether or not any particular case involves a maritime or admiralty matter must avoid encroachment on what is in pith and substance a matter of local concern involving property and civil rights or any other matter which is in essence within the exclusive provincial jurisdiction under section 92 of the Constitution Act, 1867. The Supreme Court stated that, "It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence."

[49] Thus, the starting point in determining whether this Court has jurisdiction in this matter is that it must be a case falling within section 22(1) generally, if not sections 22(2)(a) or (c) specifically.

[50] The Defendants refer to *The Incan St. Laurent*, above. That was an appeal of a judgment dismissing the plaintiff's action based on a lack of jurisdiction. The action was based on the provisions of a joint venture agreement which was one of the three contracts relating to a rail transportation project. The action alleged that under the joint interim agreement the plaintiff was the beneficial owner of a one-half interest in the respondent ship and that the respondent

company had failed to transfer one-half of the rights to the ship to the plaintiff as required by the agreement. The appeal was dismissed. The Federal Court of Appeal found that the claim could not be said to be a claim based on Canadian maritime law because of the necessary relationship to the rights and obligations created by the joint venture agreement were inseparable from those created by other agreements to construct terminals.

[51] In the related matter of *Canadian Pacific Ltd v Quebec North Shore Paper Company*, [1977] 2 SCR 1054, the Supreme Court had held that an action based on an alleged failure to perform the obligation to construct a terminal and to set aside all three contracts relating to the rail transportation project was governed by Quebec civil law and was beyond the jurisdiction of the Federal Court. Accordingly, the Federal Court of Appeal in *The Incan St. Laurent* held that the same must be true of an action based on certain rights considered by the joint venture agreement but necessarily related to the same obligation. The contracts were to be viewed as a whole and as such were not matters that fell with Canadian maritime law.

[52] The Defendants assert that the Shareholders' Agreement is likewise an inseparable part of a set of agreements, comprised of it, the SCL Bern Articles of Association and company law as indicated by clause 2 of the Shareholders' Agreement. This demonstrates that the Shareholders' Agreement falls squarely within the category of corporate agreements rather than an agreement pertaining to navigation and shipping. And, as demonstrated by the proceedings in Switzerland as described in the Affidavit of Mr. Favalli, this matter is in essence a shareholders dispute, being whether the option to sell the shares of SCL Bern pursuant to clause 13 of the Shareholders' Agreement was properly triggered.

[53] MPP says that the dispute over the partial interest in *The Incan St. Laurent*, above was in connection with the failed rail transport project and was subject to several other agreements all of which were not within were not within the jurisdiction of the Court. It is therefore distinguished from this situation which concerns two businessmen involved in the shipping business entering into arrangements for the financing of a ship.

[54] While I am not convinced that the Shareholders' Agreement, the Articles of Association and company law can be viewed as inseparable and intertwined in the same manner as the contracts in *The Incan St. Laurent*, I do think that it is quite clear that MPP's claims arise from the alleged breach of the Shareholders' Agreement concerning the sale of the shares of SCL Bern. The reference in the Shareholders' Agreement to the Articles of Association and company law adds to the characterization of the dispute, and therefore the claim, as one of corporate and not maritime law. It is very significant that the Shareholders' Agreement does not refer to the Vessel either directly or indirectly nor to any marine activity or connection. Nor, and contrary to the allegation contained in paragraph 9 of the Statement of Claim, does it grant MPP an option to sell its interest in the Vessel. What it offers is the opportunity for MPP to sell its shares in SCG Bern to SCL Reederei "at a price representing 125% of his investment (5% per year), meaning US$5,000,000.00 +25% +US$6,250,000.00".

[55] I am also not convinced that the Supreme Court's decision in *The Capricorn*, above, is overly helpful to MPP. While it is true that it found that the Federal Court of Appeal's construction of s. 22(2)(c) was unduly narrow, it also stated that the question that lay at the heart of the appeal was whether or not the Federal Court was clothed with jurisdiction to entertain an

action for the enforcement of a concluded contract for the sale of a ship by delivery and execution of a bill of sale i.e. possession of a ship by way of specific enforcement:

> …We are not concerned here with the merits of the claim; the sole question at issue is whether the Federal Court is clothed with jurisdiction to entertain it and as any claim for delivery, however it may arise, is necessarily a claim of entitlement to transfer of possession and s. 22(2)(a) expressly confers jurisdiction over "any claim or question arising out of a claim to title, possession or ownership of a ship", I am satisfied that the Federal Court has jurisdiction over the subject matter of this appeal…

[56] The claim in *The Capricorn*, above, was a claim between two parties to the contract of the sale and purchase of a ship and sought a declaration of ownership of the ship and its delivery to the plaintiff. This can be contrasted to the heart of the matter in the present dispute between MPP and the Defendants which is an alleged breach of a Shareholders' Agreement. The ship owner, SCL Bern is not a party to that agreement.

[57] *Trawlercat*, above, concerned an alleged breach of copyright through the use of the plaintiff's ship drawings as well as an alleged breach of a contract to execute a purchase and construction agreement. The plaintiff relied on s. 22(1) and s. 22(2)(m) or (n) of the FCA to support an *in rem* claim against the vessel allegedly built in reliance on the subject drawing.

[58] With respect to the copyright claims, Prothonotary Hargrave stated:

> [12] In reaching the conclusion that a copyright claim ought not to sound *in rem*, I have kept in mind that I should interpret section 22(1) of the *Federal Court Act* broadly. I have also kept in mind that the reference to remedies being sought under or by virtue of Canadian maritime law should not be confined to a traditional or historic approach, but should be interpreted in a modern and relevant context: here seek *Monk Corporation v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779 at 795. This approach of broad

> interpretation allows the Federal Court jurisdiction into subject matter "so integrally connected with maritime matters as to be legitimate Canadian maritime law..." (loc. cit.).
>
> [13] A further difficulty I have with finding jurisdiction within section 22(1) of the *Federal Court Act* is that the copyright claim involved plans supplied for a ship neither built nor in existence. This is because the claim, involving copyright in a vessel's plans sent to a prospective customer so he might visualize the nature of the vessel, neither falls within the scope of admiralty or maritime law as incorporated into the laws of Canada, nor falls within the federal legislative jurisdiction in respect of navigation and shipping: see for example *Quebec and Ontario Transportation Co. v. The "Incan St. Laurent"* (1979) 104 D.L.R. (3d) 139 at 141 - 142 (F.C.A.), affirmed [1980] 2 S.C.R. 242.
>
> [14] Certainly there have been cases in the Federal Court involving yacht design and here I have in mind, as an example, *Bayliner Marine Corporation v. Doral Boats Ltd.* (1985), 5 C.P.R. (3d) 289 (F.C.T.D.) and (1986), 10 C.P.R. (3d) 289 (F.C.A.). However, *Bayliner* did not have an *in rem* aspect. Indeed, I do not see how copyright or industrial design matters might be enforced *in rem*. *In rem* jurisdiction depends upon coming within section 22 of the *Federal Court Act*, enforced *in rem* as authorized by section 43(2) and as excepted in section 43(3). This leads back to a consideration of whether the claim of the Plaintiffs come within section 22(2), (m) or (n), which I will deal with shortly.

[59] Prothonotary Hargrave concluded:

> [27] There is nothing pleaded in this action, or explained in the affidavit material, by which the clothe of Federal Court with the necessary *in rem* jurisdiction to allow the arrest of the *Amity*. While the *in personam* aspect of this claim may fall within Federal Court legislative competency, a point not argued on this motion, it is not sufficient, in order to establish *in rem* jurisdiction, merely for the subject matter to have some connection with a ship.
>
> [28] The subject matter of the action does not come within Canadian maritime law or within the general provision providing jurisdiction under the heading of Navigation and Shipping, section 22(1) of the *Federal Court Act*, or within the included maritime jurisdiction which is more specifically set out in section 22(2).

> [29] All of this being the case the *in rem* claim is struck out and here I would refer, by way of precedent, to *Bornstein Seafoods Canada Ltd. v. Hutcheon* (1997), 140 F.T.R. 241 (F.C.T.D.). There Mr. Justice Gibson dealt with the setting aside the arrest of a ship, the cause of action being alleged transfer of a misappropriated fishing quota. Mr. Justice Gibson was unable to find that the subject matter either fell within section 22(1) or the relevant portions of section 22(2) of the *Federal Court Act* and indeed, was unable to "... conclude that the subject matter of this action is so integrally connected to maritime matters as to be legitimate Canadian maritime law." (page 251). He concluded that the subject matter of the action did not fall within the jurisdiction of the Federal Court as either Canadian maritime law or any other law coming within the subject of navigation and shipping. As such, he held the *in rem* action unfounded. Accordingly, the warrant for arrest could not stand (loc. cit.). This is the situation in the present instance.
>
> [30] All of this is not to say that the *in personam* action might not, to some degree, succeed. Rather, the action shall now proceed purely as an *in personam* action, with the *Amity* being released from arrest. Costs of this motion to the Defendants in any event.

[60] In my view, the approach taken in *Trawlercat*, above, is equally applicable here. While the copyright pertained to a vessel, Prothonotary Hargrave could not see how copyright or industrial design matters could be enforced *in rem*. Similarly here, it is difficult to see how a dispute arising out of a Shareholders' Agreement can, without more, result in the arrest of a ship not mentioned in the agreement and which is owned by another party.

[61] In *JPMorgan*, above, JP Morgan took possession of the *The Lanner* due to an unpaid mortgage, the vessel was ultimately sold. Kent Trade and Finance (Kent Trade), a creditor, was awarded a portion of the sale proceeds, but, the company has ceased to exist. Two of its shareholders claimed an entitlement to the money. They referenced an agreement by which one

shareholder agreed to transfer his shares in Kent Trade to the other in exchange for being assigned the right to proceeds of the claim against the vessel.

[62] The Prothonotary found that the matter was, in pith and substance, a disagreement as to the interpretation or implementation of an agreement concerning a share transfer and its consequences. Based on *ITO*, above, he found that the subject matter in dispute was not so integrally connected to a maritime matter as to be considered to be a maritime law matter and declined jurisdiction.

[63] On appeal of that decision, Justice Tremblay-Lamer confirmed that the Prothonotary rightly referred to the *ITO* test. The appellant argued that the first requirement of the test, that there must be a statutory grant of jurisdiction by the Federal Parliament, had been met and that finding that the dispute constituted a matter falling within Canadian maritime law was sufficient to satisfy the second and third requirements of *ITO*.

[64] Further, that the judicial sale of the vessel was captured by the statutory grant of jurisdiction under s. 22(2)(a) of the FCA as was the maritime lien for the provision of the fuel oil by s. 22(2)(m). The dispute with respect to the assignment of a right *in rem* against the proceeds of the sale of the "Lanner" (constituting maritime property) in relation to a claim arising from fuel oil supply, fell within s. 22(1) of the FCA by virtue of being a claim in which "a remedy is sought under or by virtue of Canadian maritime law". Further, that the requirement of integral connection was to be interpreting broadly (*Monk Corp v Island Fertilizers Ltd*, [1991] 1 SCR 779 [*Monk*]). The appellant also argued that after determining that the contract was not maritime

in nature, the Prothonotary had failed to evaluate whether, despite not being a maritime contract, the claim itself was nonetheless integrally connected to a maritime matter.

[65] Justice Tremblay-Lamer did not agree and found that the dispute with respect to the maritime obligation (being the claim for payment for the supply from fuel) had been resolved. All that remained was the interpretation of an agreement between shareholders as to the right to the funds resulting from a successful claim. Although the current dispute between the shareholders could be said to flow from the award to Kent Trade, the current dispute was completely separable from the maritime aspect, being the claims for compensation for the supply of fuel.

[66] As there was no basis for finding that the dispute under consideration in the matter before her was integrally connected to maritime matters and the second and third requirements of the *ITO* test were not satisfied, there was no need to consider the first requirement.

[67] I agree with the Defendants' reasoning that while it can be said, in this case, that the dispute indirectly "involves" the Vessel, in that it is the principal asset of SCL Bern, the current dispute is separate from that maritime aspect as it relates solely to the Shareholders' Agreement and the sale of the shares in the ship owning company.

[68] Put otherwise, in pith and substance, MPP's claim arises out of the Shareholders' Agreement and is a shareholder dispute. There is a sufficient degree of separation between that claim and the maritime aspect of this matter, being the fact that the Vessel is held as the sole

asset of a company in which MPP has a 40% share, that the subject matter of the dispute is not integrally connected to maritime matters falling within Canadian maritime law.

[69] I would also note that in *Atlantic Yacht & Ship*, Prothonotary Hargrave kept in mind *ITO*, above, and the expanded view of Canadian maritime law. However, he stated that he must not distort the statutory jurisdiction granted to the Federal Court by giving a forced and unreasonable reading to the relevant provisions, being s. 22(2)(a) and (n) in that case. A similar concern arises in this circumstance.

[70] Based on the pleadings contained in the Statement of Claim and the affidavits filed in connection with the jurisdictional challenge, in my view, MPP's claim is not one for relief made or a remedy sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping pursuant to s. 22(1). The heart of the matter, even when viewed in whole, is a shareholder's dispute. Unlike *Shibamoto*, above the contract in dispute did not involve the services of a ship nor or any other maritime aspect. Further, MPP did not provide funds to SCL Bern to finance its operations or those of the Vessel, it invested in SCL Reederei. In my view, this is distinguishable from the underpinning of the contract at issue in *Shibamoto*.

[71] Given this finding, it is not necessary to consider the enumerated claims in s. 22(2) relied upon by MPP. However, I would noted that while MPP frames its s. 22(2)(a) claim as one arising out of the ownership of the Vessel, based on the facts of this case, I am unable to agree with that characterization. The Statement of Claim states that the claimed damages arise from

the breach of the Shareholders' Agreement, but the agreement does not concern the Vessel. The Statement of Claim acknowledges that the Vessel is owned by SCG Bern. MPP claims it has an ownership interest in the Vessel by virtue of its ownership stake in SCL Bern. While MPP has a shareholding interest the SCG Bern, the affidavit evidence of Mr. Favalli is that share ownership does not give an ownership interest in the assets of the company nor a right to dispose of those assets.

[72] Mr. Hallak's affidavit speaks of his intention that MPP would be the buyer and owner of the Vessel. This affidavit was filed in response to the jurisdictional challenge, but it attached only two emails to establish an ownership interest and intention. One of these refers to only the share purchase, the other is unclear and both predate the Shareholders' Agreement. Mr. Hallak deposes that he and Mr. Grunder have had dealings together in the shipping business for at least the last ten years. They are not unsophisticated parties. Mr. Hallak's affidavit also references his use of legal and financial advisors in connection with the subject transaction. This was a $5,000,000 investment and it could reasonably be expected that the claimed intention could be easily documented for purposes of establishing jurisdiction but it was not.

[73] As to s. 22(2)(c), the Statement of Claim asserts that MPP loaned SCL Bern and SCL Reederei US$5,000,000 in exchange for a 40% ownership stake in the Vessel as facilitated by the Shareholders' Agreement. Further, that the loan was secured by way of a mortgage or charge on the Vessel. While MPP submits that, viewed in context, the Shareholders' Agreement is a form of a ship financing agreement and therefore is maritime in nature, the pleadings and affidavit evidence do not support this. The Shareholders' Agreement makes no reference to a

loan or to the Vessel and it is not in dispute that no mortgage has been affected by MPP. The pleadings are not supported by facts confirming the existence of a mortgage and the affidavit evidence confirms that there is no mortgage. The affidavit of Mr. Hallak also does not assert the existence of a loan nor provide evidence of one or its terms and conditions. This aspect of the claim therefore cannot succeed. MPP also submits that it holds an equitable mortgage that would support the claim, however, for many of the same reasons set out above I do not agree. Further, the pleadings also do not assert an equitable mortgage or charge.

[74] As the s. 22 jurisdictional threshold has not been met, the exercise of that jurisdiction *in rem*, pursuant to section 43(2), does not come into play. Even if it did, based on the foregoing, it is the Shareholders' Agreement and not the Vessel which is the subject of the present dispute. As stated by Justice Nadon in *Kremikovtzi Trade*, "In other words, the action in rem must relate to the specific property contemplated in the contract at issue." The only property contemplated by the Shareholders' Agreement is the shares in SCL Bern.

[75] MPP takes the view that because the Vessel is held by a one ship company that this enhances its claim to an ownership interest and that this is, therefore, a novel claim. One ship companies are not new. They have long been used as shipping owning vehicles, often for the purpose of limiting potential liabilities arising from the operation of the ship. That is, if there were company owned assets other than the single ship, those corporate assets could be looked to by a creditor seeking to satisfy a claim against the ship or the ship owning company. By having only one asset, the ship, other assets or ships would, in most circumstances, be protected from such claims. The mere fact that a company has only one asset does not vary the right of its

shareholders to claim an ownership interest in that asset. Regardless of whether a company has one ship, ten ships or multiple assets, without more its shareholders hold shares, not title to the corporate assets. While MPP describes one ship companies as an area of unsettled law, it did not refer to jurisprudence supporting that position. In my view, this aspect of the claim is not novel or unsettled nor, in these circumstances, does it serve to establish a claim to ownership as contemplated by s. 22(2)(a).

[76] The Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction. The existence of the necessary jurisdictional facts will normally be found in the pleadings and the affidavits filed in support of or in response to the motion to strike. Here, the facts do not support a finding of jurisdiction for the present dispute.

**THIS COURT ORDERS that**

1. the *in rem* action against the Defendant Vessel is struck out;
2. the warrant has no effect and the Vessel is released from arrest;
3. the Defendants shall have their costs.

"Cecily Y. Strickland"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1331-14 |
| **STYLE OF CAUSE:** | GENERAL MPP CARRIERS LTD. v SCL BERN AG, SCL REEDEREI AG, AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "SCL BERN" |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 10, 2014 |
| **ORDER AND REASONS:** | STRICKLAND J. |
| **DATED:** | JUNE 14, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Marc D. Isaacs | FOR THE PLAINTIFF |
| Michael C. Smith and Jean-Marie Fontaine | FOR THE DEFENDANT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Isaacs & Co.<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE PLAINTIFF |
| Borden Ladner Gervais, s.e.n.c.r.l., s.r.l.<br>Toronto, Ontario | FOR THE DEFENDANT |